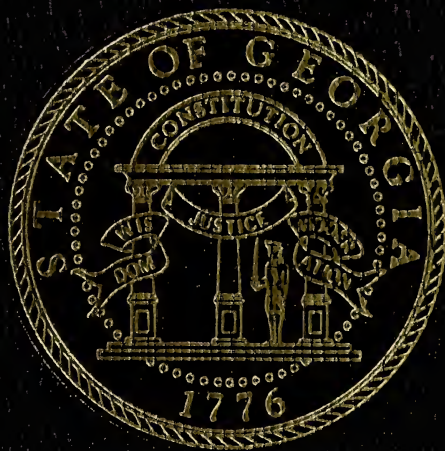


**OFFICIAL CODE
OF
GEORGIA
—
ANNOTATED**



VOLUME 34

**Title 46. Public Utilities and Public
Transportation**

2004 Edition



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OFFICIAL CODE OF GEORGIA ANNOTATED

With Provision for Subsequent Pocket Parts

Prepared by
The Code Revision Commission
The Office of Legislative Counsel
and
The Editorial Staff of LexisNexis®



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Volume 34 **2004 Edition**

Title 46. Public Utilities and Public Transportation

Including Acts of the 2004 Regular and Extraordinary Sessions of the
General Assembly of Georgia and Annotations taken from the
Georgia Reports and the Georgia Appeals Reports

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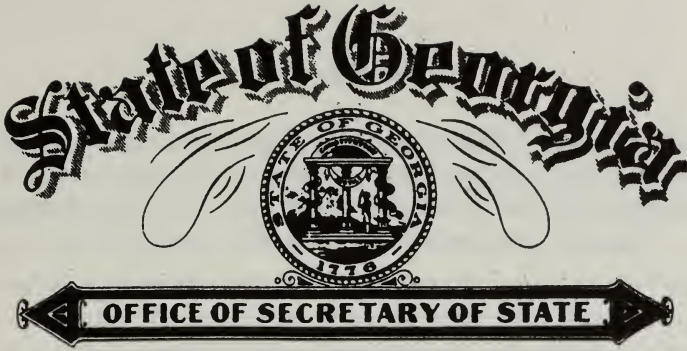
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THE STATE OF GEORGIA

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I, Cathy Cox, Secretary of State of the State of Georgia, do hereby certify that the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia; all as same appear of file and record in this office. _____

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 15th day of July, in the year of our Lord Two Thousand and Four and of the Independence of the United States of America the Two Hundred and Twenty-eighth.



Cathy Cox

SECRETARY OF STATE

Preface

This volume cumulates and replaces the 1992 edition of Volume 34 of the Official Code of Georgia Annotated, as supplemented by the 2003 Cumulative Supplement. The 1992 Volume 34 and its 2003 Supplement may be recycled or, if so desired, retained for historical purposes.

This volume contains all laws specifically codified in Title 46 by the General Assembly through the 2004 Regular and Extraordinary Sessions. This volume also contains case annotations reflecting decisions posted to LexisNexis® through January 16, 2004. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; Mercer Law Review; Georgia State Bar Journal; and American Law Reports. Also included where appropriate are cross-references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2002, 2003, and 2004 Regular and Extraordinary Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2002 Session of the General Assembly, the user should consult the Georgia Laws.

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User's Guide

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

Table of Titles

Title 1. General Provisions.

2. Agriculture.

3. Alcoholic Beverages.

4. Animals.

5. Appeal and Error.

6. Aviation.

7. Banking and Finance.

8. Buildings and Housing.

9. Civil Practice.

10. Commerce and Trade.

11. Commercial Code.

12. Conservation and Natural Resources.

13. Contracts.

14. Corporations, Partnerships, and Associations.

15. Courts.

16. Crimes and Offenses.

17. Criminal Procedure.

18. Debtor and Creditor.

19. Domestic Relations.

20. Education.

21. Elections.

22. Eminent Domain.

23. Equity.

24. Evidence.

25. Fire Protection and Safety.

26. Food, Drugs, and Cosmetics.

27. Game and Fish.

28. General Assembly.

29. Guardian and Ward.

TABLE OF TITLES

30. Handicapped Persons.
31. Health.
32. Highways, Bridges, and Ferries.
33. Insurance.
34. Labor and Industrial Relations.
35. Law Enforcement Officers and Agencies.
36. Local Government.
37. Mental Health.
38. Military, Emergency Management, and Veterans Affairs.
39. Minors.
40. Motor Vehicles and Traffic.
41. Nuisances.
42. Penal Institutions.
43. Professions and Businesses.
44. Property.
45. Public Officers and Employees.
46. Public Utilities and Public Transportation.
47. Retirement and Pensions.
48. Revenue and Taxation.
49. Social Services.
50. State Government.
51. Torts.
52. Waters of the State, Ports, and Watercraft.
53. Wills, Trusts, and Administration of Estates.

In Addition, This Publication Includes

Constitution of the United States

Constitution of the State of Georgia

Tables of Comparative Sections

Table of Acts

Index to Local and Special Laws

TABLE OF TITLES

Index to General Laws of Local Application
Short Title Index
General Index

Table of Contents

VOLUME 34

TITLE 46

PUBLIC UTILITIES AND PUBLIC TRANSPORTATION

CHAPTER	PAGE
1. General Provisions, 46-1-1 through 46-1-5	3
2. Public Service Commission, 46-2-1 through 46-2-95	27
2A. Electric Utilities Generally, 46-2A-1 through 46-2A-2	111
3. Electrical Service, 46-3-1 through 46-3-541	113
3A. Integrated Resource Planning, 46-3A-1 through 46-3A-11	316
4. Distribution, Storage, and Sale of Gas, 46-4-1 through 46-4-166	324
4A. Provision of Energy Conservation Assistance to Residential Customers by Electric and Gas Utilities, 46-4A-1 through 46-4A-14	424
5. Telephone and Telegraph Service, 46-5-1 through 46-5-192 ...	430
6. Radio Common Carriers, 46-6-1 through 46-6-16 [Repealed]	546
7. Motor Carriers, 46-7-1 through 46-7-101	547
8. Railroad Companies, 46-8-1 through 46-8-382	624
8A. Rapid Rail Passenger Service, 46-8A-1 through 46-8A-4	781
9. Transportation of Freight and Passengers Generally, 46-9-1 through 46-9-332	783
10. Consumers' Utility Counsel, 46-10-1 through 46-10-9	891
11. Transportation of Hazardous Materials, 46-11-1 through 46-11-6	897
Index to Title 46	903

TITLE 46

PUBLIC UTILITIES AND PUBLIC TRANSPORTATION

- Chap. 1. General Provisions, 46-1-1 through 46-1-5.
- 2. Public Service Commission, 46-2-1 through 46-2-95.
 - 2A. Electric Utilities Generally, 46-2A-1 through 46-2A-2.
 - 3. Electrical Service, 46-3-1 through 46-3-541.
 - 3A. Integrated Resource Planning, 46-3A-1 through 46-3A-11.
 - 4. Distribution, Storage, and Sale of Gas, 46-4-1 through 46-4-166.
 - 4A. Provision of Energy Conservation Assistance to Residential Customers by Electric and Gas Utilities, 46-4A-1 through 46-4A-14.
 - 5. Telephone and Telegraph Service, 46-5-1 through 46-5-192.
 - 6. Radio Common Carriers, 46-6-1 through 46-6-16. [Repealed]
 - 7. Motor Carriers, 46-7-1 through 46-7-101.
 - 8. Railroad Companies, 46-8-1 through 46-8-382.
 - 8A. Rapid Rail Passenger Service, 46-8A-1 through 46-8A-4.
 - 9. Transportation of Freight and Passengers Generally, 46-9-1 through 46-9-332.
 - 10. Consumers' Utility Counsel Division, 46-10-1 through 46-10-9.
 - 11. Transportation of Hazardous Materials, 46-11-1 through 46-11-6.

Cross references. — Exemption from securities-registration requirements for securities issued by or guaranteed by public utilities, common carriers, etc., § 10-5-8. Criminal penalty for damaging, injuring, or interfering with public utility properties, § 16-7-25. Prohibition against suspension of gas or electrical service for failure to make payments on appliances purchased from or repaired by gas or electric utility company, § 16-12-3. Prohibition against political campaign contributions by persons acting on behalf of public utility regulated by Public Service Commission, § 21-5-10. Blasting or

excavating operations near underground gas pipes and other underground utility facilities, Ch. 9, T. 25. Removal and relocation of public utility facilities pursuant to construction or maintenance of public road by Department of Transportation, § 32-6-170 et seq. Mass transportation, Ch. 9, T. 32. Sale, lease, etc., of public utility plants or properties by municipalities, § 36-37-7 et seq. Taxation of special franchises, § 48-5-420 et seq. Ad valorem taxation of public utilities, § 48-5-510 et seq. Taxation of income of public service corporations, § 48-7-32.

PUBLIC UTILITIES, ETC.

RESEARCH REFERENCES

ALR. — Eminent domain: measure and condemnation of public transportation system, 35 ALR4th 1263.

CHAPTER 1

GENERAL PROVISIONS

Sec.		Sec.	
46-1-1.	Definitions; exclusions; Georgia Forest Products Trucking Rules.	46-1-4.	Applicability of title to carriers engaged in interstate commerce.
46-1-2.	Measure of damages for wrongs and injuries by railroad companies generally; venue for actions against railroad companies and electric companies generally.	46-1-5.	Duties of Department of Human Resources with regard to assistance to low or fixed income consumers of gas and electric service.
46-1-3.	Applicability of powers granted by title to other companies or entities regulated by commission.		

Administrative rules and regulations. — General rules of the Georgia Public Service Commission and of the State Department of Transportation, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Public Service Commission, Chapter 515-3-1, and Rules of State Department of Transportation, Chapter 672-1.

46-1-1. Definitions; exclusions; Georgia Forest Products Trucking Rules.

As used in this title, the term:

- (1) “Carrier” means a person who undertakes the transporting of goods or passengers for compensation.
- (2) “Certificate” means a certificate of public convenience and necessity issued pursuant to this title.
- (3) “Commission” means the Public Service Commission.
- (4) “Company” shall include a corporation, a firm, a partnership, an association, or an individual.
- (5) “Electric utility” means any retail supplier of electricity whose rates are fixed by the commission.
- (6) “For hire” means an activity wherein for compensation a motor vehicle and driver are furnished to a person by another person, acting directly or knowingly and willfully acting with another to provide the combined service of the vehicle and driver, and includes every person acting in concert with, under the control of, or under common control with a motor carrier who shall offer to furnish transportation for compensation.
- (6.1) “Gas company” means any person certificated under Article 2 of Chapter 4 of this title to construct or operate any pipeline or distribution system, or any extension thereof, for the transportation, distribution, or sale of natural or manufactured gas.

(7) “Household goods” means any personal effects and property used or to be used in a dwelling when a part of the equipment or supplies of such dwelling and such other similar property as the commissioner of motor vehicle safety may provide for by regulation; provided, however, that such term shall not include property being moved from a factory or store except when such property has been purchased by a householder with the intent to use such property in a dwelling and such property is transported at the request of, and with transportation charges paid by, the householder.

(8) “Motor carrier of property” means a motor common or contract carrier engaged in transporting property, except household goods, in intrastate commerce in this state.

(9) “Motor contract carrier and motor common carrier” means as follows:

(A) “Motor contract carrier” means every person, except common carriers, owning, controlling, operating, or managing any motor propelled vehicle including the lessees or trustees of such persons or receivers appointed by any court used in the business of transporting persons or property for hire over any public highway in this state and not operated exclusively within the corporate limits of any city.

(B) “Motor common carrier” means every person owning, controlling, operating, or managing any motor propelled vehicle, and the lessees, receivers, or trustees of such person, used in the business of transporting for hire of persons or property, or both, otherwise than over permanent rail tracks, on the public highways of Georgia as a common carrier.

(C) Except as otherwise provided in this subparagraph, the terms “motor common carrier” and “motor contract carrier” shall not include:

(i) Motor vehicles engaged solely in transporting school children and teachers to and from public schools and private schools;

(ii) Taxicabs, drays, trucks, buses, and other motor vehicles which operate within the corporate limits of municipalities and are subject to regulation by the governing authorities of such municipalities. This exception shall apply to taxicabs and buses even though such vehicles may, in the prosecution of their regular business, occasionally go beyond the corporate limits of such municipalities, provided that they do not operate to or from fixed termini outside of such limits and to any dray or truck which operates within the corporate limits of a city and is subject to regulation by the governing authority of such city or by the commissioner of motor vehicle safety and which goes beyond the corporate limits only for the purpose of hauling chattels which have been seized under any court process;

(iii) Hotel passenger or baggage motor vehicles when used exclusively for patrons and employees of such hotel;

(iv) Motor vehicles operated not for profit with a capacity of 15 persons or less when they are used exclusively to transport elderly and disabled passengers or employees under a corporate sponsored van pool program, except that a vehicle owned by the driver may be operated for profit when such driver is traveling to and from his or her place of work provided each such vehicle carrying more than nine passengers maintains liability insurance in an amount of not less than \$100,000.00 per person and \$300,000.00 per accident and \$50,000.00 property damage. For the purposes of this division, elderly and disabled passengers are defined as individuals over the age of 60 years or who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, are unable to utilize mass transportation facilities as effectively as persons who are not so affected;

(v) Granite trucks, where transportation from quarry to finishing plant involves not crossing more than two counties;

(vi) RFD carriers and star-route carriers which carry no more than nine passengers along with carriage of the United States mail, provided that such carriers shall not carry passengers on a route along which another motor common carrier or motor contract carrier of passengers has a permit or a certificate to operate;

(vii) Motor trucks of railway companies which perform a pick-up and delivery service in connection with their freight train service, between their freight terminals and points not more than ten miles distant, when either the freight terminal or such points, or both, are outside the limits of an incorporated city;

(viii) Motor vehicles owned and operated exclusively by the United States government or by this state or any subdivision thereof;

(ix) Single source leasing whereby a leasing company whose primary business is leasing vehicles and who operates a fleet of ten or more vehicles provides vehicle equipment and drivers in a single transaction to a private carrier. Such arrangement is presumed to result in private carriage by the shipper if the requirements enumerated below are met and subject only to the commission's transportation safety rules:

(I) The lease must be reduced to writing and a copy maintained on the leased vehicle at all times during the term of the lease;

(II) The period for which the lease applies must be no less than 30 days;

(III) The lease agreement must provide, and the surrounding facts must reflect, that the leased equipment is exclusively committed to the lessee's use for the term of the lease;

(IV) The lease agreement must provide, and the surrounding facts must reflect, that during the term of the lease the lessee accepts, possesses, and exercises exclusive dominion and control over the leased equipment and assumes complete responsibility for the operation of the equipment;

(V) The lessee must maintain public liability insurance and accept responsibility to the public for any injury caused in the course of performing the transportation service conducted by the lessee with the equipment during the term of the lease;

(VI) The lessee shall display appropriate identification on all equipment leased by it showing operation by the lessee during the performance of the transportation;

(VII) The lessee must accept responsibility for, and bear the cost of, compliance with safety regulations during performance by the lessee of any such transportation services; and

(VIII) The lessee must bear the risk of damage to the cargo, subject to any right of action the lessee may have against the lessor for the latter's negligence;

(x) Motor vehicles engaged exclusively in the transportation of agricultural or dairy products, or both, between farm, market, gin, warehouse, or mill, whether such motor vehicle is owned by the owner or producer of such agricultural or dairy products or not, so long as the title remains in the producer. For the purposes of this division, the term "producer" includes a landlord where the relations of landlord and tenant or landlord and cropper are involved. As used in this division, the term "agricultural products" includes fruit, livestock, meats, fertilizer, wood, lumber, cotton, and naval stores; household goods and supplies transported to farms for farm purposes; or other usual farm and dairy supplies, including products of grove or orchard; poultry and eggs; fish and oysters; and timber or logs being hauled by the owner thereof or the owner's agents or employees between forest and mill or primary place of manufacture; provided, however, motor vehicles with a manufacturer's gross weight rated capacity of 44,000 pounds or more engaged solely in the transportation of unmanufactured forest products shall be subject to the Georgia Forest Products Trucking Rules which shall be adopted and promulgated by the commissioner of motor vehicle safety only for application to such vehicles and vehicles defined in subparagraph (A) of paragraph (13) of this Code section; provided, further, that pulpwood trailers and pole trailers with a manufacturer's gross

weight rated capacity of 10,001 pounds or more engaged solely in the transportation of unmanufactured forest products shall have two amber side marker reflectors on each side of the trailer chassis between the rear of the tractor cab and the rearmost support for the load. All such reflectors shall be not less than four inches in diameter. Such rules and any amendments thereto adopted by the commissioner of motor vehicle safety shall be subject to legislative review in accordance with the provisions of Code Section 46-2-30, and, for the purposes of such rules and any amendments thereto, the Senate Natural Resources Committee and the House Committee on Natural Resources and Environment shall be the appropriate committees within the meaning of said Code Section 46-2-30. The first such rules adopted by the commissioner of motor vehicle safety shall be effective July 1, 1991;

(xi) Reserved;

(xii) Motor vehicles engaged in compensated intercorporate hauling whereby transportation of property is provided by a person who is a member of a corporate family for other members of such corporate family, provided:

(I) The parent corporation notifies the commissioner of motor vehicle safety of its intent or the intent of one of the subsidiaries to provide the transportation;

(II) The notice contains a list of participating subsidiaries and an affidavit that the parent corporation owns directly or indirectly a 100 percent interest in each of the subsidiaries;

(III) A copy of the notice is carried in the cab of all vehicles conducting the transportation; and

(IV) The transportation entity of the corporate family registers the compensated intercorporate hauling operation with the commissioner of motor vehicle safety, registers and identifies any of its vehicles, and becomes subject to the commissioner's liability insurance and motor common carrier and motor contract carrier and hazardous materials transportation rules.

For the purpose of this division, the term "corporate family" means a group of corporations consisting of a parent corporation and all subsidiaries in which the parent corporation owns directly or indirectly a 100 percent interest;

(xiii) Vehicles, except limousines, transporting not more than ten persons for hire, except that any operator of such a vehicle is required to register the exempt operation with the commissioner of motor vehicle safety, register and identify any of its vehicles, and

become subject to the commissioner's liability insurance and vehicle safety rules;

(xiv) Reserved; or

(xv) Ambulances.

(10) "Passenger" means a person who travels in a public conveyance by virtue of a contract, either express or implied, with the carrier as to the payment of the fare or that which is accepted as an equivalent therefor. The prepayment of fare is not necessary to establish the relationship of passenger and carrier; although a carrier may demand prepayment of fare if persons enter his or her vehicle by his or her permission with the intention of being carried; in the absence of such a demand, an obligation to pay fare is implied on the part of the passenger, and the reciprocal obligation of carriage of the carrier arises upon the entry of the passenger.

(11) "Permit" means a registration permit issued by the commissioner of motor vehicle safety authorizing interstate transportation for hire exempt from the jurisdiction of the United States Department of Transportation or intrastate passenger transportation for hire exempt from the jurisdiction of the commissioner of motor vehicle safety or intrastate transportation by a motor carrier of property.

(12) "Person" means any individual, partnership, trust, private or public corporation, municipality, county, political subdivision, public authority, cooperative, association, or public or private organization of any character.

(13) "Private carrier" means every person except motor common carriers or motor contract carriers owning, controlling, operating, or managing any motor propelled vehicle, and the lessees or trustees thereof or receivers appointed by any court whatsoever, used in the business of transporting persons or property in private transportation not for hire over any public highway in this state. The term "private carrier" shall not include:

(A) Motor vehicles not for hire engaged solely in the harvesting or transportation of forest products; provided, however, that motor vehicles not for hire with a manufacturer's gross weight rated capacity of 44,000 pounds or more engaged solely in the transportation of unmanufactured forest products shall be subject only to the Georgia Forest Products Trucking Rules provided for in division (9)(C)(x) of this Code section;

(B) Motor vehicles not for hire engaged solely in the transportation of road-building materials;

(C) Motor vehicles not for hire engaged solely in the transportation of unmanufactured agricultural or dairy products between farm,

market, gin, warehouse, or mill whether such vehicle is owned by the owner or producer of such agricultural or dairy products or not, so long as the title remains in the producer; or

(D) Except for the motor vehicles excluded under subparagraph (C) of this paragraph, motor vehicles having a manufacturer's gross vehicle weight rating of 10,000 pounds or less; provided, however, that motor vehicles which have a manufacturer's gross vehicle weight rating of 10,000 pounds or less and which are transporting hazardous materials, as the term "hazardous materials" is defined in Title 49 C.F.R., Parts 107, 171-173, and 177-178, shall be included within the meaning of the term "private carrier."

(14) "Public highway" means every public street, road, highway, or thoroughfare of any kind in this state.

(15) "Railroad corporation" or "railroad company" means all corporations, companies, or individuals owning or operating any railroad in this state. This title shall apply to all persons, firms, and companies, and to all associations of persons, whether incorporated or otherwise, that engage in business as common carriers upon any of the lines of railroad in this state, as well as to railroad corporations and railroad companies as defined in this Code section.

(16) "Rate," when used in this title with respect to an electric utility, means any rate, charge, classification, or service of an electric utility or any rule or regulation relating thereto.

(17) "Utility" means any person who is subject in any way to the lawful jurisdiction of the commission.

(18) "Vehicle" or "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof, determined by the Department of Motor Vehicle Safety. (Orig. Code 1863, §§ 2038, 2039; Code 1868, §§ 2039, 2040; Code 1873, §§ 2065, 2066; Ga. L. 1878-79, p. 125, § 12; Code 1882, §§ 7191, 2065, 2066; Civil Code 1895, §§ 2199, 2263, 2264, 2267; Civil Code 1910, §§ 2642, 2711, 2712, 2715; Ga. L. 1931, Ex. Sess., p. 99, § 2; Ga. L. 1931, p. 199, §§ 2, 33; Ga. L. 1933, p. 198, § 1; Code 1933, §§ 18-101, 18-201, 68-502, 68-601, 93-101; Ga. L. 1939, p. 207, § 1; Ga. L. 1943, p. 179, § 1; Ga. L. 1960, p. 1129, § 1; Ga. L. 1962, p. 630, § 1; Ga. L. 1963, p. 30, § 1; Ga. L. 1963, p. 365, § 1; Ga. L. 1964, p. 298, § 1; Ga. L. 1970, p. 224, § 1; Ga. L. 1975, p. 1190, § 1; Ga. L. 1976, p. 197, § 1; Ga. L. 1979, p. 651, § 1; Ga. L. 1980, p. 479, § 1; Code 1933, § 93-102, enacted by Ga. L. 1981, p. 121, § 2; Ga. L. 1982, p. 3, § 46; Ga. L. 1982, p. 410, §§ 1, 2; Ga. L. 1982, p. 827, §§ 1, 2; Ga. L. 1983, p. 3, § 35; Ga. L. 1983, p. 735, § 1; Ga. L. 1984, p. 22, § 46; Ga. L. 1984, p. 1394, § 1; Ga. L. 1985, p. 1394, § 1; Ga. L. 1986, p. 1283, § 1; Ga. L. 1987, p. 1090,

§ 1; Ga. L. 1990, p. 709, §§ 1, 2; Ga. L. 1993, p. 579, § 1; Ga. L. 1994, p. 97, § 46; Ga. L. 1994, p. 661, § 1; Ga. L. 1994, p. 1238, § 1; Ga. L. 1995, p. 1302, § 14; Ga. L. 1996, p. 950, § 2; Ga. L. 1997, p. 798, § 1; Ga. L. 2000, p. 951, §§ 9-1, 9-2, 9-3; Ga. L. 2002, p. 415, § 46; Ga. L. 2002, p. 1378, § 8.)

The 2002 amendments. The first 2002 amendment, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, deleted “by the Public Service Commission” preceding “pursuant to this title” in paragraph (2) and substituted “Department of Motor Vehicle Safety” for “Public Service Commission” in paragraph (18). The second 2002 amendment, effective July 1, 2002, rewrote paragraph (7); rewrote subparagraph (9)(C); and, in paragraph (11), substituted “United States Department of Transportation” for “interstate Commerce Commission” and inserted “passenger” near the middle.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1986, the definitions in this Code section were arranged in alphabetical order.

Pursuant to Code Section 28-9-5, in 2000, “Senate Natural Resources Committee” was substituted for “Senate Committee on Natu-

ral Resources” in the last sentence of division (9)(C)(x).

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

Law reviews. — For article commenting on the 1997 amendment of this section, see 14 Georgia St. U.L. Rev. 264 (1997).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

COMMON CARRIERS

MOTOR CONTRACT CARRIERS

PASSENGERS

General Consideration

Exemption of hospital authority vehicle.

— In action against county hospital authority and ambulance driver by automobile accident vehicle, the hospital authority was exempt from the venue provision of O.C.G.A. § 46-7-17 under the exemption provided for vehicles operated by the state or any subdivision thereof in O.C.G.A. § 46-1-1(9)(C)(viii). *Calhoun County Hosp. Auth. v. Walker*, 205 Ga. App. 259, 421 S.E.2d 777 (1992), cert. denied, 205 Ga. App. 899, 421 S.E.2d 777 (1992).

Regulation of limousine services. — City ordinances regulating the fares licensed limousine service companies may charge for

trips to and from an airport are not pre-empted by state law where the limousine service comes within the exception set forth in O.C.G.A. § 46-1-1(9)(C)(xiii). *Executive Town & Country Servs., Inc. v. Young*, 258 Ga. 860, 376 S.E.2d 190 (1989).

Exemption of timber haulers. — Where an insured commercial motor vehicle was acting as a timber hauler at the time of an accident, it was not within the definition of a common carrier or contract carrier and no direct action could be maintained against insurer because the insurer was outside the ambit of O.C.G.A. § 46-7-12. *Smith v. Southern Gen. Ins. Co.*, 222 Ga. App. 582, 474 S.E.2d 745 (1996).

Cited in *Savannah T. & I. of H. Ry. v.*

Williams, 117 Ga. 414, 43 S.E. 751, 61 L.R.A. 249 (1903); *Helmly v. Savannah Office Bldg. Co.*, 13 Ga. App. 498, 79 S.E. 364 (1913); *Atlanta Term. Co. v. Lowndes*, 30 Ga. App. 115, 117 S.E. 111 (1923); *Cherry v. City of Atlanta*, 47 Ga. App. 719, 171 S.E. 463 (1933), *aff'd*, 179 Ga. 249, 175 S.E. 563 (1934); *Brown v. Union Bus Co.*, 61 Ga. App. 496, 6 S.E.2d 388 (1939); *Acme Freight Lines v. City of Vidalia*, 193 Ga. 334, 18 S.E.2d 540 (1942); *Collins v. Mills*, 198 Ga. 18, 30 S.E.2d 866 (1944); *Record Truck Line v. Harrison*, 220 Ga. 289, 138 S.E.2d 578 (1964); *L.C. Robinson & Sons v. Undercoffer*, 221 Ga. 391, 144 S.E.2d 755 (1965); *Darlington Corp. v. Finch*, 113 Ga. App. 825, 149 S.E.2d 861 (1966); *Wolverine Ins. Co. v. Strickland*, 116 Ga. App. 62, 156 S.E.2d 497 (1967); *Nobles v. H.W. Durham & Co.*, 120 Ga. App. 418, 170 S.E.2d 764 (1969); *Travelers Indem. Co. v. Federal Ins. Co.*, 297 F. Supp. 1346 (N.D. Ga. 1969); *Nobles v. H.W. Durham & Co.*, 226 Ga. 134, 173 S.E.2d 200 (1970); *Radcliffe v. Boyd Motor Lines*, 129 Ga. App. 725, 201 S.E.2d 4 (1973); *Seaboard Coast Line R.R. v. Freight Delivery Serv., Inc.*, 133 Ga. App. 92, 210 S.E.2d 42 (1974); *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975); *Gunn v. Sims Crane Serv., Inc.*, 182 Ga. App. 24, 354 S.E.2d 653 (1987); *Progressive Cas. Ins. Co. v. Scott*, 188 Ga. App. 75, 371 S.E.2d 881 (1988); *Chrostowski v. G & MSS Trucking, Inc.*, 198 Ga. App. 140, 401 S.E.2d 53 (1990).

Common Carriers

Definition of "private carrier." — A "private carrier" is one who, without being engaged in the business of carrying as a public employment, undertakes to deliver goods in a particular case for hire or reward. *McIntyre v. Harrison*, 172 Ga. 65, 157 S.E. 499 (1931).

Whether person is common carrier or private carrier depends upon facts; and where there is a question whether the carrier is a private or a common carrier, it is to be determined by the facts relating to, first, whether it is public business or employment, and whether the service is to be rendered to all indifferently; and, second, whether one has so held oneself out as so engaged as to make the person liable for a refusal to accept the employment offered. *Georgia Pub. Serv.*

Comm'n v. Taylor, 172 Ga. 100, 157 S.E. 515 (1931); *In re Ga. Air, Inc.*, 345 F. Supp. 636 (N.D. Ga. 1972).

Status as common carrier cannot be forced on one by legislative fiat. *In re Ga. Air, Inc.*, 345 F. Supp. 636 (N.D. Ga. 1972).

Public nature of common carrier business. — Whether a person is a common carrier or a private carrier depends upon whether it is public business or employment, and whether the service is to be rendered to all indifferently; and, whether one has so held oneself out as so engaged as to make one liable for refusal to accept the employment offered. *McIntyre v. Harrison*, 172 Ga. 65, 157 S.E. 499 (1931).

Carrier not common carrier merely by inviting employment by all. — Mere fact that carrier invites all and sundry persons to employ the carrier does not render the carrier a common carrier, if the carrier reserves the right of accepting or rejecting their offers of goods for carriage, whether the carrier's vehicles are full or empty, being guided in the carrier's decision by the attractiveness or otherwise of the particular offer, and not by the carrier's ability or inability to carry, having regard to the carrier's other engagements. *McIntyre v. Harrison*, 172 Ga. 65, 157 S.E. 499 (1931); *Georgia Pub. Serv. Comm'n v. Taylor*, 172 Ga. 100, 157 S.E. 515 (1931).

Single contract of transportation. — One who contracts to transport goods from one point to another and deliver them in good order and condition, unavoidable accidents only excepted, is not a common carrier, but is responsible on one's own contract as one. *Fish v. Chapman & Ross*, 2 Ga. 349, 46 Am. Dec. 393 (1847).

Making individual bargains tends to make service private. — If a carrier does not deal with the public indiscriminately as a matter of routine, but in effect makes an individual bargain in each case, this course of business tends to show that the service is upon a private basis. *McIntyre v. Harrison*, 172 Ga. 65, 157 S.E. 499 (1931).

Making individual bargains not conclusive of nature of carrier. — The making of separate contracts is considered in determining whether a person is a private or a public carrier, but is not conclusive, since contracts might be made simply to escape the duties of a common carrier by subterfuge. *McIntyre v.*

Common Carriers (Cont'd)

Harrison, 172 Ga. 65, 157 S.E. 499 (1931).

Common carrier must be entitled to compensation. — To make one a common carrier, one must be entitled, either by the bargain or by implication, to toll or hire. *Self v. Dunn & Brown*, 42 Ga. 528, 5 Am. R. 544 (1871).

Carrying goods as common employment. — To make a person a common carrier, a person must exercise it as a common employment; the person must undertake to carry goods for persons generally, and the person must hold oneself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation *pro hac vice*. *Fish v. Chapman & Ross*, 2 Ga. 349, 46 Am. Dec. 393 (1847).

Evidence that carrier is common carrier. — That one is a common carrier may be evidenced by carrier's own notice, or practically by a series of acts, by one's own habitual continuance in one's line of business. *McIntyre v. Harrison*, 172 Ga. 65, 157 S.E. 499 (1931).

Express company is common carrier. — An express company which pursues continuously, for any period of time, the business of transporting goods, packages, etc., is a common carrier. *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783 (1867).

Chartered car. — There is no exception made in the case of a chartered car. *Central R.R. Banking Co. v. Anderson*, 58 Ga. 393 (1877).

A school bus is not a motor common carrier. *Hancock v. Bryan County Bd. of Educ.*, 240 Ga. App. 622, 522 S.E.2d 661 (1999).

Operator for hire of school bus. — The operator for hire of a school motorbus who operates along a certain route every school day in taking all school children alike to and from a certain school is a carrier of passengers insofar as such school children are concerned, and is required to exercise extraordinary care and diligence for the safety of any one of such school children riding in the driver's bus. *Sheffield v. Lovering*, 51 Ga. App. 353, 180 S.E. 523 (1935).

An ambulance is a common carrier so long as it undertakes to carry sick, injured, or disabled persons indiscriminately and indif-

ferently, so as to make it liable for refusal to accept the employment offered. *Bricks v. Metro Ambulance Serv., Inc.*, 177 Ga. App. 62, 338 S.E.2d 438 (1985) (decided prior to 1996 amendment, adding division (9)(c)(xv)).

Miller running ferry not common carrier. — One who keeps a ferry for one's own use and for the convenience of customers to one's mill, but who charges no ferriage, is not a common carrier, and is only bound to ordinary diligence. *Self v. Dunn & Brown*, 42 Ga. 528, 5 Am. R. 544 (1871).

Truck transporting potting soil held not common carrier. — Truck which was engaged exclusively in the transportation of potting soil was not a "motor common carrier." *National Indem. Co. v. Tatum*, 193 Ga. App. 698, 388 S.E.2d 896 (1989).

Truck transporting gravel or other road material not common carrier. — Truck which was engaged exclusively in the transportation of gravel, crushed stone, plant mix road material or road base materials was not a "motor common carrier." *Bailey v. Occidental Fire & Cas. Co.*, 193 Ga. App. 710, 388 S.E.2d 899 (1989).

No set length of road. — Former Civil Code 1895, § 2264 (see O.C.G.A. § 46-1-1) did not indicate any length of road which the company must have in order to be a common carrier. *Bridwell v. Gate City Term. Co.*, 127 Ga. 520, 56 S.E. 624, 10 L.R.A. (n.s.) 909 (1907).

Common carrier bound to use extraordinary diligence. — While a carrier of passengers is not an insurer of the safety of the carrier's passengers in the sense that a common carrier of goods is said to be an insurer of the safety of goods carried, the carrier is bound to exercise extraordinary care and diligence for the safety of the carrier's passengers, and it matters not the kind of conveyance used or the nature of the motive power employed. *Sheffield v. Lovering*, 51 Ga. App. 353, 180 S.E. 523 (1935).

Allegation of negligence unnecessary. — Public ferryman being common carriers, no allegation of negligence was necessary in an action brought to recover damages for the loss of property accepted for shipment. *Louisville & N.R.R. v. Warfield & Lee*, 129 Ga. 473, 59 S.E. 234 (1907); *Deen v. Wheeler*, 7 Ga. App. 507, 67 S.E. 212 (1910).

Motor Contract Carriers

O.C.G.A. § 46-1-1(9)(C) not unconstitutional. — The classification in present O.C.G.A. § 46-1-1(9)(C)(x) and (9)(C)(xi), designed to ameliorate the lot of the producers of farm and dairy products, is not an arbitrary preference within the meaning and the condemnation of U.S. Const., Amend. 14. *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n*, 295 U.S. 285, 55 S. Ct. 709, 79 L. Ed. 1439 (1935).

Language in O.C.G.A. § 46-1-1(9)(C)(x) limits exemption. — Language “so long as the title remains in the producer” in present O.C.G.A. § 46-1-1(9)(C)(x) limits operation of exemption in that section to such an extent that the only property in the class mentioned which is exempted is property where the “title remains in the producer.” This is a reasonable classification in favor of the producer, which will enable movement of the products over the highways so long as title remains in the producer without exaction of the prescribed fee. *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n*, 179 Ga. 431, 176 S.E. 487 (1934), *aff'd*, 295 U.S. 285, 55 S. Ct. 709, 79 L. Ed. 1439 (1935).

O.C.G.A. § 46-1-1(9)(C) strictly construed. — With specific reference to O.C.G.A. § 46-1-1(9)(C), exemptions from taxation are to be strictly construed against the taxpayer. *Georgia Cas. & Sur. Co. v. Jernigan*, 166 Ga. App. 872, 305 S.E.2d 611 (1983).

Limitations on taxicab operations. — A taxicab which was qualified to operate exclusively within city limits and not to fixed termini without the city limits could not transport passengers for hire as a part of its regular business beyond the city limits except “occasionally” and then not to “fixed termini.” *Selph v. Georgia Stages, Inc.*, 62 Ga. App. 887, 10 S.E.2d 209 (1940).

Activities of association constituted operation as motor carrier for hire. — Where nonprofit association used trucks owned and operated by the association to haul products of association members to and from location in this state, and at the end of the year the amount of fees in excess of costs were refunded to members, the association was operating as a motor carrier for hire, and was required to obtain a certificate of public convenience and necessity. *Southeast Ship-*

pers Ass'n v. Georgia Pub. Serv. Comm'n, 211 Ga. 550, 87 S.E.2d 75 (1955).

Passengers

Definition of passenger not exhaustive. — Former Civil Code 1910, § 2715 (see O.C.G.A. § 46-1-1) afforded one instance of a definition of passenger, but was not exhaustive. There was no statute in this state giving a complete and exhaustive definition of the term “passenger.” The relation arises out of contract express or implied, and must depend upon the facts of each case, which are necessarily variable. *Payne v. Allen*, 155 Ga. 54, 116 S.E. 640 (1923).

Mere intention does not make person passenger. — A mere intention on the part of one to become a passenger, without regard to any act on the part of the carrier from which an acceptance of the person as a passenger might arise, expressly or by necessary implication, does not constitute such person a passenger. *White v. Boyd*, 58 Ga. App. 219, 198 S.E. 81 (1938).

Plaintiff's unauthorized boarding of a school bus did not make plaintiff a “passenger” thereon. *Hancock v. Bryan County Bd. of Educ.*, 240 Ga. App. 622, 522 S.E.2d 661 (1999).

Railway mail clerk was a passenger, and former Code 1933, § 18-201 (see O.C.G.A. § 46-1-1) was applicable under Georgia law to such person. *Jackson v. Southern Ry.*, 317 F.2d 532 (5th Cir.), *cert. denied*, 375 U.S. 837, 84 S. Ct. 77, 11 L. Ed. 2d 65 (1963).

Effect of use of school bus for special trips. — A school bus operator who used a bus on nonschool days for special trips, not charters, in undertaking to transport college students to a football game in Tennessee, was a “carrier of passengers” within the meaning of former Code 1933, § 18-204 (see O.C.G.A. § 46-9-132) and while being used on one of its special trips, was a “public conveyance” within the meaning of former Code 1933, § 18-201 (see O.C.G.A. § 46-1-1). *Scott v. Torrance*, 69 Ga. App. 309, 25 S.E.2d 120 (1943).

Legal duty of taxicab operators. — The operators of a taxicab business of transporting the general public for hire are carriers of passengers, and amenable to the legal duty of exercising extraordinary diligence for their protection. *Locke v. Ford*, 54 Ga. App. 322, 187 S.E. 715 (1936).

Passengers (Cont'd)

No showing by evidence that plaintiff was passenger. — Where it is not shown by the evidence that plaintiff made any agreement, express or implied, with the defendant to transport plaintiff in the relationship of passenger and carrier, and plaintiff paid nothing, did not promise to pay anything, and did not profess to have known anything about an arrangement, alleged in plaintiff's petition, whereby from paid admissions to the school entertainment the bus drivers would be compensated for transporting plaintiff and others, it was not shown that plaintiff was a passenger. *White v. Boyd*, 58 Ga. App. 219, 198 S.E. 81 (1938).

No recovery by person on shuttle train. — Proof that a railroad company ran a shuttle train from a city to its railroad shops nearby, for the purpose of carrying its employees to

and from their work, and that occasionally other persons boarded the train and were carried either to or from the shops without the payment of fare, does not entitle a person who was upon the train and was not an employee to recover for injuries occasioned by a sudden jerk of the train, when there was no payment of fare exacted or knowledge of the presence of the person. *Carter v. Seaboard Air-Line Ry.*, 21 Ga. App. 251, 94 S.E. 280 (1917).

Amusement park ride not "public conveyance." — Amusement ride known as "The Wheelie" was not a public conveyance within the meaning of O.C.G.A. § 46-1-1, therefore the standard of care owed by the proprietor, owner, and operator of "The Wheelie" was a duty of ordinary care to the proprietor's passengers. *Harlan v. Six Flags Over Ga., Inc.*, 250 Ga. 352, 297 S.E.2d 468 (1982).

OPINIONS OF THE ATTORNEY GENERAL

Common carrier defined. — A common carrier is one who undertakes for hire to carry all persons indifferently who may apply for passage so long as there is room and there is no legal excuse for refusal. 1957 Op. Att'y Gen. p. 110.

School bus is not motor common carrier. 1957 Op. Att'y Gen. p. 110.

Use of trucks by railroad requires classification as common or contract carriers. — Trucks used by a railroad operating a pickup and delivery service for which no separate charge is made are to be classified as "common or contract carriers." 1960-61 Op. Att'y Gen. p. 292.

Description of carrier not under jurisdiction of commission. — A carrier which transports only its own goods and does not contract or hire itself out to transport goods owned by others is not under the jurisdiction of the commission. 1970 Op. Att'y Gen. No. U70-112.

Contractor subject to regulation by commission. — Independent contractor transporting materials by motor vehicle on public highways and performing ancillary services

such as spreading or placing materials at delivery site are subject to regulation by the commission. 1962 Op. Att'y Gen. p. 438.

Exempt and nonexempt motor carriers due to products carried. — Any motor vehicle which carries the products listed is exempt from the operation of the chapter only if such vehicle hauls or transports exclusively those commodities or others also exempt by law; however, as soon as a motor vehicle begins to carry nonexempt products, either in the same load with exempt products or alternately with exempt products, or indeed at all, then it becomes a motor carrier subject to the chapter, and thus to the jurisdiction of the commission. 1960-61 Op. Att'y Gen. p. 431.

A company constructing a rapid rail passenger service line is a utility within the meaning of O.C.G.A. § 46-1-1 and the Department of Transportation has authority to issue a revocable license to such company to cross the rights-of-way of several state routes so long as consideration is received which represents a substantial benefit to the public. 1995 Op. Att'y Gen. No. 95-45.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 1 et seq. 14 Am. Jur. 2d, Carriers, § 714. 18

Am. Jur. 2d, Corporations, § 30. 65 Am. Jur. 2d, Railroads, § 6.

C.J.S. — 13 C.J.S., Carriers, §§ 2, 495, 499, 502.

ALR. — Carriers: attempt to have child transported without paying fare, 1 ALR 1451.

Status of passenger in ordinary coach who enters Pullman coach for temporary purpose, 18 ALR 71.

Persons or corporations engaged in local transportation of goods as common carriers, 18 ALR 1316.

Federal control of public utilities, 19 ALR 678; 52 ALR 296.

Validity of statute or ordinance in relation to moving vans and moving operations, 20 ALR 210.

Duty and liability to passenger temporarily leaving train, 35 ALR 757; 61 ALR 403.

Powers of federal and state governments respectively as regards railroad stations, 37 ALR 1372.

Company engaged exclusively or mainly in furnishing switching service as carrier engaged in interstate commerce, 38 ALR 1147.

Regulating issuance of securities by public utilities through Public Service Commissions, 41 ALR 889.

Liability of carrier for injury to passenger by car door, 41 ALR 1089.

Passenger's waiver of right to seat, 42 ALR 156.

One operating bus or stage as common carrier, 42 ALR 853.

Presumption and burden of proof as to carrier's responsibility for goods received in good condition and deliver to consignee in bad condition, 53 ALR 996; 106 ALR 1156.

Company furnishing switching service as a common carrier, 54 ALR 620.

Logging or mining road as a common carrier, 67 ALR 588.

Carrier's liability as affected by improper packing or preparation of goods for shipment, 81 ALR 811.

Conductor's acceptance of ticket or pass which because of time limit or for other reason he was not obliged to accept as affecting status of, or duty toward, person tendering it, 88 ALR 760.

Persons hauling commodities for

co-operative purchasing or marketing associations, or their members, as common carriers, 98 ALR 226.

Person or corporation transporting goods on the public highways as a common carrier, or private or contract carrier, as regards liability for loss of or damage to goods, 112 ALR 89.

When relation of carrier and passenger commences as between railway or interurban company and one intending to take train or car not at a regular stopping place, 116 ALR 756.

Isolated, occasional, or incidental transportation of person or property for compensation as within contemplation of statute requiring permit or otherwise regulating transportation of persons or property on highway, 123 ALR 229.

Who is "common carrier" within provision of insurance policy providing for indemnity for injury or death while on conveyance operated by common carrier, 149 ALR 1293.

What carriers are within statutory definition of common carriers by motor vehicle, 161 ALR 417.

Car pool or "share-the-expense" arrangement as subjecting vehicle operator to regulations applicable to carriers, 51 ALR2d 1193.

Air carrier as common or private carrier, and resulting duties as to passenger's safety, 73 ALR2d 346.

Share-the-ride arrangement or car pool as affecting status of automobile rider as guest, 10 ALR3d 1087.

Liability for injury to or death of passenger from accident due to physical condition of carrier's employee, 53 ALR3d 669.

What is "conveyance," "passenger conveyance," or "public conveyance" within coverage of accident policy, 60 ALR3d 858.

Who is "fare-paying passenger" within coverage provision of life or accident insurance policy, 60 ALR3d 1273.

Liability for injury caused by fall of person into shaft, or by abrupt drop, sudden movement, or stopping between floors, of automatic passenger elevator, 64 ALR3d 950.

46-1-2. Measure of damages for wrongs and injuries by railroad companies generally; venue for actions against railroad companies and electric companies generally.

(a) As used in this Code section, the term “electric company” means all corporations engaged in the business of either generating or transmitting electricity for light, heat, power, or other commercial purposes.

(b) If any railroad company doing business in this state shall, in violation of any rule or regulation of the Public Service Commission, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury in the county where the wrong or injury occurred and the damages which may be recovered in such actions shall be the same as in actions between individuals, provided that, in cases of willful violation of law, such railroad companies shall be liable for exemplary damages. All such actions under this title must be brought within 12 months after the commission of the alleged wrong or injury.

(c) Any railroad or electric company shall be sued by anyone whose person or property has been injured by such railroad or electric company, or by its officers, agents, or employees, for the purpose of recovering damages for such injuries, in the county in which the cause of action originated; and actions on all contracts shall be brought in the county in which the contract in question is made or is to be performed. If the cause of action arises in a county where the railroad or electric company liable to suit has no agent, service may be perfected by the issuance of a second original, to be served upon the company in the county of its principal office and place of business, if in this state, and if not, on any agent of such company. In the alternative, if the company has no agent in the county where the cause of action arises, an action may be brought in the county of the residence of such company.

(d) Whenever any railroad or electric company incorporated under the laws of this state acquires by purchase, lease, or otherwise the ownership or control of the line of railroad of a competing railroad company in this state, in violation of Article III, Section VI, Paragraph V(c) of the Constitution of the State of Georgia, or whenever any railroad or electric company incorporated under the laws of this state acquires by purchase, lease, or otherwise the ownership or control of the generating plant or transmission line of a competing electric company in this state, in violation of Article III, Section VI, Paragraph V(c) of the Constitution of the State of Georgia, the venue of an action brought against the railroad or electric company for the purpose of setting aside and having annulled such unlawful act of acquisition shall be in any county through which may run the line of railroad or in any county through which may run the transmission line of such electric company or in which may be located the generating plant of such electric company so unlawfully acquired.

(e) In any cause of action described in this Code section, any judgment rendered in any county other than one designated in this Code section shall be void.

(f) The following electric companies shall be embraced within the provisions of this Code section:

(1) An electric company owning a generating plant in one county and having its situs or principal office either in some other county of this state or beyond the limits of this state;

(2) An electric company operating a generating plant, whether under lease or otherwise, in one county and having its situs or principal office either in some other county of this state or beyond the limits of this state;

(3) An electric company owning a transmission line located in one county and having its situs or principal office in some other county of this state or beyond the limits of this state;

(4) An electric company operating, whether under lease or otherwise, a transmission line located in one county and having its situs or principal office in some other county of this state or beyond the limits of this state;

(5) An electric company owning a transmission line located in, or extending through, more than one county; and

(6) An electric company operating, whether under lease or otherwise, a transmission line located in or extending through more than one county. (Ga. L. 1855-56, p. 154, §§ 1, 2; Ga. L. 1859, p. 48, § 1; Code 1863, § 3317; Code 1868, § 3329; Ga. L. 1869, p. 14, § 1; Code 1873, § 3406; Ga. L. 1878-79, p. 125, § 10; Code 1882, §§ 719, 3406; Ga. L. 1892, p. 59, § 1; Civil Code 1895, §§ 2197, 2334; Ga. L. 1898, p. 50, § 1; Civil Code 1910, §§ 2640, 2798; Ga. L. 1912, p. 66, §§ 1-4; Code 1933, §§ 93-413, 94-1101; Ga. L. 1983, p. 3, § 62; Ga. L. 1984, p. 22, § 46; Ga. L. 1985, p. 149, § 46; Ga. L. 1986, p. 37, § 1; Ga. L. 1992, p. 6, § 46; Ga. L. 2004, p. 631, § 46.)

The 2004 amendment, effective May 13, 2004, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (d).

Cross references. — Time limitation on actions against railroads for injury to or death of employee, § 34-7-46. Venue for actions against lessees or possessors of railroads, § 46-8-310. Venue for actions against receivers, trustees, etc., of railroad companies, § 46-8-314.

Law reviews. — For article discussing aspects of third party practice (impleader) under the Georgia Civil Practice Act (Ch. 11,

T. 9), see 4 Ga. St. B. J. 355 (1968). For article, "Statutes of Limitation: Counterproductive Complexities," see 37 Mercer L. Rev. 1 (1985). For annual survey trial practice and procedure, see 38 Mercer L. Rev. 383 (1986). For annual survey of recent developments, see 38 Mercer L. Rev. 473 (1986). For annual survey on trial practice and procedure, see 43 Mercer L. Rev. 441 (1991).

For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DEFINITIONS

STATUTE OF LIMITATIONS

PLEADING AND PRACTICE

SERVICE OF PROCESS

JURISDICTION AND VENUE

1. IN GENERAL
2. IN TORT ACTIONS
3. IN CONTRACT ACTIONS
4. ACTIONS AGAINST FOREIGN CORPORATIONS

General Consideration

Venue provisions constitutional. — The mandatory venue provisions of O.C.G.A. § 46-1-2(c) were not impliedly repealed by the venue provisions of the Georgia Business Corporation Code, O.C.G.A. Ch. 2, T. 14, and do not violate the equal protection guarantees of the federal constitution. *Driskell v. Georgia Power Co.*, 260 Ga. 488, 397 S.E.2d 285 (1990).

Purpose of section. — The scheme of O.C.G.A. § 46-1-2 is to make the jurisdiction exclusive in the county where the cause of action originates when there is such resident agent, but elective when there is not. *Devereux v. Atlanta Ry. & Power Co.*, 111 Ga. 855, 36 S.E. 939 (1900).

The combined intent of this O.C.G.A. §§ 46-1-2 and 46-2-90 is to provide for the recovery of compensatory and exemplary damages as well as attorney fees for the tortious infliction of property damages upon the owner or possessor of property where the damage is inflicted as the result of a wilful act. *Southern Ry. v. Malone Freight Lines*, 174 Ga. App. 405, 330 S.E.2d 371 (1985).

No distinction made as to how actions begin. — O.C.G.A. § 46-1-2 makes no distinction as to how actions begin, whether by petition and process or by the levy of an attachment, but refers to "any judgment" in any action against "all railroad * * * companies." *Grand Trunk W.R.R. v. Barge*, 75 Ga. App. 646, 44 S.E.2d 281 (1947).

Construction with state constitution. — Former Code 1933, § 94-1101 (see O.C.G.A. § 46-1-2) must be construed in connection with Ga. Const. 1976, Art. VI, Sec. XIV, Para. IV (see Ga. Const. 1983, Art. VI, Sec. II, Para.

IV). *Southern Ry. v. Wooten*, 110 Ga. App. 6, 137 S.E.2d 696 (1964).

Increased venue for actions against railroad corporations. — The only exceptions to the general rule that a railroad corporation must be sued in the county where its principal office is located are contained in Ga. L. 1898, p. 50, § 1 (see O.C.G.A. § 46-1-2). *McCall v. Central of Ga. Ry.*, 120 Ga. 602, 48 S.E. 157 (1904).

Applicability to railroad companies. — Provisions of former Code 1933, § 94-1101 (see O.C.G.A. § 46-1-2) applied to all railroad companies, without regard to whether they were corporate companies or not, and without regard to whether they were domestic or foreign. *Atlanta-Asheville Motor Express v. Dooley*, 78 Ga. App. 265, 50 S.E.2d 822 (1948).

Former Civil Code 1895, § 2334 (see O.C.G.A. § 46-1-2) was not applicable to action against railroad company for injuries sustained in foreign state on account of the negligence of the agents and servants of the company in that state. *Atlanta, K. & N. Ry. v. Wilson*, 116 Ga. 189, 42 S.E. 356 (1902); *Reeves v. Southern Ry.*, 121 Ga. 561, 49 S.E. 674, 70 L.R.A. 573, 2 Ann. Cas. 207 (1905).

Injuries sustained in foreign state. — Former Code 1910, § 2798 (see O.C.G.A. § 46-1-2) did not apply if action was for injuries sustained in foreign state. *Louisiana State Rice Milling Co. v. Mente & Co.*, 173 Ga. 1, 159 S.E. 497 (1931); *Neal v. CSX Transp., Inc.*, 213 Ga. App. 707, 445 S.E.2d 766 (1994).

Foreign corporation is nonresident. — Foreign corporation would have no residence in this state. *Atlanta-Asheville Motor Express v. Dooley*, 78 Ga. App. 265, 50 S.E.2d 822 (1948).

Section is mandatory. — Former Civil Code 1895, § 2334 (see O.C.G.A. § 46-1-2) did not allow a railroad company, expressly or by silence, to give jurisdiction to the court of a county other than that in which the tort was committed. Its provisions were mandatory. *Summers v. Southern Ry.*, 118 Ga. 174, 45 S.E. 27 (1903).

Action against joint obligors not within section. — Former Civil Code 1895, § 2334 (see O.C.G.A. § 46-1-2) did not apply to an action on a bond made by a railroad company in a county other than that in which its principal office is located, conditioned to pay damages to another railroad company resulting from the delay incident to the prosecution of a writ of error (see O.C.G.A. §§ 5-6-49 and 5-6-50) complaining of the refusal to enjoin the latter company from crossing the tracks of the former in still another county. *Waycross Air-Line R.R. v. Offerman & W.R.R.*, 114 Ga. 727, 40 S.E. 738 (1902).

Section not applicable to joint action of trespass. — Where the company and third person are joint trespassers, former Civil Code 1895, § 2334 (see O.C.G.A. § 46-1-2) did not determine the venue of the action. *Central of Ga. Ry. v. Brown*, 113 Ga. 414, 38 S.E. 989, 84 Am. St. R. 250 (1901).

Cited in *Hodges v. Atlantic & G.R.R.*, 51 Ga. 244 (1874); *Central R.R. v. Flournoy*, 69 Ga. 763 (1882); *Mitchell v. Southwestern R.R.*, 75 Ga. 398 (1885); *Atlanta & F.R.R. v. Western Ry.*, 50 F. 790 (5th Cir. 1892); *Southern Ry. v. Brock*, 115 Ga. 721, 42 S.E. 65 (1902); *LeCroix v. Western & A.R.R.*, 118 Ga. 98, 44 S.E. 840 (1903); *Southern Ry. v. Grizzle*, 124 Ga. 735, 53 S.E. 244, 110 Am. St. R. 191 (1906); *Southern Ry. v. Moore*, 133 Ga. 806, 67 S.E. 85, 26 L.R.A. (n.s.) 851 (1910); *Wright v. Southern Ry.*, 7 Ga. App. 542, 67 S.E. 272 (1910); *Atlanta, B. & A.R.R. v. Atlantic Coast Line R.R.*, 138 Ga. 353, 75 S.E. 468 (1912); *Atkinson v. Olmstead*, 140 Ga. 100, 78 S.E. 720 (1913); *Flint River & N.E.R.R. v. Sanders*, 18 Ga. App. 766, 90 S.E. 655 (1916); *Ocilla S.R.R. v. McAllister*, 20 Ga. App. 400, 93 S.E. 26 (1917); *Davis v. Seigel*, 28 Ga. App. 418, 111 S.E. 439 (1922); *Griffer v. Southern Ry.*, 30 Ga. App. 20, 116 S.E. 655 (1923); *Taylor v. Central of Ga. Ry.*, 31 Ga. App. 374, 121 S.E. 348 (1923); *Atlantic Log & Export Co. v. Central of Ga. Ry.*, 42 Ga. App. 256, 155 S.E. 530 (1930); *De Loach*

v. Southeastern Greyhound Lines, 49 Ga. App. 662, 176 S.E. 518 (1934); *Harrison v. Neel Gap Bus Line*, 51 Ga. App. 120, 179 S.E. 871 (1935); *Kwilecki v. Young*, 180 Ga. 602, 180 S.E. 137 (1935); *Powell v. First Nat'l Bank*, 58 Ga. App. 648, 199 S.E. 668 (1938); *Georgia Power Co. v. Blum*, 80 Ga. App. 618, 57 S.E.2d 18 (1949); *Ledger-Enquirer Co. v. Brown*, 213 Ga. 538, 100 S.E.2d 166 (1957); *Gurley v. Hardwick*, 98 Ga. App. 334, 106 S.E.2d 53 (1958); *Studdard v. Evans*, 108 Ga. App. 819, 135 S.E.2d 60 (1964); *Southern Ry. v. Pruitt*, 121 Ga. App. 530, 174 S.E.2d 249 (1970); *Fowler v. Aetna Cas. & Sur. Co.*, 159 Ga. App. 190, 283 S.E.2d 69 (1981).

Definitions

"Injury to property" defined. — The expression "injury to property" is used, in its broad and general sense, and is broad enough to comprehend a wrongful conversion of property. *Crawford v. Crawford*, 134 Ga. 114, 67 S.E. 673, 28 L.R.A. (n.s.) 353, 19 Ann. Cas. 932 (1910); *Lamb v. Howard*, 145 Ga. 847, 90 S.E. 63 (1916).

Constructor of plant not "electric company." — A general contracting corporation, engaged in the construction of a tunnel, building a dam and power house, is not an "electric company" within the meaning of Ga. L. 1912, p. 66 (see O.C.G.A. § 46-1-2). *Northern Contracting Co. v. Maddux*, 144 Ga. 686, 87 S.E. 892 (1916).

What constitutes an agent of a railroad. — For service upon a railroad corporation to be effectual by reason of service upon an agent, at the time of the service the person must be its agent. *Pennington & Evans v. Douglas, A. & G. Ry.*, 6 Ga. App. 854, 65 S.E. 1084 (1909), later appeal, 10 Ga. App. 288, 73 S.E. 425 (1912).

Agent of state not agent of corporation under receivership. — An agent of the state, under a receiver who has possession of the road in consequence of a seizure by the Governor for nonpayment of interest on bonds which the state has endorsed, is not the agent of the corporation. *Cherry v. North & S.R.R.*, 59 Ga. 446 (1877).

Classification of electric companies within meaning of this section. — The fact that electric membership corporations have by the law extended to them privileges and enjoy certain immunities not granted to other corporations does not of itself remove

Definitions (Cont'd)

them from the category of electric companies within the definition contained in former Code 1933, § 94-1101 (see O.C.G.A. § 46-1-2). Since the act creating such corporation empowers them to do nothing else but generate and transmit electric energy, and to perform functions incidental thereto, they must be classified as a species of electric companies within the meaning of that section. *Lamar Elec. Membership Corp. v. Carroll*, 89 Ga. App. 440, 79 S.E.2d 832 (1953).

Distinction between electric corporations within contemplation of this section. — If the entire benefit of the sole enterprise upon which the electric membership corporation was empowered by its charter to enter inures to the general public and no profit or improvement of the economic condition or desires of its stockholders or members was contemplated, the corporation could not be said to be in business within the contemplation of former Code 1933, § 94-1101 (see O.C.G.A. § 46-1-2), but a corporation whose stockholders, by whatever name they may be designated, derive from the transaction of the business a profit in money or improvement in their economic conditions, was engaged in business within the contemplation of the above mentioned section, and was subject to the jurisdiction of the courts, under the same rules of practice that other electric corporations are. *Lamar Elec. Membership Corp. v. Carroll*, 89 Ga. App. 440, 79 S.E.2d 832 (1953).

Statute of Limitations

Limitation of action. — Former Civil Code 1910, § 2640 (see O.C.G.A. § 46-1-2) had no application to an action brought by a railway company to recover the difference between the amount actually collected as freight and that which should have been collected under the rules of the commission; and such an action would not be barred if brought within four years from the accrual of the right of action. *Central of Ga. Ry. v. Eatonton Lumber Co.*, 14 Ga. App. 302, 80 S.E. 725 (1914).

Statute of limitations tolled by suit in wrong county. — An action brought in the wrong county, contrary to former Civil Code 1910, § 2798 (see O.C.G.A. § 46-1-2), may be the basis of a renewed action, tolling the

statute of limitations, as provided by former Civil Code 1910, § 4381 (see O.C.G.A. § 46-1-2) § 9-2-61. *Lamb v. Howard*, 150 Ga. 12, 102 S.E. 436 (1920).

No right of renewal outside limitations period. — Under former Code 1882, § 719 (see O.C.G.A. § 46-1-2), bringing an action within 12 months was a condition precedent, and the right of renewal within six months after the dismissal of one action, though more than 12 months from the time the right of action accrued, did not exist under that section. *Parmelee v. Savannah F. & W. Ry.*, 78 Ga. 239, 2 S.E. 686 (1886).

Pleading and Practice

Sufficiency of pleading in tort action against railroad. — It has been held under former Code 1873, § 3406 (see O.C.G.A. § 46-1-2) that a declaration against a railroad company showing upon its face that the company was duly chartered under the laws of this state, and complaining that it damaged the plaintiffs by constructing a railroad upon their land in the county in which the action was located, showed substantially, though not in accurate form, that the railroad of the company was wholly or partly in that county. *East Ga. & F. R.R. v. King*, 91 Ga. 519, 17 S.E. 939 (1893); *Gilbert v. Georgia R.R. & Banking Co.*, 104 Ga. 412, 30 S.E. 673 (1898).

Sufficiency of pleading in contract action against railroad. — In an action against a railroad company on a contract instituted in a county other than the one where its chief office of business is located, the pleadings should show that the contract was either made or was to be performed in the county where such action was brought. *Corley & Dasset v. Georgia R.R. & Banking Co.*, 49 Ga. 626 (1873).

Jurisdictional defect is amendable. — Failure to show jurisdiction, is an amendable defect in a petition, and unless such defect is challenged by demurrer (now motion to dismiss), and opportunity given to amend, a dismissal entered for another and different reason will not be upheld because of such omission. *Burton v. Wadley S. Ry.*, 25 Ga. App. 599, 103 S.E. 881 (1920).

Relevance of allegations of willful conduct to recovery of exemplary damages. — In an action for damages sustained on account of a violation of a rule of the commission, exem-

plary damages may be recovered, if it appears that the conduct of the company amounted to a willful violation of law under former Civil Code 1895, § 2197 (see O.C.G.A § 46-1-2); and therefore allegations of the petition which, if proved, would throw light on the question as to whether the conduct of the company was willful, should not be stricken as irrelevant and impertinent. *Augusta Brokerage Co. v. Central of Ga. Ry.*, 121 Ga. 48, 48 S.E. 714 (1904).

Evidence must show injury occurred in county where action brought. — In actions against railway and electric companies, it is essential, for the rendition of a valid judgment, that it be shown by evidence that the alleged injury occurred in the county in which the action was brought. *Georgia Power Co. v. Woodall*, 48 Ga. App. 85, 172 S.E. 76 (1933).

Mandamus by shipper. — A railroad company owes to the public a duty to obey the reasonable tariff rates fixed by the commission, and a shipper, whose shipment has been rejected on the ground that one of the rates of the commission's schedule is, in the opinion of the carrier, too low, has such special interest in the observance by the railroad company of its duty to the public in this regard as that one may compel its performance by mandamus. *Southern Ry. v. Atlanta Stove Works*, 128 Ga. 207, 57 S.E. 429 (1907).

Election of assignee between action in tort or on contract. — Under former Civil Code 1895, § 2334 (see O.C.G.A § 46-1-2), it has been held that where the assignee of a bill of lading has the option to sue the carrier either in tort or for a breach of the contract, and elects the former remedy, and the case is dismissed for want of jurisdiction, the election to proceed in tort does not prevent a subsequent action on the contract. *Louisville & N.R.R. v. Pferdmenges, Preyer & Co.*, 8 Ga. App. 81, 68 S.E. 617 (1910).

Service of Process

Sufficiency of service on agent. — Where an action was brought against a railroad company in the county where the injury complained of took place, and the sheriff returned that the sheriff had served a certain person as agent for defendant at the depot in that county, and a second original of the declaration and process also had been

served upon the president of the company, such service was sufficient. *Mitchell v. Southwestern R.R.*, 75 Ga. 398 (1885), overruled on other grounds, *Woodley v. Coker*, 119 Ga. 226, 46 S.E. 89 (1903).

Personal service upon a ticket-agent in charge of a ticket office of a railroad company, and selling tickets and handling passenger business for it is sufficient service. *Seaboard Air-Line Ry. v. Browder*, 144 Ga. 322, 87 S.E. 6 (1915).

Construction of provisions concerning service on domestic and foreign railroads.

— Former Code 1933, § 94-1101 (see O.C.G.A § 46-1-2) provided that if the carrier by rail had no agent in the county where the accident took place, then plaintiff may sue the company in that county and service may be perfected by the issuance of a second original to be served upon said company in the county of its principal office and place of business, if in this state, and if not, on any agent of such company, or suit may be brought in the county of the residence of such company. *Atlanta-Asheville Motor Express v. Dooley*, 78 Ga. App. 265, 50 S.E.2d 822 (1948).

Jurisdiction and Venue

1. In General

Defendant cannot waive jurisdiction where improper venue in action against railroad. — Where former Code 1933, § 94-1101 (see O.C.G.A § 46-1-2), relating to venue of actions against railroad companies, was applicable, it was exclusive; an action brought elsewhere than was there provided, was void, and the defendant cannot waive the question of jurisdiction by pleading to the merits. *Georgia, A., S. & C. Ry. v. Atlantic C.L.R.R.*, 88 Ga. App. 426, 76 S.E.2d 724 (1953), cert. denied, 350 U.S. 887, 76 S. Ct. 142, 100 L. Ed. 782 (1955).

Party not required to bring suit in county where injury occurred. — For the purpose of determining the venue in a suit against a railroad, the language used in O.C.G.A. § 46-1-2 is permissive; thus, a party has the option of bringing suit in the county where an injury occurred, rather than being required to bring suit therein. *Southern Ry. v. Lawson*, 174 Ga. App. 101, 329 S.E.2d 288 (1985).

Jurisdiction and Venue (Cont'd)**1. In General (Cont'd)**

Venue of action for injuries by previous owner. — Former Civil Code 1895, § 2334 (see O.C.G.A § 46-1-2) did not apply to an action brought against a railroad company having its principal office in this state, to recover upon the liability attaching to it as the purchaser or successor in title of another corporation or an individual, to whom the injuries alleged were primarily chargeable. *White v. Atlanta, B. & A.R.R.*, 5 Ga. App. 308, 63 S.E. 234 (1908).

2. In Tort Actions

Venue provisions of construed. — Former Code 1933, § 94-1101 (see O.C.G.A § 46-1-2) provided that where the railroad company has an agent in the county where the cause arose action shall be brought therein, but that where the company has no agent there, the person injured can sue the railroad where it has its principal place of business or in the county of its residence. *Atlanta-Asheville Motor Express v. Dooley*, 78 Ga. App. 265, 50 S.E.2d 822 (1948).

If there is an agent of the railroad company in the county where the cause of action arose, jurisdiction of the action in that county is mandatory, but it is elective with the person injured as to whether the person shall bring an action in the county where the cause of action originated or in the county where the company has its principal place of business or the county of its residence, where there is no agent of the defendant railroad company in the county where the cause originated. *Atlanta-Asheville Motor Express v. Dooley*, 78 Ga. App. 265, 50 S.E.2d 822 (1948).

Venue of action where absence of agent in county where tort occurred. — Under former Civil Code 1895, § 2334 (see O.C.G.A § 46-1-2) an action against a railway company for a tort may be brought in the county of the residence of the company when it had no agent in the county where the cause of action arose. *Georgia S. & F. Ry. v. Pearson*, 120 Ga. 284, 47 S.E. 904 (1904); *Southwestern R.R. v. Vellines*, 14 Ga. App. 674, 82 S.E. 166 (1914).

Jurisdiction exclusive where agent has residence in county where cause of action originates. — Since the sole jurisdictional fact is

the place of the origin of the cause of action, and the statute has not superadded the further fact of the residence of an agent as one requisite to jurisdiction, it must be held that the scheme of the law is to make the jurisdiction exclusive in the county where the cause of action originates when there is such residence, but elective when there is not. *United Motor Freight Term. Co. v. Driver*, 74 Ga. App. 244, 39 S.E.2d 496 (1946).

Provisions jurisdictional in nature and cannot be waived. — Provisions such that "railroad and electric companies shall be sued by anyone whose person or property has been injured ... for the purpose of recovering damages for such injuries, in the county in which the cause of action originated ..." are jurisdictional in their nature and cannot be waived. *Southern Ry. v. Wooten*, 110 Ga. App. 6, 137 S.E.2d 696 (1964).

Venue in tort actions against railroad or electric companies. — Former Code 1933, § 94-1101 (see O.C.G.A § 46-1-2) provided that, as to tort actions against railroad or electric companies, action must be brought in the county where the damage or injury occurred. *Georgia, A., S. & C. Ry. v. Atlantic C.L.R.R.*, 88 Ga. App. 426, 76 S.E.2d 724 (1953), cert. denied, 350 U.S. 887, 76 S. Ct. 142, 100 L. Ed. 782 (1955).

Wife and the estate cited no authority that the presence of the driver authorized suit against the owner/electric company in any county other than the county where the driver resided or where the accident occurred. *Pullum v. Sewell*, 257 Ga. App. 553, 571 S.E.2d 552 (2002).

Proper venue in county of residence of either tort-feasor. — An action against a railroad and another as joint tort-feasors may be brought in the county of the residence of the individual tort-feasor; and, the fact that the individual tort-feasor is the servant of the railroad and the servant's negligence is the only negligence charged against the railroad, will not alter the rule. *Southern Ry. v. Wooten*, 110 Ga. App. 6, 137 S.E.2d 696 (1964).

Venue of joint and several action against company and another tort-feasor. — A joint and several action can be brought against a railroad company and another tort-feasor, and as against the railroad company and its employee, a conductor or engineer, and the

action can be brought in the county where the cause of action originated and service perfected by second original, and this is true even though neither defendant resides or has an agent in that county; the same principle is applicable to an action against a motor common carrier and the driver of its motor vehicle for a tort. *Atlanta-Asheville Motor Express v. Dooley*, 78 Ga. App. 265, 50 S.E.2d 822 (1948).

Futile action where court without jurisdiction due to improper venue. — An action against a common carrier by rail for damages on account of an injury sustained by reason of the negligence of the railroad company in the operation of one of its trains would have to be brought in the county where the injury took place, if the company had an agent in that county; otherwise, the action would be futile, the court not having jurisdiction of the case and any judgment therein void. *Modern Coach Corp. v. Faver*, 87 Ga. App. 221, 73 S.E.2d 497 (1952).

Venue of action where continuous tort to passenger. — The county in which the transportation and the alleged injuries commenced is not a wrong venue for an action by a passenger against a carrier who tortiously and continuously failed to provide for the plaintiff's comfort during a journey from a point in this state to a point in another state. *Bryant v. Atlantic C. L. R.R.*, 19 Ga. App. 536, 91 S.E. 1047 (1917).

Former Civil Code 1910, § 2798 (see O.C.G.A § 46-1-2) was applicable in a case where a passenger brought an action in tort against a railroad company for negligence in carrying the passenger beyond the passenger's destination in a particular county and through that county into another state, where further damages result from the continued wrong; and where the railroad company had an agent in the county where the tort originated, the venue of an action for such injury was exclusively in that county. *Southern Ry. v. Clark*, 162 Ga. 616, 134 S.E. 605 (1926).

Venue of action for homicide. — An action under former Code 1868, § 2920 (see O.C.G.A § 51-4-2) by a widow against a railroad company for the homicide of her husband may, under Ga. L. 1869, p. 14 (see O.C.G.A. § 46-1-2), be tried in the county where the killing was done, although such county was not that in which, by the charter,

the principal place of business of the company was located. *Georgia R.R. & Banking Co. v. Oaks*, 52 Ga. 410 (1874).

No matter where the contract of employment by the company with the agent was made, the homicide being committed at the place where the agent was assigned to duty, and where the agent was serving the company at the time of the wrongful act, thus the cause of action originated at that place, and the superior court of that county had jurisdiction. *Christian v. Columbus & R. Ry.*, 79 Ga. 460, 7 S.E. 216 (1887).

Venue of action for failure to build spur track. — Where a common carrier neglected or refused to obey an order of the Railroad Commission (now Public Service Commission), requiring it to build a spur or side-track in a certain county, and action was brought by an individual to recover for damage, resulting therefrom, the venue of the action was not determined by former Civil Code 1895, § 2334 (see O.C.G.A § 46-1-2). *English v. Central of Ga. Ry.*, 7 Ga. App. 263, 66 S.E. 969 (1910).

Action for false arrest of passenger. — If, after the arrest of a person stealing a ride, the train stops at a station in another county, and the plaintiff was there delivered to an officer and imprisoned, and if the detention, failure to prosecute, or other act in such latter county gave rise to a cause of action, former Civil Code 1895, § 2334 (see O.C.G.A § 46-1-2) imperatively required that action should be there brought. *Summers v. Southern Ry.*, 118 Ga. 174, 45 S.E. 27 (1903).

Action against initial carrier in county of destination. — Where there is an interstate shipment of goods and they are damaged in transit, the superior court of the county of the destination of the shipment has jurisdiction of an action for damages therefor against the initial nonresident carrier. *Adair v. Atlantic C.L.R.R.*, 21 Ga. App. 564, 94 S.E. 840, cert. denied, 21 Ga. App. 825 (1918).

3. In Contract Actions

Venue and jurisdiction involved in portion of statute concerning contract actions. — Portion of former Code 1933, § 94-1101 (see O.C.G.A § 46-1-2) dealing with contract actions related, not to venue merely, but to the jurisdiction of the court over the subject matter involved. *Georgia, A., S. & C. Ry. v.*

Jurisdiction and Venue (Cont'd)**3. In Contract Actions (Cont'd)**

Atlantic C.L.R.R., 88 Ga. App. 426, 76 S.E.2d 724 (1953), cert. denied, 350 U.S. 887, 76 S. Ct. 142, 100 L. Ed. 782 (1955).

Construction of venue provisions relating to breach of contract actions against railroads. — Under the provisions of former Code 1933, § 94-1101 (see O.C.G.A § 46-1-2), all actions against railroads for breach of contract must be brought in the county in which the contract in question was made or was to be performed; any judgment rendered in any county other than those so designated shall be utterly void, with the exception that, if the cause of action shall arise in a county in which the defendant railroad had no agent, the action may then be brought in the county of residence of the defendant. Georgia, A., S. & C. Ry. v. Atlantic C.L.R.R., 88 Ga. App. 426, 76 S.E.2d 724 (1953), cert. denied, 350 U.S. 887, 76 S. Ct. 142, 100 L. Ed. 782 (1955).

Proper venue in contract matter involving railroad corporation. — If the sole responsibility of the obligor in a contract is to pay over a sum of money upon a certain contingency arising, then the venue of the action is properly laid at the home office of the railroad corporation which is liable for such sum, and a demand therefor must also be made at such home office, in the county of its residence. Georgia, A., S. & C. Ry. v. Atlantic C.L.R.R., 88 Ga. App. 426, 76 S.E.2d 724 (1953), cert. denied, 350 U.S. 887, 76 S. Ct. 142, 100 L. Ed. 782 (1955).

Election between counties by plaintiff to contract. — Under former Civil Code 1895, § 2334 (see O.C.G.A § 46-1-2) railroad companies are suable, on causes of action arising upon contracts, either in the county in which the contract is made, or in the county in which it is to be performed, at the option of the plaintiff. Central of Ga. Ry. v. Crapps, 4 Ga. App. 550, 61 S.E. 1126 (1908).

Judgment unauthorized where mandatory and exclusive venue criteria unmet. — In an action on a contract against a defendant railroad in this state, the provisions of former Code 1933, § 94-1101 (see O.C.G.A § 46-1-2) relating to the county in which the action shall be laid are mandatory and exclusive, and refer to the jurisdiction of the court over the subject matter involved; ac-

cordingly, a judgment for the plaintiff in such action is unauthorized where it does not affirmatively appear (a) that the contract was entered into, or (b) the work was to be performed in the county in which the action was laid, or (c) that the defendant railroad has no agent upon whom service may be perfected in such counties. Georgia, A., S. & C. Ry. v. Atlantic C.L.R.R., 88 Ga. App. 426, 76 S.E.2d 724 (1953), cert. denied, 350 U.S. 887, 76 S. Ct. 142, 100 L. Ed. 782 (1955).

Judgment void where requirements of venue provisions unmet. — Where it is neither alleged nor proved, in an action against a railroad company based on a contract, that the suit is brought in the county where the contract was made or to be performed, or if brought in the county of residence of the defendant, that there is no agent in such counties upon whom service may be perfected, the judgment in such action is utterly void. Georgia, A., S. & C. Ry. v. Atlantic C.L.R.R., 88 Ga. App. 426, 76 S.E.2d 724 (1953), cert. denied, 350 U.S. 887, 76 S. Ct. 142, 100 L. Ed. 782 (1955).

4. Actions Against Foreign Corporations

Applicability to foreign corporations. — Former Civil Code 1895, § 2334 (see O.C.G.A § 46-1-2) fixing the venue of actions against railroad companies, applied to foreign as well as domestic corporations. Mitchell v. Southern Ry., 118 Ga. 845, 45 S.E. 703 (1903); Bracewell v. Southern Ry., 134 Ga. 537, 68 S.E. 98 (1910).

Venue in action against foreign corporation having no residence in this state. — A foreign corporation not operating under a domestic franchise, has no residence in this state, and the action, if brought in this state, must be brought in the county in which the cause of action originated, whether the defendant has an agent in that county or not. Coakley v. Southern Ry., 120 Ga. 960, 48 S.E. 372 (1904).

Required procedure where foreign railroad companies involved in actions. — While foreign railroad companies are subject to action by attachment or in personam for any cause of action arising in Georgia and the plaintiff may proceed by attachment and secure a lien on property of said company located in Georgia, the attachment must be returned to and the case tried in a court having jurisdiction of the attachment

in the county designated by the provisions of former Code 1933, § 94-1101 (see O.C.G.A. § 46-1-2), for the trial of such case. *Grand Trunk W.R.R. v. Barge*, 75 Ga. App. 646, 44 S.E.2d 281 (1947).

Proper procedure and venue where attachment against nonresident company. — Under a proper construction of former Code 1933, § 8-117 and former Code 1933, § 94-1101 (see O.C.G.A. § 46-1-2), where an attachment was issued against a nonresident railway company, which was not operating under a domestic franchise and which did not maintain an office, agent or place of business within Georgia, based on a cause of action brought for the purpose of recovering damages for personal injuries sustained by the plaintiff in one of the counties of Georgia by reason of the alleged negligence of such railway company, the attachment must be returned to and tried in the county in which the cause of action originated by a court having jurisdiction of said action. *Grand Trunk W.R.R. v. Barge*, 75 Ga. App. 646, 44 S.E.2d 281 (1947).

Venue of actions involving foreign motor common carriers. — A foreign motor common carrier, engaged in the business of trucking, hauling and transporting freight over the various public highways within the state, and having designated a resident agent upon whom service of process can be made, under the clear mandate of former Code 1933, § 68-619 (see O.C.G.A. § 46-7-17) was so far as the right to sue was concerned, a resident of this state, and a resident of the county in which the cause of action originated, so far as the right to bring an action against it for a cause of action originating in that county was concerned. *Southeastern Truck Lines v. Rann*, 214 Ga. 813, 108 S.E.2d 561 (1959).

A motor common carrier may be a non-resident corporation, yet since it is engaged in doing business in this state, and has agents in the state for that purpose, it is a resident of this state and a resident of the county in which the cause of action originated, so far as the right to bring an action against it for a cause of action originating in that county is concerned, and, being a resident of that county for the purpose of action, a joint tort-feasor, notwithstanding that the person may reside in another county of this state, may be sued jointly with the motor common carrier in the county in which the cause of action originated. *A.G. Boone Co. v. Owens*, 51 Ga. App. 739, 181 S.E. 519 (1935).

Circumstances under which action brought in county where cause of action originated. — If the company has no agent in the county in which the cause of action originated, the action may nevertheless be brought in that county, the court having power to perfect service upon the defendant by second original, and such ruling is not contrary to the provisions of the state Constitution that all civil cases, except those enumerated, shall be tried in the county where the defendant resides. *Atlanta-Asheville Motor Express v. Dooley*, 78 Ga. App. 265, 50 S.E.2d 822 (1948).

A foreign corporation operating in this state as a motor common carrier may be sued in the county where the cause of action originated, and service on one designated by the corporation for that purpose may be had by second original; it is not necessary, if such foreign corporation have an agent and a place of business in this state, that the action be brought in that county. *Tennessee Coach Co. v. Snelling*, 51 Ga. App. 432, 180 S.E. 741 (1935).

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2180, 2182-2184, 2192, 2194-2196, 2202, 2206. 65 Am. Jur. 2d, Railroads, §§ 281, 481. 77 Am. Jur. 2d, Venue, § 32.

C.J.S. — 19 C.J.S., Corporations, §§ 717-718. 74 C.J.S., Railroads, § 67. 92 C.J.S., Venue, §§ 79, 80.

ALR. — Appointment of receiver for railroad as affecting service of process on agent

or employee in action against company, 9 ALR 228.

Liability for personal injury to passenger in Pullman car, 41 ALR 1397.

Liability of electric power or light company to patron for interruption, failure, or inadequacy of power, 4 ALR3d 594.

Electric generating plant or transformer station as nuisance, 4 ALR3d 902.

Forum non conveniens: circumstances justifying state court's refusal to take jurisdiction of federal employers' liability act proceeding, 60 ALR3d 964.

46-1-3. Applicability of powers granted by title to other companies or entities regulated by commission.

Notwithstanding the placement of any provision of law within this title, the powers granted by provisions of one Code section shall be applicable to any other company or entity regulated by the commission, where applicable.

46-1-4. Applicability of title to carriers engaged in interstate commerce.

Unless otherwise provided by Georgia law and not preempted by federal law or unless provided or allowed by federal law, the provisions of this title relating to carriers engaged in the transportation of passengers or goods within this state shall not apply to carriers engaged in interstate commerce.

46-1-5. Duties of Department of Human Resources with regard to assistance to low or fixed income consumers of gas and electric service.

By March 2, 1982, the Department of Human Resources shall develop a program to identify those low or fixed income consumers of gas and electric utility service who, in the department's opinion, should benefit from public assistance in paying their bills for gas and electric service. The department shall also establish an efficient and economical method for distributing to such consumers all public assistance funds which will be made available, whether by appropriations of state or federal funds, grants, or otherwise. All gas and electric utilities shall cooperate fully with the department in developing and implementing its program. Nothing in this Code section shall limit the commission's authority to order regulatory alternatives which assist low or fixed income ratepayers. (Ga. L. 1981, p. 121, § 8.)

Cross references. — Public assistance generally, Ch. 4, T. 49.

CHAPTER 2

PUBLIC SERVICE COMMISSION

Article 1

Organization and Members

Sec.		Sec.	
46-2-1.	Election of Commissioners; terms of office.	46-2-22.	Jurisdiction of commission over express companies and telegraph companies.
46-2-2.	Qualifications of Commissioners; restriction on any interest in companies under jurisdiction of commission; disqualification of Commissioner.	46-2-23.	Rate-making power of commission generally; special provisions concerning telecommunications companies.
46-2-3.	Oath of office of Commissioners.	46-2-23.1.	"Alternative form of regulation" defined; filing; notice; approval; release of interstate pipeline capacity.
46-2-4.	Filling of vacancies on commission.	46-2-24.	Consideration by commission of quality of service in determining just and reasonable rates and charges.
46-2-5.	Chairman of commission; selection.	46-2-25.	Procedure for changing any rate, charge, classification, or service.
46-2-6.	Salary of Commissioners.	46-2-25.1.	County-wide local calling; modification of existing rate schedules; plans for implementing service; methods of funding; rate-making power of commission not affected.
46-2-7.	Employment of officers, experts, and other employees by commission; compensation of employees.	46-2-25.2.	Sixteen-mile toll-free telephone calling; modification of rate schedules; recovery of expenses or lost revenues by telephone companies; rate-making power of Public Service Commission not affected.
46-2-7.1.	Director of utilities.	46-2-25.3.	Toll-free calls within 22 miles of exchange; hearings; "net gain" defined.
46-2-7.2.	Public information officer.	46-2-26.	Restriction as to utilization of fuel-adjustment tariffs; procedure for rate change by utility based solely on change in fuel costs; extent of commission's power over rate changes; disclosure requirements for utilities seeking rate change.
46-2-8.	Payment of salaries and expenses by commission; appropriations for salaries and expenses; designation of Public Service Commission Fund.	46-2-26.1.	Accounting methods to be used by electric utilities in rate-making proceedings.
46-2-9.	Domicile of commission; jurisdiction of actions involving commission or business entities regulated by commission; furnishing commission with office and supplies.	46-2-26.2.	Tax accounting by utilities in rate-making proceedings.
46-2-10.	Payment of special fee by corporations and utilities subject to jurisdiction of commission; notice of amount due; procedure on default.	46-2-26.3.	Recovery of costs of conversion from oil-burning to coal-burning generating facility; filing of re-

Article 2

Jurisdiction, Powers, and Duties Generally

46-2-20.	Jurisdiction of commission generally; powers and duties of commission generally.	46-2-26.1.	Accounting methods to be used by electric utilities in rate-making proceedings.
46-2-21.	Extension of commission's powers and duties to street railroads, telegraph companies, telephone companies, and gas and electric light and power companies.	46-2-26.2.	Tax accounting by utilities in rate-making proceedings.
		46-2-26.3.	Recovery of costs of conversion from oil-burning to coal-burning generating facility; filing of re-

Sec.

- quest; public hearing; determination of rate; adjustments.
- 46-2-26.4. Accounting procedures in gas utility rate proceedings.
- 46-2-26.5. Gas supply plans and adjustment factors; filings and hearing procedures; recovery of purchase gas cost.
- 46-2-27. Notation on bill of charges for fuel adjustment, meter reading and consumption, and where rates charged may be obtained.
- 46-2-28. Procedure for issuance of stocks, bonds, notes, or other debt by companies under commission's jurisdiction.
- 46-2-29. Requirement of confidentiality of information obtained by commission member or employee in a proceeding under Code Section 46-2-28.
- 46-2-30. Power of commission to make rules and regulations generally.
- 46-2-31. Annual report by commission to Governor.
- 46-2-32. Payment of fines into state treasury; cumulative nature of remedies provided by this title.

Article 2A

Utility Finance Section

- 46-2-40. Creation of Utility Finance Section; composition of section.
- 46-2-41. Appointment of director of Utility Finance Section; compensation; supervisory role of director of utilities; qualifications and responsibilities of director of section generally.
- 46-2-42. Employment of assistant director of Utility Finance Section; employment of accountants, statisticians, experts, and clerical personnel; classification of employees.
- 46-2-43. Director, assistant director, or any other employee of Utility Finance Section prohibited from having any interest in or being employed by electric utilities.
- 46-2-44. Duties of Utility Finance Section generally.
- 46-2-45. Relationship of Utility Finance Section to commission.

Article 3

Investigations and Hearings

Sec.

- 46-2-50. Conducting of hearings and investigations generally.
- 46-2-51. Prescription by commission of rules of procedure and rules of evidence; promulgation of rules and regulations as to rehearing, reconsideration, and oral argument of orders.
- 46-2-52. Keeping of records of proceedings on formal investigations; transcribing of testimony.
- 46-2-53. Reports, rate schedules, orders, rules, or regulations of commission as admissible evidence in court proceedings.
- 46-2-54. Power to issue subpoenas; payments to witnesses; failure or refusal to obey subpoenas.
- 46-2-55. Compelling witnesses to testify before commission as to the giving or granting of rebates or as to discriminations in rates and charges by common carriers.
- 46-2-56. Compelling witnesses to testify against common carriers or any other person in court.
- 46-2-57. Obtaining of discovery by employees and agents of commission; petitions by commission for necessary orders, injunctions, and subpoenas; extension of suspension period by Superior Court of Fulton County; time of hearing of applications and petitions from commission.
- 46-2-58. Conducting of hearings by hearing officers.
- 46-2-59. Permissible parties in proceedings before commission; intervention in proceedings generally; limited appearances; procedure for granting leave to intervene.

Article 4

Allocation of Gas and Electricity to Protect Public Health and Safety

- 46-2-70. Definitions.
- 46-2-71. Power of commission to allocate utility service and to alter,

Sec.		Sec.	
	amend, suspend, or terminate existing rates, schedules, contracts, rules, or regulations; findings required before commission exercises powers of allocation.	46-2-91.	Penalties recoverable before commission.
46-2-72.	Immunity from liability of persons acting in accordance with ruling or order of commission entered pursuant to Code Section 46-2-71.	46-2-92.	Penalties recoverable by state through civil action.
		46-2-93.	Criminal penalty; venue for actions; calling of agents and employees of company as witnesses; use of testimony against agents and employees.
		46-2-94.	Operation as household goods carrier for hire without having valid certificate prohibited [Repealed].
		46-2-95.	Civil actions; standard for obtaining an injunction.

Article 5

Miscellaneous Offenses and Penalties

46-2-90. Liability of companies subject to jurisdiction of commission generally; venue for actions generally; award of attorney's fee.

Cross references. — Generally, see Ga. Const. 1983, Art. IV, Sec. I, Para. I; Art. IV, Sec. VII, Para. I, II.

ARTICLE 1

ORGANIZATION AND MEMBERS

Administrative rules and regulations. — Organization of administration of Commission, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Public Service Commission, Chapter 515-1-1.

46-2-1. Election of Commissioners; terms of office.

(a) The Georgia Public Service Commission shall consist of five members to be elected as provided in this Code section. The members in office on January 1, 2000, and any member appointed or elected to fill a vacancy in such membership prior to the expiration of a term of office shall continue to serve out their respective terms of office. As terms of office expire, new members elected to the commission shall be required to be residents of one of five Public Service Commission Districts as hereafter provided, but each member of the commission shall be elected state wide by the qualified voters of this state who are entitled to vote for members of the General Assembly. Except as otherwise provided in this Code section, the election shall be held under the same rules and regulations as apply to the election of Governor. The Commissioners, who shall give their entire time to the duties of their offices, shall be elected at the general election next preceding the expiration of the terms of office of the respective incumbents. Their terms of office shall be six years and shall expire on December 31.

(b) In order to be elected as a member of the commission from a Public Service Commission District, a person must have resided in that district for at least 12 months prior to election thereto. A person elected as a member of the commission from a Public Service Commission District by the voters of Georgia must continue to reside in that district during the person's term of office or that office shall thereupon become vacant.

(c) For the purpose of electing the members of the Public Service Commission, the state shall be divided into five Public Service Commission Districts described as follows:

District 001

Appling County
Atkinson County
Bacon County
Baker County
Ben Hill County
Berrien County
Bleckley County
Brantley County
Brooks County
Bryan County
Bulloch County
Calhoun County
Camden County
Candler County
Charlton County
Chatham County
Chattahoochee County
Clay County
Clinch County
Coffee County
Colquitt County
Cook County
Crisp County
Decatur County
Dodge County
Dooly County
Dougherty County
Early County
Echols County
Effingham County
Evans County
Glynn County
Grady County
Irwin County
Jeff Davis County

Lanier County
Laurens County
Lee County
Liberty County
Long County
Lowndes County
Macon County
Marion County
McIntosh County
Miller County
Mitchell County
Montgomery County
Pierce County
Pulaski County
Quitman County
Randolph County
Schley County
Seminole County
Stewart County
Sumter County
Tattnall County
Telfair County
Terrell County
Thomas County
Tift County
Toombs County
Treutlen County
Turner County
Ware County
Wayne County
Webster County
Wheeler County
Wilcox County
Worth County

District 002
Baldwin County
Barrow County
Bibb County
Burke County
Butts County
Clarke County
Columbia County
Crawford County
Elbert County
Emanuel County

GlascocK County
Greene County
Gwinnett County

Tract: 504.15
Tract: 504.16
Tract: 504.29
Tract: 504.30
Tract: 505.09

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BG: 3
BG: 4

Tract: 505.14
BG: 1

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1013 1014 1015 1017 1018 1019 1020 1021 1039 1040

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2014 2015 2042 2043 2057 2058 2999

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2026 2027 2028 2029 2030

BG: 5

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3013 3014 3015 3016 3017 3018 3019 3020 3022 3023 3024

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Tract: 506.04

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2070 2071 2072

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Hancock County

Houston County

Jackson County

Jasper County

Jefferson County

Jenkins County

Johnson County

Jones County

Lincoln County

Madison County

McDuffie County

Monroe County

Morgan County

Newton County

Oconee County

Oglethorpe County

Peach County

Putnam County

Richmond County

Rockdale County

Screven County

Taliaferro County

Taylor County

Twiggs County

Walton County

Warren County

Washington County

Wilkes County

Wilkinson County

District 003

Clayton County

DeKalb County

Fulton County

District 004

Banks County

Bartow County

Catoosa County

Chattooga County

Cherokee County

Dade County

Dawson County

Fannin County

Floyd County

Forsyth County

Franklin County

Gilmer County

Gordon County

Gwinnett County

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BG: 5

Tract: 506.03

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2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027

2028 2029 2030 2031 2032 2033 2034 2035 2036 2037

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2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2054

2055 2056 2057 2058 2059

Tract: 507.12

Habersham County

Hall County

Hart County

Lumpkin County

Murray County

Pickens County

Rabun County

Stephens County

Towns County

Union County

Walker County

White County

Whitfield County

District 005

Carroll County

Cobb County

Coweta County

Douglas County

Fayette County

Haralson County

Harris County

Heard County

Henry County

Lamar County

Meriwether County

Muscogee County

Paulding County

Pike County
Polk County
Spalding County
Talbot County
Troup County
Upson County

(d) The first members of the commission elected under this Code section shall be elected thereto on the Tuesday next following the first Monday in November, 2000, from Public Service Commission Districts 3 and 5, shall take office on the first day of January immediately following that election, and shall serve for terms of office of six years and until the election and qualification of their respective successors. Those members of the commission elected thereto on the Tuesday next following the first Monday in November, 2002, from Public Service Commission Districts 1 and 4 shall take office on the first day of January immediately following that election and shall serve for terms of office of six years and until the election and qualification of their respective successors. The member of the commission elected thereto on the Tuesday next following the first Monday in November, 2004, from Public Service Commission District 2 shall take office on the first day of January immediately following that election and shall serve for a term of office of six years and until the election and qualification of his or her respective successor. All future successors to members of the commission whose terms of office are to expire shall be elected at the state-wide general election immediately preceding the expiration of such terms, shall take office on the first day of January immediately following that election, and shall serve for terms of office of six years.

(e) For purposes of this Code section:

(1) The terms “Tract” and “BG” (Block Group) shall mean and describe the same geographical boundaries as provided in the report of the Bureau of the Census for the United States decennial census of 2000 for the State of Georgia. The separate numeric designations in a Tract description which are underneath a “BG” heading shall mean and describe individual Blocks within a Block Group as provided in the report of the Bureau of the Census for the United States decennial census of 2000 for the State of Georgia.

(2) Except as otherwise provided in the description of any Public Service Commission District, whenever the description of any Public Service Commission District refers to a named city, it shall mean the geographical boundaries of that city as shown on the census maps for the United States decennial census of 2000 for the State of Georgia.

(3) Any part of the State of Georgia which is not included in any Public Service Commission District described in subsection (c) of this Code section shall be included within that district contiguous to such part

which contains the least population according to the United States decennial census of 2000 for the State of Georgia.

(4) Any part of the State of Georgia which is described in subsection (c) of this Code section as being included in a particular Public Service Commission District shall nevertheless not be included within such Public Service Commission District if such part is not contiguous to such Public Service Commission District. Such noncontiguous part shall instead be included within that Public Service Commission District contiguous to such part which contains the least population according to the United States decennial census of 2000 for the State of Georgia. (Ga. L. 1878-79, p. 125, § 1; Code 1882, § 719a; Civil Code 1895, § 2185; Ga. L. 1906, p. 100, §§ 1-3; Ga. L. 1907, p. 72, § 1; Civil Code 1910, §§ 2615, 2616; Ga. L. 1922, p. 143, § 1; Code 1933, § 93-201; Ga. L. 1998, p. 1530, §§ 1, 2; Ga. L. 2002, p. 359, §§ 1, 2.)

The 2002 amendment, effective April 11, 2002, rewrote the descriptions of Public Service Commission Districts 1 through 5 fol-

lowing the colon at the end of the introductory language in subsection (c) and added subsection (e).

JUDICIAL DECISIONS

Beginning of term of commissioner fixed by statute. *Bennett v. Public Serv. Comm'n*, 160 Ga. 189, 127 S.E. 612 (1925).

New office not created. — Georgia Laws 1906, p. 100 creates no new office, but simply provides a new way of filling an office already existing. With respect to their functions, duties, powers, etc., including the liability to removal from office and the method of effecting the same, the officers elected would be subject to the provisions of law existing at the time the method of selection to office was changed. *Gray v. McLendon*, 134 Ga. 224, 67 S.E. 859 (1910).

Office of Public Service Commissioner is statutory office, and the power of the legislature is absolute with respect to all offices that it creates, where no constitutional restriction is placed upon its power. *Felton v. Huie*, 178 Ga. 311, 173 S.E. 660 (1933).

Residency requirement upheld. — Requiring appellee candidate to reside in the district for 12 months prior to the general election did not deny the candidate equal

protection under the United States Constitution or the Georgia Constitution as the residency requirement for election to the Georgia Public Service Commission was rationally related to the state's legitimate interests in fostering informed voters and promoting knowledgeable and responsive candidates with ties to the community, and did not place an unreasonable burden on the right of voters to choose a candidate or the right of the candidate to run for public office. *Cox v. Barber*, 275 Ga. 415, 568 S.E.2d 478 (2002), cert. denied, 537 U.S. 1109, 123 S. Ct. 851, 154 L. Ed. 2d 780 (2003).

Nature of actions against Commission. — Mere fact that Public Service Commission is constitutional body does not make action against it one against the state. *Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618 (1949).

Cited in *Southern Ice & Coal Co. v. Atlantic Ice & Coal Corp.*, 143 Ga. 810, 85 S.E. 1021 (1915); *Gas Light Co. v. Georgia Power Co.*, 313 F. Supp. 860 (M.D. Ga. 1970).

OPINIONS OF THE ATTORNEY GENERAL

Commissioners elected in same manner as Governor. — Under the terms of former Code 1933, § 93-201 (see O.C.G.A. § 46-2-1)

and Ga. Const. 1976, Art. IV, Sec. I, Para. I (Ga. Const. 1983, Art. IV, Sec. I, Para. I; Art. IV, Sec. VII, Para. I, II), members of the

Public Service Commission should be elected in the same manner as the Governor, as provided in former Ga. Const. 1976, Art. V, Sec. I, Para. III. 1948-49 Op. Att'y Gen. p. 161.

Georgia Public Service commissioner may not serve simultaneously as member of governing authority of a county. 1978 Op. Att'y Gen. No. 78-32.

46-2-2. Qualifications of Commissioners; restriction on any interest in companies under jurisdiction of commission; disqualification of Commissioner.

(a) Any person who is at least 30 years of age, is qualified to vote as an elector, and is not directly or indirectly interested in any mercantile business or any corporation that is controlled by or that participates in the benefit of any pool, combination, trust, contract, or arrangement that has the effect of increasing or tending to increase the cost to the public of carriage, heat, light, power, or any commodity or merchandise sold to the public shall be eligible for membership on the commission, without regard to his experience in law or in the utility or transportation business.

(b) During their terms of office, the Commissioners shall not, jointly or severally, or in any way, be the holders of any stock or bonds, or be agents or employees of any company, or have any interest in any company under the jurisdiction of the commission. If any Commissioner becomes disqualified in any way, he shall at once remove the disqualification or resign; and on failure to do so he shall be suspended from office by the Governor. (Ga. L. 1878-79, p. 125, § 1; Code 1882, § 719a; Civil Code 1895, § 2185; Ga. L. 1907, p. 72, § 2; Civil Code 1910, § 2620; Code 1933, § 93-202.)

Cross references. — Conflicts of interest of state officials and employees generally, § 45-10-20 et seq.

JUDICIAL DECISIONS

Suspension by Governor. — Under former Code 1933, § 93-202 (see O.C.G.A. § 46-2-2) Governor may suspend commissioner for any satisfactory cause. *Felton v. Huiet*, 178 Ga. 311, 173 S.E. 660 (1933).

Suspension from office is not deprivation of property. — Public office is public trust or

agency and is not property of incumbent thereof, and, when incumbent is suspended from such office, incumbent is not deprived of any property. *Felton v. Huiet*, 178 Ga. 311, 173 S.E. 660 (1933).

Cited in *Gas Light Co. v. Georgia Power Co.*, 313 F. Supp. 860 (M.D. Ga. 1970).

OPINIONS OF THE ATTORNEY GENERAL

Limitation on applicability of section. — Application of former Code 1933, § 93-202 (see O.C.G.A. § 46-2-2) was limited to five

commissioners comprising Public Service Commission. 1963-65 Op. Att'y Gen. p. 536.

RESEARCH REFERENCES

C.J.S. — 73B C.J.S., Public Utilities, §§ 25, 64.

46-2-3. Oath of office of Commissioners.

The Commissioners shall take an oath of office, the wording of which shall be determined by the Governor. (Ga. L. 1878-79, p. 125, § 1; Code 1882, § 719a; Civil Code 1895, § 2185; Civil Code 1910, § 2619; Code 1933, § 93-203.)

JUDICIAL DECISIONS

Cited in *Gas Light Co. v. Georgia Power Co.*, 313 F. Supp. 860 (M.D. Ga. 1970).

RESEARCH REFERENCES

ALR. — Public utilities: validity of preferential rates for elderly or low-income persons, 29 ALR4th 615.

46-2-4. Filling of vacancies on commission.

Any vacancy in the commission shall be filled by the Governor. Any person so appointed shall hold his office until the next regular general election and until his successor for the balance of the unexpired term has been elected and has qualified. (Ga. L. 1906, p. 100, § 4; Civil Code 1910, § 2617; Code 1933, § 93-204.)

JUDICIAL DECISIONS

Cited in *Gas Light Co. v. Georgia Power Co.*, 313 F. Supp. 860 (M.D. Ga. 1970).

46-2-5. Chairman of commission; selection.

(a) There shall be a chairman of the commission. The chairman shall be selected on an annual basis. The initial chairman selected under this Code section shall take office within 15 days after April 20, 1992, and shall serve for a term of office as chairman expiring January 1, 1993. Thereafter a new chairman shall take office within 15 days after the first day of January in 1993 and each subsequent year; and each such chairman shall serve for a one-year term of office as chairman.

(b) The chairman shall be selected by the members of the commission according to the following rules; and for purposes of these rules, seniority on the commission shall be determined according to the longest period of continuous unbroken service:

(1) A member of the commission with less than one year of continuous unbroken service on the commission shall not be eligible to take office as chairman;

(2) A member of the commission who has previously served as chairman shall not be eligible to serve again as chairman until each other eligible member (i.e., each other member with more than one year of continuous service on the commission) has served as chairman or has deferred service as chairman;

(3) Subject to paragraphs (1) and (2) of this subsection, the most senior member of the commission who is eligible to serve as chairman shall be selected to the office of chairman; provided, however, that such member may elect to defer service as chairman for a period of one year, at the conclusion of which year such member shall resume his place at the head of the order of rotation for the chairmanship; and

(4) If in any year the foregoing rules fail to provide for a chairman because two or more members have equal seniority, then the member to serve as chairman shall be selected by lot.

(c) Anything in subsection (b) of this Code section to the contrary notwithstanding, the members of the commission may by unanimous vote of the members select any member as chairman for any given year for a term of office as chairman as specified in subsection (a) of this Code section.

(d) The chairman shall give his entire time to the duties of his office. (Ga. L. 1907, p. 72, § 3; Civil Code 1910, § 2622; Ga. L. 1919, p. 92, § 2; Ga. L. 1922, p. 143, § 7; Code 1933, § 93-206; Ga. L. 1947, p. 673, § 1; Ga. L. 1953, Jan.-Feb. Sess., p. 613, §§ 1-5; Ga. L. 1960, p. 57, §§ 1, 2; Ga. L. 1963, p. 651, § 1; Ga. L. 1967, p. 95, § 1; Ga. L. 1992, p. 2335, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1992, “April 20, 1992,” was substituted for “this Code section becomes effective” in the third sentence of subsection (a).

JUDICIAL DECISIONS

Cited in Gas Light Co. v. Georgia Power Co., 313 F. Supp. 860 (M.D. Ga. 1970).

OPINIONS OF THE ATTORNEY GENERAL

Deferring of service as chairman. — A member of the Public Service Commission who defers serving as chairman will resume the member's place, in the following year, at the head of the order rather than behind the other otherwise eligible commissioners. 1999 Op. Att'y Gen. No. 99-1.

RESEARCH REFERENCES

C.J.S. — 73B C.J.S., Public Utilities, § 63.

46-2-6. Salary of Commissioners.

The salary of each Commissioner shall be as provided in Code Section 45-7-4, provided that nothing in this Code section or in Code Section 46-2-5 shall entitle an emeritus commissioner to a salary greater than \$12,000.00 per annum. (Ga. L. 1878-79, p. 125, § 1; Code 1882, § 719a; Civil Code 1895, § 2185; Ga. L. 1907, p. 72, § 15; Civil Code 1910, §§ 2621, 2670; Ga. L. 1919, p. 92, §§ 1, 2; Ga. L. 1919, p. 94, § 1; Ga. L. 1922, p. 143, § 7; Ga. L. 1931, p. 7, § 99; Code 1933, § 93-208; Ga. L. 1947, p. 673, § 1; Ga. L. 1951, p. 668, § 1; Ga. L. 1953, Jan.-Feb. Sess., p. 613, §§ 1-5; Ga. L. 1960, p. 57, §§ 1, 2; Ga. L. 1963, p. 651, § 1; Ga. L. 1967, p. 95, § 2.)

JUDICIAL DECISIONS

Cited in Atlanta Term. Co. v. Georgia Pub. (1927); Gas Light Co. v. Georgia Power Co., Serv. Comm’n, 163 Ga. 897, 137 S.E. 556 313 F. Supp. 860 (M.D. Ga. 1970).

RESEARCH REFERENCES

C.J.S. — 73B C.J.S., Public Utilities, § 63.

46-2-7. Employment of officers, experts, and other employees by commission; compensation of employees.

The commission shall have power to employ such officers, experts, engineers, statisticians, accountants, inspectors, clerks, and other employees as it may deem necessary to perform the duties and exercise the powers conferred by law upon the commission. The compensation of such employees shall be fixed by the commission at such sums as it may deem reasonable and proper. (Ga. L. 1907, p. 72, § 4; Civil Code 1910, § 2623; Ga. L. 1922, p. 143, § 2; Code 1933, § 93-207.)

Cross references. — Applicability of conflicts of interest laws to full-time state employees hired by commission to assist commission in fulfilling duties and responsibilities, § 45-10-20.

JUDICIAL DECISIONS

Cited in Gas Light Co. v. Georgia Power Co., 313 F. Supp. 860 (M.D. Ga. 1970).

OPINIONS OF THE ATTORNEY GENERAL

Power to hire and terminate employees. (see O.C.G.A § 46-2-7), and subject to the — Pursuant to former Code 1933, § 93-207 provisions of the law creating the State Merit

System of Personnel Administration (see O.C.G.A. Ch. 20, T. 45) only the Public Service Commission, acting as a constitutional entity, or persons to whom it delegates its authority, has the authority to hire personnel, and to terminate the employment of the personnel which it hires. 1979 Op. Att'y Gen. No. 79-61.

Types of employees protected by merit system. — Provisions dealing with personnel administration (see O.C.G.A. Ch. 20, T. 45) modifies former Code 1933, § 93-207 (see O.C.G.A. § 46-2-7) to the extent that the commission's officers, experts, engineers, statisticians, accountants, inspectors, clerks

and other employees who fall within the ambit of the merit system do not serve at the pleasure of the commission, but rather must be hired by the commission and terminated by the commission in accordance with the laws affecting and the rules and regulations promulgated by the State Personnel Board. 1979 Op. Att'y Gen. No. 79-61.

Termination of confidential, individually assigned secretary. — Public Service Commission has authority to terminate employment of confidential secretary assigned to individual commissioner. 1979 Op. Att'y Gen. No. 79-61.

RESEARCH REFERENCES

C.J.S. — 73B C.J.S., Public Utilities, § 63.

46-2-7.1. Director of utilities.

(a) On or before July 1, 1981, the commission shall employ a director of utilities, who shall serve at the pleasure of the commission and whose salary shall be set by the commission.

(b) The director of utilities shall:

(1) Direct the activities of the utility divisions and sections;

(2) Manage and coordinate the commission's preparation of rate cases;

(3) Schedule and coordinate all in-house, reactive, regular, and engineering audits;

(4) Direct all utility personnel and the preparation of that section of the commission's budget; and

(5) Perform such other duties as the commission may establish by order. (Code 1933, § 93-207.1, enacted by Ga. L. 1981, p. 121, § 3.)

OPINIONS OF THE ATTORNEY GENERAL

Position is unclassified. — The Georgia Public Service Commission positions of the director of utilities, the public information officer and the director and assistant direc-

tor of the Utility Finance Section are, as a matter of law, unclassified positions. 1981 Op. Att'y Gen. No. 81-39.

46-2-7.2. Public information officer.

(a) On or before September 1, 1981, the commission shall employ a public information officer, who shall serve at the pleasure of the commission.

(b) The public information officer shall:

- (1) Report directly to the executive secretary;
 - (2) Maintain the commission's public information files;
 - (3) Coordinate official commission press releases and media relations; and
 - (4) Perform such other duties as the executive secretary may establish.
- (Code 1933, § 93-207.2, enacted by Ga. L. 1981, p. 121, § 3.)

OPINIONS OF THE ATTORNEY GENERAL

Position created is unclassified. — The Georgia Public Service Commission positions of the director of utilities, the public information officer and the director and assistant director of the Utility Finance Section are, as a matter of law, unclassified positions. 1981 Op. Att'y Gen. No. 81-39.

46-2-8. Payment of salaries and expenses by commission; appropriations for salaries and expenses; designation of Public Service Commission Fund.

The salaries fixed by the commission for its officers, experts, engineers, statisticians, accountants, inspectors, clerks, and other employees, and fixed by Code Section 45-7-4 for Commissioners, shall be paid monthly from the funds provided for the use of the commission after being approved by the commission. All expenses incurred by the commission, including the actual and necessary traveling and other expenses and disbursements of the Commissioners, and of officers and employees, incurred while on business of the commission, shall be paid from the funds provided for the use of the commission after being approved by the commission. The necessary expenses of conducting the business of the commission and the salaries of the Commissioners shall be provided for by appropriations made for such purposes. The funds assessed and collected as provided in Code Section 46-2-10 shall be specially designated as the Public Service Commission Fund and shall be expended only as provided and directed in this title. (Ga. L. 1922, p. 143, § 7; Ga. L. 1931, p. 7, § 99; Code 1933, § 93-209; Ga. L. 1953, Jan.-Feb. Sess., p. 613, §§ 1-5; Ga. L. 1960, p. 57, § 2.)

RESEARCH REFERENCES

C.J.S. — 73B C.J.S., Public Utilities, § 63.

46-2-9. Domicile of commission; jurisdiction of actions involving commission or business entities regulated by commission; furnishing commission with office and supplies.

(a) The domicile of the commission is fixed at the capital; and no courts of this state other than those of Fulton County shall have or take jurisdiction in any action brought or instituted against the commission or on account of any of its orders or rules, provided that nothing in this Code section shall prevent the courts of the county in which is located the principal office of a business entity regulated by the commission from having or taking jurisdiction in any action brought or instituted against that business entity as a result of any such commission order or rule.

(b) The commission shall be furnished with necessary furniture and stationery and an office in Atlanta. (Ga. L. 1878-79, p. 125, § 2; Civil Code 1895, § 2186; Ga. L. 1905, p. 95, §§ 1, 2; Ga. L. 1907, p. 72, § 14; Civil Code 1910, §§ 2625, 2627; Code 1933, § 93-211; Ga. L. 1976, p. 418, § 1.)

JUDICIAL DECISIONS

Court review of commission orders and rules. — Former Code 1933, § 93-211 (see O.C.G.A § 46-2-9) within itself did not give consent of the state to be sued. However, that section did indicate a construction of the powers and duties conferred by the General Assembly on the commission, and that the commission is subject to having its orders and rules reviewed by the courts. *Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618 (1949).

Former Code 1933, § 93-211 (see O.C.G.A § 46-2-9) recognizes right to judicial review of administrative orders, and must be construed as conferring that sort of right which furnishes the adequate and avail-

able remedy which meets the requirements of the Constitution. *Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618 (1949).

Jurisdiction of class action against commission vested in courts of Fulton County. — Former Code 1933, § 93-211 (see O.C.G.A § 46-2-9) required that, in a class action brought against a utility to enjoin it from collecting new rates on electricity and to recover moneys already collected under a rate increase ordered by the Public Service Commission, no courts of the state other than those of Fulton County shall have jurisdiction. *Riley v. Savannah Elec. & Power Co.*, 236 Ga. 802, 225 S.E.2d 301 (1976).

46-2-10. Payment of special fee by corporations and utilities subject to jurisdiction of commission; notice of amount due; procedure on default.

(a) There shall be paid by all public service corporations and utilities which are subject to the jurisdiction of the Public Service Commission a special fee in addition to all other fees required by law. Such fee shall be fixed by the state revenue commissioner upon each of such public service corporations or utilities according to the gross revenues of each such public service corporation or utility resulting from intrastate service regulated by the commission, as ascertained by the state revenue commissioner from reports filed with the state revenue commissioner by such public service corporations and utilities and from gross revenues reported for income tax

purposes pursuant to Chapter 7 of Title 48, and shall be apportioned among such public service corporations or utilities upon the basis of such gross revenues so as to produce a revenue of \$1,050,000.00 per annum. Notwithstanding any other provisions of this Code section, the gross revenues of a telephone utility shall not include revenues of such a utility received from the collection of interstate tolls, interstate access or subscriber line charges, interstate call charges, amounts paid by a telecommunications service provider to any other telecommunications service provider for carrier access charges, or any charges for any unregulated services. Any revenues collected by a local exchange company as a billing and collection agent shall be excluded from the calculation of the gross revenues of the local exchange company.

(b)(1) Not later than December 1, 1994, the state revenue commissioner shall notify each public service corporation or utility of the state of the amount due by it under this Code section, and the fee shall be paid into the general fund of the state by January 20, 1995. Such sum of \$1,050,000.00 shall be available for appropriation in an amount sufficient to cover the cost of operating the Public Service Commission.

(2) Effective January 1, 1995, not later than April 1 of each year, the state revenue commissioner shall notify each public service corporation or utility of the state of the amount due by it under this Code section, and the fee shall be paid into the general fund of the state by July 1 of such year. Such sum of \$1,050,000.00 shall be available for appropriation in an amount sufficient to cover the cost of operating the Public Service Commission.

(c) In case of default in payment by any public service corporation or utility of the fee provided for in this Code section, the state revenue commissioner shall proceed to collect the same in the same manner as franchise taxes are collected. (Ga. L. 1922, p. 143, § 6; Ga. L. 1931, p. 7, § 99; Code 1933, § 93-210; Ga. L. 1960, p. 168, § 1; Ga. L. 1973, p. 664, § 1; Ga. L. 1982, p. 1063, §§ 1, 2; Ga. L. 1988, p. 263, § 1; Ga. L. 1990, p. 856, § 1; Ga. L. 1994, p. 630, § 1.)

RESEARCH REFERENCES

C.J.S. — 73B C.J.S., Public Utilities, § 65.
ALR. — Right of public service corporation to judicial relief from contract rates which have become inadequate, 6 ALR 1659; 10 ALR 1335.

Constitutionality and construction of statute imposing upon public service corporation expense of investigation of its affairs, 101 ALR 197.

ARTICLE 2

JURISDICTION, POWERS, AND DUTIES GENERALLY

Administrative rules and regulations. — Georgia, Rules of Georgia Public Service Organization of Commission, Official Compilation of Rules and Regulations of State of Commission, Chapter 515-1-1.

46-2-20. Jurisdiction of commission generally; powers and duties of commission generally.

(a) Except as otherwise provided by law, the commission shall have the general supervision of all common carriers, express companies, railroad or street railroad companies, dock or wharfage companies, terminal or terminal station companies, telephone and telegraph companies, gas or electric light and power companies, and persons or private companies who operate rapid rail passenger service lines within this state; provided, however, that nothing in this subsection shall be deemed to extend the jurisdiction of the commission to include the operations of the Metropolitan Atlanta Rapid Transit Authority created in an Act approved March 10, 1965 (Ga. L. 1965, p. 2243), as amended.

(b) The commission may hear complaints; in addition, it is also authorized to perform the duties imposed upon it of its own initiative.

(c) The commission may, either by general rules or by special orders in particular cases, require all companies under its supervision to establish and maintain such public services and facilities as may be reasonable and just.

(d) The commission may require common carriers and persons or private companies who operate rapid rail passenger service lines to publish their schedules in newspapers of towns through which their lines extend, in such manner as may be reasonable and as the public convenience demands.

(e) The commission shall have authority to examine the affairs of all companies under its supervision and to keep informed as to their general condition, their capitalization, their franchises, and the manner in which the lines owned, leased, or controlled by them are managed, conducted, and operated, not only with respect to the adequacy, security, and accommodation afforded by their service to the public and their employees but also with reference to their compliance with all laws, orders of the commission, and charter requirements.

(f) The commission shall have the power and authority, whenever it deems advisable, to prescribe, establish, and order a uniform system of accounts to be used by railroads and other companies over which it has jurisdiction, the same to be, as far as practicable, in conformity with the system of accounts prescribed by the Interstate Commerce Commission. The commission shall also have the power and authority to examine all

books, contracts, records, papers, and documents of any person subject to its supervision and to compel the production thereof.

(g) The commission shall have the power, through any of its members, at its discretion, to make personal visits to the offices and places of business of the companies under its supervision for the purpose of examination. Any Commissioner making a personal visit pursuant to this subsection shall have full power and authority to examine the agents and employees of any such company, under oath or otherwise, in order to procure information deemed by the Commissioner necessary to the work of the commission or of value to the public.

(h) Nothing in this Code section shall be so construed as to repeal or abrogate any existing law or rule of the commission as to notice or hearings to be accorded to any person interested in the rates fixed by, or in the orders, rules, or regulations promulgated by, the commission before the same are issued. Neither shall anything in this Code section repeal the law of this state as to notice by publication of a change in rates.

(i) The commission shall have the power and authority to prescribe rules and regulations for the safe installation and safe operation of all natural gas transmission and distribution facilities within this state, including, without limitation, all natural gas transmission and distribution facilities which are owned and operated by municipalities within this state.

(j) Notwithstanding any other provision of law, the authority and jurisdiction of the commission shall not extend to persons or companies who are engaged in the retail sale of natural gas to the public for use as a fuel in motor vehicles and who are not otherwise subject to the authority and jurisdiction of the commission. (Ga. L. 1907, p. 72, § 6; Civil Code 1910, § 2663; Ga. L. 1922, p. 143, §§ 3, 5; Code 1933, § 93-307; Ga. L. 1967, p. 650, § 1; Ga. L. 1989, p. 692, § 1; Ga. L. 1990, p. 856, § 2; Ga. L. 1992, p. 1647, § 1.)

Cross references. — Authority of commission to promulgate safety rules and regulations for motor vehicles within its jurisdiction, § 40-8-2. Authority of commission to contract with state agencies to use state employees, § 45-10-20. Jurisdiction of commission with regard to projects of Municipal

Electric Authority of Georgia, § 46-3-152. Rapid Rail Passenger Service, Chapter 8A, Title 46.

Code Commission notes. — Pursuant to Code section 28-9-5, in 1989, a comma was inserted following “promulgated by” in subsection (h).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
POWERS OF COMMISSION
RATE-MAKING

General Consideration

Constitutionality. — Former Civil Code 1910, § 2663 (see O.C.G.A § 46-2-20) was not void as in opposition to U.S. Const., Art. I, Sec. 9, Cl. 3 or Ga. Const. 1976, Art. I, Sec. I, Para. VII (Ga. Const. 1983, Art. I, Sec. I, Para. X), prohibiting passage of any ex post facto law, or U.S. Const., Art. I, Sec. 10, Cl. 1 or Ga. Const. 1976, Art. I, Sec. I, Para. VII (Ga. Const. 1983, Art. I, Sec. I, Para. X), prohibiting passage of laws impairing the obligation of contracts, or U.S. Const., Amend. 5 or Ga. Const. 1976, Art. I, Sec. III, Para. I (Ga. Const. 1983, Art. I, Sec. III, Para. I, II; Art. III, Sec. VI, Para. II), prohibiting the taking of property without due process of law, or Ga. Const. 1976, Art. VII, Sec. I, Para. I (Ga. Const. 1983, Art. VII, Sec. I, Para. I), declaring taxation a sovereign right. *Union Dry Goods Co. v. Georgia Pub. Serv. Corp.*, 142 Ga. 841, 83 S.E. 946, 1916E L.R.A. 358 (1914), *aff'd*, 248 U.S. 372, 39 S. Ct. 117, 63 L. Ed. 309, 9 ALR 1420 (1919).

Business conducted by electric light and power companies public in nature. — Public nature of business conducted by electric light and power companies was indicated by former Civil Code 1910, § 2663 (see O.C.G.A § 46-2-20) placing them under the general supervision of the commission. *Central Ga. Power Co. v. Ham*, 139 Ga. 569, 77 S.E. 396 (1913).

Construction of word “establish.” — A reasonable construction of the word “establish” used in former Code 1933, § 93-307 (see O.C.G.A § 46-2-20) was that it is defined to include the extension of existing service, and to bring into being new service and facilities in connection therewith. *Georgia Pub. Serv. Comm’n v. Georgia Power Co.*, 182 Ga. 706, 186 S.E. 839 (1936).

Injunction available against commission. — Injunction is an available remedy to restrain the Georgia Public Service Commission from acts or threatened acts which are beyond the scope of its jurisdiction and authority. *Georgia Power Co. v. Georgia Pub. Serv. Comm’n*, 211 Ga. 223, 85 S.E.2d 14 (1954).

Utility has no authority to select customers or discriminate. — A corporation organized to generate and supply hydroelectric power to the public, and having a monopoly of such power in former Code 1933, § 93-307 (see O.C.G.A § 46-2-20) where it operated,

had no authority to select customers or discriminate against the members of a class it had elected to serve. *Georgia Pub. Serv. Comm’n v. Georgia Power Co.*, 182 Ga. 706, 186 S.E. 839 (1936).

Right of utilities to contract. — Public utilities have the right to enter into contracts between themselves, or with others, free from control or supervision of the state, so long as such contracts are not unconscionable or oppressive and do not impair the obligation of the utility to discharge its public duties. *Georgia Power Co. v. Georgia Pub. Serv. Comm’n*, 211 Ga. 223, 85 S.E.2d 14 (1954).

Contract provisions prepared by utility to be construed in customer’s favor. — Where provisions of contract are prepared by a utility company the provisions must be strictly construed in favor of the customer. *State Farm Fire & Cas. Co. v. Southern Bell Tel. & Tel. Co.*, 245 Ga. 5, 262 S.E.2d 895 (1980).

Gas utility converting gas into total energy service subject to rate regulation. — Public utility selling only natural gas cannot avoid regulation of its rates by converting gas into total energy service, which includes electricity, a utility also subject to regulation. *Atlanta Gas Light Co. v. Georgia Pub. Serv. Comm’n*, 228 Ga. 347, 185 S.E.2d 403 (1971).

Contract to furnish total energy system held not private nonutility contract. — Contract between public utility and landlord to furnish total energy system (hot and cold water and electricity included) is not a private nonutility contract and was therefore subject to regulation by the Public Service Commission. *Atlanta Gas Light Co. v. Georgia Pub. Serv. Comm’n*, 228 Ga. 347, 185 S.E.2d 403 (1971).

Utility may require separate gas meters. — Rule and regulation of gas company, approved by the Public Service Commission, requiring a separate gas meter to be installed for each housekeeping apartment, was not, under the allegations of the petition, arbitrary, unreasonable, or discriminatory. *Carmichael v. Atlanta Gaslight Co.*, 185 Ga. 34, 193 S.E. 896 (1937).

Cited in *Ezell v. City of Atlanta*, 13 Ga. App. 95, 78 S.E. 850 (1913); *Savannah Elec. Co. v. Lowe*, 27 Ga. App. 350, 108 S.E. 313 (1921); *Gas Light Co. v. Georgia Power Co.*, 313 F. Supp. 860 (M.D. Ga. 1970); *City of*

General Consideration (Cont'd)

Doraville v. Southern Ry., 227 Ga. 504, 181 S.E.2d 346 (1971); *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975); *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975); *Bryan v. Georgia Pub. Serv. Comm'n*, 238 Ga. 572, 234 S.E.2d 784 (1977).

Powers of Commission

For power of Public Service Commission to regulate generally, see *Railroad Comm'n v. Louisville & N.R.R.*, 140 Ga. 817, 80 S.E. 327, 1915E L.R.A. 902, 1915A Ann. Cas. 1018 (1913).

Public Service Commission has only such powers as are granted to it by statute. *Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618 (1949).

Commission may require railroads to provide equal freight service. — Public Service Commission has power to prevent unjust discriminations and to require railroad companies in the conduct of their intrastate business to afford equal facilities in the transportation and delivery of freight. *Southern Ry. v. Georgia Pub. Serv. Comm'n*, 218 Ga. 157, 127 S.E.2d 12 (1962).

Commission may regulate handling of baggage. — Former Civil Code 1910, § 2663 (see O.C.G.A. § 46-2-20) conferred the power upon the Public Service Commission to issue an order requiring a terminal company to receive and check to its destination certain properly identified baggage. *Atlanta Term. Co. v. Georgia Pub. Serv. Comm'n*, 163 Ga. 897, 137 S.E. 556 (1927).

Commission not authorized to grant reparations or compensatory damages. — Public Service Commission is not authorized to grant reparations or compensatory damages, either by reason of a public utility collecting unreasonable rates, or by reason of the violation of any rule or regulation of the commission. The commission does not have the power to impose forfeitures or to provide for pecuniary recoveries. *Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618 (1949).

Commission can not require utility to buy, merge with, or sell power to another utility. — Public Service Commission is not authorized to require electric public utility to buy or merge against its will with a neighboring

electric public utility, or to sell power to such other public utility where it has never undertaken as such public utility to provide such service. Public regulation must not supplant private management. *Georgia Power Co. v. Georgia Pub. Serv. Comm'n*, 211 Ga. 223, 85 S.E.2d 14 (1954).

Commission not authorized to determine whether street railroad company may discontinue service. — Under former Civil Code 1910, § 2663 (see O.C.G.A. § 46-2-20) the commission had no express or implied power to determine whether a chartered street railroad company may entirely discontinue or abandon service upon a line, or part thereof, voluntarily constructed by it and devoted to the public use. *Railroad Comm'n v. Macon Ry. & Light Co.*, 151 Ga. 256, 106 S.E. 282 (1921).

Limitation of damages for interrupted telephone service proper. — Since the fixing of utility rates is no longer a matter of private contract, but is charged with a public interest, and it is to the public interest to have uninterrupted service at a reasonable price, it necessarily follows that a reasonable limitation of liability for damages for interrupted telephone service may be considered as a part of the telephone rate-making function. *Southern Bell Tel. & Tel. Co. v. Invenchek, Inc.*, 130 Ga. App. 798, 204 S.E.2d 457 (1974).

Requiring extension of power lines beyond utility's commitment unconstitutional. — Requiring extension of existing power lines beyond scope of carrier's commitment to public service is an unconstitutional taking of property. *Georgia Pub. Serv. Comm'n v. Georgia Power Co.*, 182 Ga. 706, 186 S.E. 839 (1936).

Commission may investigate contracts impairing utilities public duties. — Commission is authorized to investigate possibility that a contract impairs obligation of a utility to discharge its public duties. *Atlanta Gas Light Co. v. Georgia Pub. Serv. Comm'n*, 228 Ga. 347, 185 S.E.2d 403 (1971).

Commission not to issue special order without notice and hearing. — Former Civil Code 1910, § 2663 (see O.C.G.A. § 46-2-20) contemplated that notice and an opportunity of a hearing be given and that provision may be made for such notice either by statute or rule of the commission. That section was to be construed to mean that the

commission shall not issue a special order in a particular case, directed to a person or corporation, without first giving notice and an opportunity for hearing to the person or corporation so to be affected thereby. *Wadley S. Ry. v. State*, 137 Ga. 497, 73 S.E. 741 (1912), *aff'd*, 235 U.S. 651, 35 S. Ct. 214, 59 L. Ed. 405 (1914); *City of Atlanta v. Georgia Ry. & Power Co.*, 149 Ga. 411, 100 S.E. 442 (1919).

Courts to investigate only unreasonable, arbitrary, or confiscatory commission orders. — Courts should not interfere with valid order of Public Service Commission unless it is clearly shown that the order is unreasonable, arbitrary, or confiscatory; and courts have no power to substitute their judgment for that of the commission. *Georgia Pub. Serv. Comm'n v. Georgia Power Co.*, 182 Ga. 709, 186 S.E. 839 (1936).

Commission has no authority to adjudicate contractual disputes between local exchange carriers. — The statute does not grant authority to the Georgia State Public Commission to adjudicate contractual disputes between local exchange carrier. *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs.*, 278 F.3d 1223 (11th Cir. 2002), *vacated*, 297 F.3d 1276 (11th Cir. 2002).

Commission has authority under federal law to interpret and enforce interconnection agreements and its determination is subject to review in federal court. *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs.*, 317 F.3d 1270 (11th Cir. 2003).

Power to regulate construction belongs to Commission. — The regulation of the construction of electric power substations by municipalities was preempted based on the authority given to the Public Service Commission under O.C.G.A. § 46-2-20. *City of Buford v. Ga. Power Co.*, 276 Ga. 590, 581 S.E.2d 16 (2003).

Rate-making

Public Service Commission has power to regulate rates and practices of public utilities.

ties. Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062, 92 S. Ct. 732, 30 L. Ed. 2d 750 (1972).

Commission may fix different rates for classes of customers. — Since the Public Service Commission has by statute authority to fix just and reasonable gas rates to be paid by consumers, it has the power to make classifications which are reasonable, and to fix a different rate for each class of consumers; and where such rates are attacked in the courts, there is a presumption that they are valid, and the burden is on the attacking party to show that the same are invalid in that they are unjust, unreasonable, or discriminatory. *Carmichael v. Atlanta Gaslight Co.*, 185 Ga. 34, 193 S.E. 896 (1937).

Matters to be considered in rate-making. — What is just and reasonable to be charged, what is actuarially sound, what limitations of liability are necessary to reach this result, are matters which need to be taken into account in the determination of public utility rates, just as there are proper actuarial considerations in fixing insurance premiums. *Southern Bell Tel. & Tel. Co. v. Invenchek, Inc.*, 130 Ga. App. 798, 204 S.E.2d 457 (1974).

Courts have no power to make rates. — Making and controlling utility rates is a legislative function delegated to a quasi-legislative body and the courts have no power to control and make such rates. *DeKalb County v. Southern Bell Tel. & Tel. Co.*, 358 F. Supp. 498 (N.D. Ga. 1972), *aff'd*, 478 F.2d 700 (5th Cir. 1973).

Administrative remedies must be exhausted before court may exercise jurisdiction. — Where plaintiff fails to utilize the administrative remedies available for investigations and hearings (see O.C.G.A. Art. 3, Ch. 2, T. 46), a court lacked jurisdiction to determine the reasonableness of a public utility's rate structure. *Norman v. United Cities Gas Co.*, 231 Ga. 788, 204 S.E.2d 127 (1974).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERAL CONSIDERATION
POWERS OF COMMISSION

General Consideration

Grant of right to render utility service predicated on meeting public need. — The reason and purpose for granting a right or authority to render a utility service is to meet a public need for service; if the utility holding such grant fails to serve, the grant should not survive. 1971 Op. Att’y Gen. No. 71-144.

Meaning of terms within section prohibiting political contributions by utilities. — Section 21-5-30 prohibited political campaign contributions on behalf of public utility corporations regulated by the Public Service Commission; “public utility” was a business organization which regularly supplied the public with some commodity or service; “regulated” was defined in former Code 1933, § 93-307 (see O.C.G.A. § 46-2-20). 1976 Op. Att’y Gen. No. 76-53.

Utilities within scope of section prohibiting political contributions by utilities. — Those public utility corporations which are within the ambit of Public Service Commission’s supervision under former Code 1933, § 93-307 (see O.C.G.A. § 46-2-20) or other laws were also within the scope of § 21-5-10. 1976 Op. Att’y Gen. No. 76-53.

Property owner to be compensated where utility service interrupted by condemnation. — When a taking of property by condemnation interrupts utility service, the property owner has a right to this service, and the utility company is required to furnish the service; this is a right which cannot be taken without just compensation being paid; therefore, utility service must be maintained, or the property owner compensated, in case the service is interrupted by condemnation. 1967 Op. Att’y Gen. No. 67-69.

Liability of condemning authority for damages. — Where market value of property is adversely affected by interruption of utility service, condemning authority is liable for damages. 1967 Op. Att’y Gen. No. 67-69.

Powers of Commission

Restrictions on commission’s jurisdiction. — Jurisdiction of Public Service Commission was restricted to those electric and gas companies which serve the public, under former Code 1933, §§ 93-304 and 93-307 (see O.C.G.A. § 46-2-20 and 46-2-21). 1972 Op. Att’y Gen. No. 72-84.

Commission has power to regulate telegraph charges. — The Public Service Com-

mission has not only general supervisory powers over business organizations which are chartered as telegraph companies under the laws of the State of Georgia, but also express authority to regulate the charges for telegraph messages. 1976 Op. Att’y Gen. No. 76-79.

Commission may require telephone companies to indicate fact that subscriber using listening equipment. — The Public Service Commission has the authority to require, by appropriate regulation, telephone companies under its jurisdiction to accurately indicate in a reasonable manner, by reference in their telephone directories, the fact that a subscriber is utilizing telephone service observing equipment and this requirement is enforceable even where the subscriber happens to be the United State Internal Revenue Service. 1974 Op. Att’y Gen. No. 74-69.

Where commission lacks jurisdiction. — Commission has no jurisdiction over natural gas facilities owned and operated by and within county or municipality. 1967 Op. Att’y Gen. No. 67-291.

Commission has no jurisdiction over rates charged by electric power company for steam generated as by-product of the manufacture of electricity. 1976 Att’y Gen. No. 76-91.

Commission has no jurisdiction over intrastate transportation rates of railroads and common and contract motor carriers on movements of government-owned property for account of United States Armed Forces. 1958-59 Op. Att’y Gen. p. 304.

Commission has no jurisdiction over resale of utility services by landlord to the landlord’s tenants who object to the specific charges being made by their landlord for the furnishing of utility services. 1971 Op. Att’y Gen. No. 71-81.

Commission does not have authority over private carriers. — Private carriers are not included within the purview of the commission’s general supervision and are not subject to the prohibition against political contributions set forth in O.C.G.A. § 21-5-30(f). 1990 Op. Att’y Gen. No. 90-32.

Commission may not require railroad not presently providing passenger service to begin doing so. — Commission does not have authority to require a railroad not presently providing passenger service to commence passenger service if the railroad does not

desire to do so. If railroad has voluntarily undertaken to provide passenger service to the citizens of this state the commission would have the authority to require the railroad to maintain such public service and facilities as may be reasonable and just. However, the commission cannot require the railroad to operate at a loss. 1980 Op. Att'y Gen. No. 80-36.

Commission may not regulate construction details within railroad yards. — Public Service Commission is without authority to regulate constructional details as to spacing of railroad tracks within railroad yards. 1952-53 Op. Att'y Gen. p. 496.

Commission may not regulate railroad safety regulations not affecting public. — Commission is not concerned with internal affairs of railroads and disputes between the railroads and their employees concerning safety regulations which do not in any way affect the public. 1972 Op. Att'y Gen. No. 72-133.

Federal preemption of safety regulations of railroads engaged in interstate com-

merce. — As to railroads which are in interstate commerce, commission is preempted from imposing any safety regulations concerning any subject over which the federal government has an existing regulation. 1980 Op. Att'y Gen. No. 80-36.

Commission revocation of nonuse of certificate granted to telephone company. — Public Service Commission can revoke for nonuse a certificate of public convenience and necessity granted to a telephone company after hearing all facts of a particular case. 1971 Op. Att'y Gen. No. 71-144.

Regulation of cellular radio telecommunication services. — The Georgia Public Service Commission does not have jurisdiction to regulate cellular radio telecommunication services where the company providing the service operates as a radio utility, but may have jurisdiction to regulate cellular radio telecommunication services where the company providing the service operates as a telephone utility. 1983 Op. Att'y Gen. No. 83-65.

RESEARCH REFERENCES

ALR. — Jurisdiction of Public Service Commission over carriers transporting by motor trucks or buses, 1 ALR 1460; 9 ALR 1011; 51 ALR 820; 103 ALR 268.

Federal control of public utilities, 14 ALR 234; 19 ALR 678; 52 ALR 296.

Power of Public Service Commission to require carrier to furnish cars of special type, 23 ALR 411.

Special services or facilities afforded by shipper as a factor in carrier's rates, 25 ALR 191.

Power to require railroads or street railways to permit use of tracks in street by other companies, 28 ALR 969.

Power of Public Service Commission to require railroad or street railway to extend its line or build new line to new territory, 30 ALR 73.

Power of Public Service Commission with respect to regulation of street railways, 39 ALR 1517.

Street easements as a factor in fixing a rate base for a street railway company, 49 ALR 1477.

Power of Public Service Commission in

respect to alteration or extension of passenger service, 70 ALR 841.

Right to make charge for telephone or other public utility service in excess of that fixed by public utility, 73 ALR 1194.

Discrimination between telephone subscribers, or between them and nonsubscribers, as regards use of phone by third persons or charges therefor, 127 ALR 728.

Membership corporation or association or cooperative group furnishing to its members electric, telephone, or other service commonly supplied by public utility, as subject to governmental regulation or to jurisdiction of Public Service Commission, 132 ALR 1495.

Adequacy, as regards right to injunction, of other remedy for review of order fixing public utility rates, 8 ALR2d 839.

Right of customers of public utility with respect to fund representing a refund from another supplying utility upon reduction of latter's rates, 18 ALR2d 1343.

Community antenna television systems (CATV) as subject to jurisdiction of state public utility or service commission, 61 ALR3d 1150.

Landlord supplying electricity, gas, water, or similar facility to tenant as subject to utility regulation, 75 ALR3d 1204.

Incidental provision of utility services, by party not in that business, as subject to regulation by state regulatory authority, 85 ALR4th 894.

Incidental provision of transportation services, by party not primarily in that business, as common carriage subject to state regulatory control, 87 ALR4th 638.

Public service commission's implied authority to order refund of public utility revenues, 41 ALR5th 783.

46-2-21. Extension of commission's powers and duties to street railroads, telegraph companies, telephone companies, and gas and electric light and power companies.

(a) The powers and duties conferred by law prior to August 23, 1907, upon the commission and its authority and control shall extend to street railroads and to companies owning, leasing, or operating street railroads in this state, provided that nothing in this Code section shall be construed to impair any valid contract between any municipality and any such company in force on that date; provided, further, that this Code section shall not operate to repeal any municipal ordinance existing on that date; nor shall it impair or invalidate any contract or ordinance of any municipality made or adopted since that date as to the public uses of such company, which contract or ordinance has received the assent of the commission.

(b) The powers and duties conferred by law prior to August 23, 1907, upon the commission and its authority and control shall also extend to:

(1) Docks and wharves, and companies owning, leasing, or operating the same;

(2) Terminals or terminal stations, and companies owning, leasing, or operating the same;

(3) Cotton compress corporations or associations, and companies owning, leasing, or operating the same;

(4) Telegraph or telephone companies, or persons owning, leasing, or operating a public telephone service or telephone lines in this state; and

(5) Gas and electric light and power companies, or persons owning, leasing, or operating public gas plants or electric light and power plants furnishing service to the public. (Ga. L. 1907, p. 72, § 5; Ga. L. 1908, p. 67, § 1; Civil Code 1910, § 2662; Ga. L. 1922, p. 143, § 1; Code 1933, § 93-304.)

Law reviews. — For survey article on local government law, see 34 Mercer L. Rev. 225 (1982).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
POWERS OF COMMISSION

General Consideration

Constitutionality. — Ga. L. 1907, p. 72, § 5 (see O.C.G.A. § 46-2-21) is not void as in opposition to U.S. Const., Art. I, Sec. 9, Cl. 3 or Ga. Const. 1976, Art. I, Sec. I, Para. VII (Ga. Const. 1983, Art. I, Sec. I, Para. X), prohibiting passage of any ex post facto law, or U.S. Const., Art. I, Sec. 10, Cl. 1 or Ga. Const. 1976, Art. I, Sec. I, Para. VII (Ga. Const. 1983, Art. I, Sec. I, Para. X), prohibiting passage of laws impairing the obligation of contracts, or U.S. Const., Amend. 5 or Ga. Const. 1976, Art. I, Sec. III, Para. I (Ga. Const. 1983, Art. I, Sec. III, Para. I, II; Art. III, Sec. VI, Para. II), prohibiting the taking of property without due process of law, or Ga. Const. 1976, Art. VII, Sec. I, Para. I (Ga. Const. 1983, Art. VII, Sec. I, Para. I), declaring taxation a sovereign right. *Union Dry Goods Co. v. Georgia Pub. Serv. Corp.*, 142 Ga. 841, 83 S.E. 946, 1916E L.R.A. 358 (1914), *aff'd*, 248 U.S. 372, 39 S. Ct. 117, 63 L. Ed. 309, 9 ALR 1420 (1919).

Application of section generally. — The provisions of former Civil Code 1910, § 2662 (see O.C.G.A. § 46-2-21), which restrict the power of the commission in regard to contracts existing at the time of the passage of the Act embodied in this section, and contracts which might be made subsequently to that Act, apply alike to all of the several classes of companies specified. *City of Atlanta v. Georgia Ry. & Power Co.*, 149 Ga. 411, 100 S.E. 442 (1919).

Municipal ordinances regulating public uses of telephone companies require commission's assent. — Authority and control vested in Public Service Commission invalidates any municipal ordinance adopted since August 23, 1907, as to public uses of a telephone company unless the Public Service Commission shall assent thereto. *Camden Tel. & Tel. Co. v. City of St. Marys*, 247 Ga. 687, 279 S.E.2d 200 (1981).

Construction of term "corporation." — Word "corporation" in former Code 1933, § 93-304 (see O.C.G.A. § 46-2-21) did not refer to municipal corporations which own,

lease, or operate electric light and power plants, but refers to what are ordinarily known as private corporations. *Georgia Pub. Serv. Comm'n v. City of Albany*, 180 Ga. 355, 179 S.E. 369 (1935).

Construction of term "public uses." — Words "public uses" as employed in O.C.G.A. § 46-2-21 comprehend rates a telephone company may charge the public. *Camden Tel. & Tel. Co. v. City of St. Marys*, 247 Ga. 687, 279 S.E.2d 200 (1981).

Ordinance taxing percentage of telephone company revenues held not ordinance as to public use of utility. — Ordinance imposing a tax upon percentage of revenues of a telephone company is not an ordinance as to public uses of the utility; the tax is a factor the Public Service Commission may take into account in setting rates to be charged by the utility, and, in that manner the consequences of the tax as to the public uses of the telephone system remain within the control of the Public Service Commission. *Camden Tel. & Tel. Co. v. City of St. Marys*, 247 Ga. 687, 279 S.E.2d 200 (1981).

Power of common carrier to make regulations must yield to state. — Construing former Civil Code 1910, §§ 2662, 2630, 2729 and 2750 (see O.C.G.A. §§ 46-2-21, 46-8-20, 46-9-40 and 46-9-131), it was evident that the power of a common carrier to make reasonable regulations must yield where regulations have been made by authority of the state, unless they were invalid. *Railroad Comm'n v. Louisville & N.R.R.*, 140 Ga. 817, 80 S.E. 327, 1915E L.R.A. 902, 1915A Ann. Cas. 1018 (1913).

Contracts subject to subsequent rate schedules prescribed by commission. — If a patron of a public service corporation, furnishing electrical power and light, sees fit to make a contract covering a definite period of time, where no rates have been prescribed by the commission, the patron will be taken to have done so subject to subsequent schedules of rates lawfully prescribed by the commission. *Union Dry Goods Co. v. Georgia Pub. Serv. Corp.*, 142 Ga. 841, 83 S.E. 946, 1916E L.R.A. 358 (1914), *aff'd*, 248 U.S. 372,

General Consideration (Cont'd)

39 S. Ct. 117, 63 L. Ed. 309, 9 ALR 1420 (1919).

Utility has no authority to select customers or discriminate. — A corporation organized to generate and supply hydroelectric power to the public, and having a monopoly of such power in former Code 1933, § 93-304 (see O.C.G.A. § 46-2-21) where it operates, had no authority to select customers or discriminate against the members of a class it had elected to serve. *Georgia Pub. Serv. Comm'n v. Georgia Power Co.*, 182 Ga. 706, 186 S.E. 839 (1936).

Maximum rates fixed by commission presumptively reasonable. — Where the legislature confers upon the commission the power to fix maximum rates for service rendered to the public by individuals or corporations engaged in a public service, the maximum rates fixed by the commission are presumptively reasonable, and public service companies may demand such maximum rates. *City of Dublin v. Ogburn*, 142 Ga. 840, 83 S.E. 939 (1914); *City of Atlanta v. Atlanta Gaslight Co.*, 149 Ga. 405, 100 S.E. 439 (1919), overruled on other grounds, *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975).

Unreasonable, arbitrary, or confiscatory commission orders within court's scope. — Courts should not interfere with valid order of Public Service Commission unless it is clearly shown that the order is unreasonable, arbitrary, or confiscatory; and courts have no power to substitute their judgment for that of the commission. *Georgia Pub. Serv. Comm'n v. Georgia Power Co.*, 182 Ga. 709, 186 S.E. 839 (1936).

Administrative remedies must be exhausted before court may exercise jurisdiction. — Where plaintiff fails to utilize the administrative remedies available (see O.C.G.A. Art. 3, Ch. 2, T. 46), a court lacks jurisdiction to determine the reasonableness of a public utility's rate structure. *Norman v. United Cities Gas Co.*, 231 Ga. 788, 204 S.E.2d 127 (1974).

No certiorari merely because of commission rate changes. — Certiorari did not lie to order by commission lowering or raising rates by virtue of former Civil Code 1910, § 2662 (see O.C.G.A. § 46-2-21). *Mutual Light & Water Co. v. City of Brunswick*, 158

Ga. 677, 124 S.E. 178 (1924).

Utility may require separate gas meters. — Rule and regulation of gas company, approved by the Public Service Commission, requiring a separate gas meter to be installed for each housekeeping apartment, was not, under the allegations of the petition, arbitrary, unreasonable, or discriminatory. *Carmichael v. Atlanta Gaslight Co.*, 185 Ga. 34, 193 S.E. 896 (1937).

Cited in *Western & A.R.R. v. Western Union Tel. Co.*, 138 Ga. 420, 75 S.E. 471 (1912); *Smith v. Whiddon*, 138 Ga. 471, 75 S.E. 635 (1912); *Mayor of Savannah v. Standard Fuel Supply Co.*, 140 Ga. 353, 78 S.E. 906 (1913); *Georgia Ry. & Power Co. v. Railroad Comm'n*, 149 Ga. 1, 98 S.E. 696 (1919); *Georgia Power Co. v. City of Decatur*, 170 Ga. 699, 154 S.E. 268 (1930); *Gas Light Co. v. Georgia Power Co.*, 313 F. Supp. 860 (M.D. Ga. 1970).

Powers of Commission

Power of commission to regulate utility rates and practices. — Public Service Commission has power to regulate rates and practices of public utilities. *Gas Light Co. v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), cert. denied, 404 U.S. 1062, 92 S. Ct. 732, 30 L. Ed. 2d 750 (1972).

Public Service Commission is authorized to set rates to dictate consequences of charges imposed by municipality in connection with its franchise agreement with a public utility; that is, the Public Service Commission may determine whether or not the charge may be passed on to customers of the utility. *Camden Tel. & Tel. Co. v. City of St. Marys*, 247 Ga. 687, 279 S.E.2d 200 (1981).

Extent of authority over electric utilities. — Under former Code 1933, § 93-304 (see O.C.G.A. § 46-2-21) the Public Service Commission has authority over electric light and power companies, corporations, or persons owning, leasing, or operating public electric light and power plants furnishing service to the public whether foreign or domestic. *Florida Blue Ridge Corp. v. Tennessee Elec. Power Co.*, 106 F.2d 913 (5th Cir. 1939), cert. denied, 309 U.S. 666, 60 S. Ct. 591, 84 L. Ed. 1013 (1940).

Powers of commission. — That part of the proviso of former Civil Code 1910, § 2662 (see O.C.G.A. § 46-2-21) which declared that

this Act shall not impair nor invalidate any future contract or ordinance of any municipality which has received the assent of the commission, does not deprive the commission of power, after assenting to a contract or ordinance of the character mentioned in such provision, to revise or make new rates, where future conditions render the rates specified in the contract or ordinance unreasonable and unjust to the companies or to the public. *City of Atlanta v. Georgia Ry. & Power Co.*, 149 Ga. 411, 100 S.E. 442 (1919).

The Public Service Commission has power to fix just and reasonable gas rates to be paid by the consumers to the corporation owning or operating public gas plants. *City of Atlanta v. Atlanta Gaslight Co.*, 149 Ga. 405, 100 S.E. 439 (1919), overruled on other grounds, *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975).

Power to fix different rates for classes of customers. — Since the Public Service Commission has by statute authority to fix just and reasonable gas rates to be paid by consumers, it has the power to make classifications which are reasonable, and to fix a different rate for each class of consumers; and where such rates are attacked in the courts, there is a presumption that they are valid, and the burden is on the attacking party to show that the same are invalid in that they are unjust, unreasonable, or discriminatory. *Carmichael v. Atlanta Gaslight Co.*, 185 Ga. 34, 193 S.E. 896 (1937).

OPINIONS OF THE ATTORNEY GENERAL

Factors to be considered in determining public utility status. — Whether a business operation renders such “service to the public” as to become a public utility is controlled by the facts of each particular case and the question depends on such factors as the extent of the service, whether the operation holds itself out as ready to serve the public generally — at least within a certain area — and whether in other ways it has conducted itself as a public utility. 1969 Op. Att’y Gen. No. 69-27.

In determining whether a business renders such public service as to qualify as a public utility, it is necessary to examine such factors as the extent of the service, whether the operation holds itself out as ready to serve the public generally, and whether in

Power to fix telephone rates. — The commission has the right to fix the rates to be charged by telephone companies for the use of their telephones in sending and receiving messages within the state. *City of Dawson v. Dawson Tel. Co.*, 137 Ga. 62, 72 S.E. 508 (1911).

Power to fix street railway fares. — In the absence of a valid subsisting contract and ordinance upon the subject of fares, it is the duty of the commission, upon application by a street-railroad company, to fix and determine the rates of fare upon the lines of the street-railroad in the city, in accordance with the law defining the powers and duties of the commission. *Georgia Ry. & Power Co. v. Railroad Comm’n*, 149 Ga. 1, 98 S.E. 696, 5 ALR 1 (1919).

Exception to authority to fix street railway fares. — The Public Service Commission is without authority to fix fares upon street railway lines where there is a valid, subsisting contract. *Georgia Ry. & Power Co. v. Railroad Comm’n*, 149 Ga. 1, 98 S.E. 696, 5 ALR 1 (1919).

Requiring extension of power lines beyond utility’s commitment unconstitutional. — Requiring extension of existing power lines beyond scope of carrier’s commitment to public service is unconstitutional taking of property. *Georgia Pub. Serv. Comm’n v. Georgia Power Co.*, 182 Ga. 706, 186 S.E. 839 (1936).

other ways the business has conducted itself as a public utility. 1972 Op. Att’y Gen. No. 72-84.

Limitations on commission’s jurisdiction. — Jurisdiction of Public Service Commission is restricted to those electric and gas companies which serve the public under former Code 1933, §§ 93-304 and 93-307 (see O.C.G.A. §§ 46-2-20 and 46-2-21). 1972 Op. Att’y Gen. No. 72-84.

Jurisdiction over proposed fare increases. — Public Service Commission has jurisdiction over proposed increase in fares, even though the city in which the transit company operates has already provisionally assented thereto. 1950-51 Op. Att’y Gen. p. 205.

No jurisdiction over rates charged by trailer park owner. — Public Service Com-

mission does not have jurisdiction over rates charged by trailer park owner to tenants occupying space in the owner's trailer park. 1969 Op. Att'y Gen. No. 69-27.

No jurisdiction over sale of utilities to tenants by landlord. — The sale of water or electric energy to one's tenants, whether they be tenants of one's houses, office buildings or otherwise, is not service to the public as to require compliance with the laws on public utilities. 1969 Op. Att'y Gen. No. 69-27.

No jurisdiction over corporation furnishing energy to three other corporations. — A corporation which furnishes electricity and steam to a total of three other corporations which are engaged in general manufacturing operations does not serve a substantial segment of the public, and hence, is not engaged in "service to the public". 1972 Op. Att'y Gen. No. 72-84.

Regulation of cellular radio telecommunication services. — The Georgia Public Service Commission does not have jurisdiction to regulate cellular radio telecommunication services where the company providing the service operates as a radio utility, but may have jurisdiction to regulate cellular

radio telecommunication services where the company providing the service operates as a telephone utility. 1983 Op. Att'y Gen. No. 83-65.

Cellular communications service is not a telephone service and, as such, not subject to regulation by the Georgia Public Service Commission. 1994 Op. Att'y Gen. No. 94-7.

Phasing cost of generating plant into ratebase of Georgia Power Company. — The Georgia Public Service Commission may phase the cost of Plant Vogtle into the ratebase of Georgia Power Company prior to the commercial operation of the plant; the Georgia Public Service Commission has authority to phase the cost of Plant Vogtle into the ratebase of Georgia Power Company after the commercial operation of the plant if the phase-in meets certain legal requirements; but either ratemaking treatment should follow threshold regulatory principles. 1985 Op. Att'y Gen. No. U85-2.

Jurisdiction over master-metered customers. — The Public Service Commission has no jurisdiction over master-metered customers so long as the activities of said customers do not constitute furnishing service to the public. 1985 Op. Att'y Gen. No. 85-39.

RESEARCH REFERENCES

ALR. — Carrying freight on electric railway in street or highway as an additional servitude, 2 ALR 1404; 46 ALR 1472.

Power of Public Service Commission with respect to regulation of street railways, 5 ALR 36; 39 ALR 1517.

Jurisdiction of Public Service Commission over carriers transporting by motor trucks or busses, 9 ALR 1011; 51 ALR 820; 103 ALR 268.

What telephone companies are within public utilities acts, 21 ALR 1162; 132 ALR 1495.

Power to require railroads or street rail-

ways to permit use of tracks in street by other companies, 28 ALR 969.

Power of Public Service Commission to require railroad or street railway to extend its line or build new line to new territory, 30 ALR 73.

Street easements as a factor in fixing a rate base for a street railway company, 49 ALR 1477.

Validity of statute, ordinance, or other public regulation prescribing minimum number of employees for train or streetcar, 69 ALR 343.

46-2-22. Jurisdiction of commission over express companies and telegraph companies.

All companies owning, controlling, or operating lines of express or telegraph which are in whole or in part in this state shall be under the control of the commission, which shall have full power to regulate the prices charged by any such company for any service performed by such company. All the powers given to the commission over railroads in this state and all

the penalties prescribed against railroad companies are declared to be of force against companies owning, controlling, or operating lines of express or telegraph and doing business in this state and whose lines are in whole or in part in this state, so far as such powers and penalties can be made applicable thereto. The commission shall also have power and authority to require such companies to locate agencies at railroad stations. (Ga. L. 1890-91, p. 151, § 1; Civil Code 1895, § 2217; Civil Code 1910, § 2660; Ga. L. 1922, p. 143, § 1; Code 1933, § 93-305.)

JUDICIAL DECISIONS

Courts to investigate only unreasonable, arbitrary, or confiscatory commission orders. — Courts should not interfere with valid order of Public Service Commission unless it is clearly shown that the order is unreasonable, arbitrary, or confiscatory; and courts have no power to substitute their judgment for that of the commission. *Georgia Pub. Serv. Comm'n v. Georgia Power Co.*, 182 Ga. 706, 186 S.E. 839 (1936).

Requiring extension of power lines beyond utility's commitment unconstitutional. — Requiring extension of existing power lines beyond scope of carrier's commitment

to public service is unconstitutional taking of property. *Georgia Pub. Serv. Comm'n v. Georgia Power Co.*, 182 Ga. 706, 186 S.E. 839 (1936).

Utility has no authority to select customers or discriminate. — A corporation organized to generate and supply hydroelectric power to the public, and having a monopoly of such power in the section where it operates, has no authority to select customers or discriminate against the members of a class it has elected to serve. *Georgia Pub. Serv. Comm'n v. Georgia Power Co.*, 182 Ga. 706, 186 S.E. 839 (1936).

OPINIONS OF THE ATTORNEY GENERAL

Authority of commission to regulate telegraph charges. — The Public Service Commission has not only general supervisory powers over business organizations which are chartered as telegraph companies under

the laws of the state, but also express authority to regulate the charges for messages sent by telegraph by these companies. 1976 Op. Att'y Gen. No. 76-79.

RESEARCH REFERENCES

ALR. — What telephone companies are within public utilities acts, 21 ALR 1162; 132 ALR 1495.

Telephone company's liability for disclosure of number or address of subscriber holding unlisted number, 1 ALR4th 218.

46-2-23. Rate-making power of commission generally; special provisions concerning telecommunications companies.

(a) The commission shall have exclusive power to determine what are just and reasonable rates and charges to be made by any person, firm, or corporation subject to its jurisdiction.

(b) As to those telecommunications companies subject to the jurisdiction of the commission, the commission is not required to fix and determine specific rates, tariffs, or charges for the services offered by said

telecommunications companies and in lieu thereof may on application of an interested party or on its own motion after public notice and hearing:

- (1) Totally deregulate a service;
- (2) Totally eliminate any tariffs on a service;
- (3) Eliminate tariff rates for a service but retain tariffs for service standards and requirements; or
- (4) Eliminate tariff rates for a service but require that notice of any rate changes be provided to the commission.

(c) In determining what actions, if any, are to be taken on applications under subsection (b) of this Code section, the commission shall conduct hearings at which it shall consider the following factors:

- (1) The extent to which competing telecommunications services are available from competitive providers in the relevant geographic market;
- (2) The ability of competitive providers to make functionally equivalent or substitute services readily available;
- (3) The number and size of competitive providers of service;
- (4) The overall impact of the proposed regulatory change on the continued availability of existing services at just and reasonable rates;
- (5) The impact of the proposed regulatory change upon efforts to promote universal availability of basic telecommunications services at affordable rates and to permit telecommunications companies subject to the jurisdiction of the commission to respond to competitive thrusts; and
- (6) Such other factors as the commission may determine are in the public interest.

(d) Nothing in this Code section shall authorize the application of subsection (b) of this Code section to any service unless functionally equivalent or substitute services are readily available from competitive providers in the relevant geographic market. This finding must be made on the record after public hearing.

(e) Any telecommunications service deregulated or detariffed under this Code section may be reregulated or resubjected to tariffing by the commission if the commission finds, through a proceeding initiated on its own or upon application by an interested party, that such reregulation or retariffing is in the public interest.

(f) Nothing in this Code section shall be interpreted as requiring the commission to alter, amend, or repeal any rule or regulation which relates to any telecommunications company and which has been adopted by the commission or which is under consideration for adoption by the commission as of April 14, 1988.

(g) No telecommunications company may use current revenues earned or expenses incurred in conjunction with services subject to regulation to subsidize services which are not regulated or tariffed. The commission may adopt procedural rules as necessary to implement this subsection.

(h) Beginning one year after deregulation or eliminating tariffs on a service, the utility will file within 60 days of such anniversary date with the commission a report showing the rates or tariffs for such service on the effective date of deregulation or detariffing and the rates or tariffs on the anniversary date. Such reports will continue to be filed on an updated basis annually for a period of five years. The commission may prescribe the form and content of such reports. The commission will thereafter as soon as practicable file a summary of the results and contents of such reports with the Industry Committee of the House of Representatives and the Finance and Public Utilities Committee of the Senate. (Code 1981, § 46-2-23, enacted by Ga. L. 1981, Ex. Sess., p. 8; Ga. L. 1988, p. 1988, § 1; Ga. L. 1990, p. 8, § 46; Ga. L. 1992, p. 6, § 46; Ga. L. 2002, p. 415, § 46.)

The 2002 amendment, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, deleted former subsection (h), which read: "Nothing in this Code section shall be interpreted as amending, modifying, altering, or repealing Chapter 6 of this title, known as the 'Georgia Radio Utility Act.'" and redesignated former subsection (i) as present subsection (h).

Cross references. — Authority of General Assembly regarding regulation of public utility rates, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Prohibition against gratuities, Ga. Const. 1983, Art. III, Sec. VI, Para. VI.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, "April 14, 1988" was substituted for "the effective date of this Code section" at the end of subsection (f) and subsections (f.1) and (g) were redesignated as subsections (g) and (h), respectively.

Editor's notes. — Ga. L. 1990, p. 8, § 55, repealed Ga. L. 1988, p. 1988, § 2, providing for certain reports after deregulation or elimination of tariffs on a service. These provisions may now be found in subsection (h) of this Code section.

JUDICIAL DECISIONS

Legislature's power to regulate. — The grant of authority to regulate public utilities to the Public Service Commission, to the exclusion of other executive branch agencies, does not mean that the General Assembly has divested itself of its constitutional power to regulate public utilities. *Lasseter v. Georgia Pub. Serv. Comm'n*, 253 Ga. 227, 319 S.E.2d 824 (1984).

Review of commission order lowering electric rates. — Order of Public Service Commission lowering rates charged for electricity is quasi-legislative in character, and writ of certiorari will not lie from the superior court to review such an order. *Mutual*

Light & Water Co. v. City of Brunswick, 158 Ga. 677, 124 S.E. 178 (1924).

Agency decision supported by facts. — Where the Public Service Commission granted a rate increase, but disallowed some of the utility company's costs in calculating the rate base for a fair increase because it concluded that some of the costs were the result of the company's imprudent management of the project, the agency's decision was within its authority and was supported by the facts. *Georgia Power Co. v. Georgia Pub. Serv. Comm'n*, 196 Ga. App. 572, 396 S.E.2d 562 (1990).

Failure to state a claim. — Where consum-

ers alleged that they suffered an injury to their business and property, within the purview of 18 U.S.C. § 1964(c), in the form of excessive and illegal charges paid for electrical utility services, the consumer's arguments were rejected because they did not possess a legal right to be charged a lower rate than they were actually charged, and therefore they failed to state a claim upon which relief could have been granted. *Taffet v. Southern Co.*, 967 F.2d 1483 (11th Cir. 1992), cert. denied, 506 U.S. 1021, 113 S. Ct. 657, 121 L. Ed. 2d 583 (1992).

Consumer cannot establish own rate. — Since the legislature has provided by law that the Public Service Commission shall estab-

lish the legal rate for a utility's services, although a consumer of a utility's services has the right to participate in the rate-setting process within the parameters set up by this legislature, the consumer has no legal right to pay any rate other than the one established by the Public Service Commission. *Taffet v. Southern Co.*, 967 F.2d 1483 (11th Cir. 1992), cert. denied, 506 U.S. 1021, 113 S. Ct. 657, 121 L. Ed. 2d 583 (1992).

A rate-payer has no legal right to a rate other than that established by the commission, or filed by a utility and accepted by the commission. *Carr v. Southern Co.*, 263 Ga. 771, 438 S.E.2d 357 (1994).

RESEARCH REFERENCES

ALR. — Public utilities: validity of preferential rates for elderly or low-income persons, 29 ALR4th 615.

46-2-23.1. "Alternative form of regulation" defined; filing; notice; approval; release of interstate pipeline capacity.

(a) As used in this Code section, the term "alternative form of regulation" means a method of establishing just and reasonable rates and charges for a gas company by performance based regulation without regard to methods based strictly upon cost of service, rate base, and rate of return. Performance based regulation may include without limitation one or more of the following features: earnings sharing, price caps, price-indexing formulas, ranges of authorized rates of return, and the reduction or suspension of regulatory requirements.

(b) A gas company may from time to time file an application with the commission to have its rates, charges, classifications, and services regulated under an alternative form of regulation. Within ten days of the filing, the gas company shall publish a notice generally describing the application in a newspaper or newspapers with general circulation in its service territory.

(c) After notice and hearing the commission may approve the plan, or approve it with modifications, if the commission determines that the application is in the public interest and will produce just and reasonable rates, after taking into consideration the extent to which the application:

(1) Is designed to and is likely to produce lower prices for consumers of natural gas in Georgia;

(2) Will provide incentives for the gas company to lower its costs and rates;

(3) Will provide incentives to improve the efficiency and productivity of the gas company;

(4) Will foster the long-term provision of natural gas service in a manner that will improve the quality and choices of service;

(5) Is consistent with maintenance and enhancement of safe, adequate, and reliable service and will maintain or improve preexisting service quality and consumer protection safeguards;

(6) Will not result in cross-subsidization among or between groups of gas company customers;

(7) Will not result in cross-subsidization among or between the portion of the gas company's business or operations subject to the alternative form of regulation and any unregulated portion of the business or operations of the gas company or of any of its affiliates;

(8) Will reduce regulatory delay and cost; and

(9) Will tend to enhance economic activity in the affected service territory.

(d) Performance based regulation adopted by the commission as an alternative form of regulation shall provide for the following:

(1) Equal and symmetric opportunities to earn above and below the performance standard;

(2) Performance incentives based upon conditions within the control of the management of the gas company; and

(3) Adjustments from time to time for the net effect of changes in tax rates, other costs imposed by law, and the cost of capital.

(e) Where an application for an alternative form of regulation has been filed by a gas company and the commission determines that the proposal does not satisfy the requirements of this Code section, it may either reject the proposal or issue an order approving an alternative with such modifications as the commission deems necessary to satisfy the requirements of this Code section. The commission shall determine and prescribe in any such order establishing rates and charges the revenue requirements of the gas company filing the application.

(f) An order adopting an alternative form of regulation may include:

(1) Terms and conditions for establishing new services, withdrawing services, price changes to services, and services by contract to individual customers;

(2) Terms and conditions necessary to achieve the objectives contained in subsection (c) of this Code section;

(3) General or specific authorization for changes in rates, charges, classifications, or services such that the provisions of subsection (a) of Code Section 46-2-25 do not require 30 days' notice and commission approval before such change or changes may go into effect; and

(4) Other rates, terms, and conditions that are consistent with the objectives and requirements of subsection (c) of this Code section.

(g) Except as otherwise provided in this Code section, the provisions of this title relating to the rates, charges, and terms of service of a gas company shall apply to rates, charges, and terms of service established pursuant to this Code section.

(h) Any special or negotiated contract between a gas company and a retail customer approved by the commission shall not be invalidated or modified by the provisions of this Code section.

(i)(1) Neither the provisions of this Code section nor the provisions of Article 5 of Chapter 4 of this title shall prohibit a gas company from releasing interstate pipeline capacity available to it from time to time and not required to serve the requirements of its retail customers and marketers and from making sales of gas with or without interstate transportation capacity to municipal corporations, other local gas distribution companies, or marketers and end users connected to an interstate pipeline company or connected to another local distribution company; provided, however, that where net benefits to the firm retail customers who are receiving commodity sales service from the gas company accrue:

(A) Twenty percent of the revenues from the release of interstate pipeline capacity for the purposes of transporting gas to end users in Georgia shall be allocated to the gas company, and the remaining 80 percent of such revenues shall be credited to the costs of gas sold by the gas company to firm retail customers;

(B) Ten percent of the revenues from the release of interstate pipeline capacity for the purpose of transporting gas to end users outside of Georgia shall be allocated to the gas company, and the remaining 90 percent of such revenues shall be credited to the costs of gas sold by the gas company to firm retail customers; and

(C) Fifty percent of the net margin from the sale of gas, with or without interstate capacity, to municipal corporations, other local gas distribution companies, or marketers and end users connected to an interstate pipeline company or connected to another local distribution company shall be allocated to the gas company, and the remaining 50 percent of such net margins shall be credited to the costs of gas sold by the gas company to firm retail customers; provided, however, that if as a result of such sale, the then existing natural gas requirements of retail customers in Georgia cannot be supplied physically, all of such net

margin shall be credited to the costs of gas. The net margin shall be calculated by subtracting all variable costs associated with the transaction from the revenues generated by the transaction. The costs recovered by the gas company through such transactions shall be credited to the gas costs payable by retail customers of the gas company.

(2) Where a universal service fund has been created by the commission pursuant to Code Section 46-4-161 for a gas company which is an electing distribution company, as defined in paragraph (10) of Code Section 46-4-152, the shares that are to be credited to the costs of gas sold to firm retail customers under subparagraphs (A), (B), and (C) of paragraph (1) of this subsection shall be allocated to such fund, and the costs recovered through a transaction described in subparagraph (C) of this subsection shall be allocated to such company.

(3) Any gas company which engages in a transaction of a type described in paragraph (1) of this subsection, which results in the allocation to the gas company of a share of the revenues or net margin therefrom, shall make a report to the commission annually describing each such transaction and explaining the benefits resulting to firm retail customers from each such transaction. Such report shall be served on the consumer's utility counsel division of the Governor's Office of Consumer Affairs. (Code 1981, § 46-2-23.1, enacted by Ga. L. 1997, p. 798, § 2.)

Law reviews. — For article commenting on the enactment of this section, see 14 Georgia St. U.L. Rev. 264 (1997).

46-2-24. Consideration by commission of quality of service in determining just and reasonable rates and charges.

In determining what are just and reasonable rates and charges to be made by any person, firm, or corporation (referred to in this Code section as a "utility") subject to its jurisdiction, the commission is authorized and is directed to consider the quality of the service rendered by such utility. (Code 1933, § 93-309.1, enacted by Ga. L. 1973, p. 677, § 1.)

Cross references. — Limitation on authority of General Assembly regarding regulation of public utility rates, Ga. Const. 1983, Art. III, Sec. VI, Para. V.

RESEARCH REFERENCES

Am. Jur. 2d. — 64 Am. Jur. 2d, Public Utilities, § 166 et seq.

C.J.S. — 73B C.J.S., Public Utilities, § 27.

ALR. — Special services or facilities afforded by shipper as a factor in carrier's rates, 25 ALR 191.

Validity of "fuel adjustment" or similar clauses authorizing electric utility to pass on

increased cost of fuel to its customers, 83 ALR3d 933.

Advertising or promotional expenditures of public utility as part of operating expenses for rate-making purposes, 83 ALR3d 963.

Public utility's right to recover cost of nuclear power plants abandoned before completion, 83 ALR4th 183.

46-2-25. Procedure for changing any rate, charge, classification, or service.

(a) No person, firm, or corporation (referred to in this Code section as a “utility”) subject to the jurisdiction of the commission shall make any change in any rate, charge, classification, or service subject to the jurisdiction of the commission, or in any rule or regulation relating thereto, except after 30 days’ notice to the commission and to the public, unless the commission otherwise orders, or unless the commission has previously authorized or approved the change. Such notice shall be given by filing with the commission and keeping open for public inspection new schedules stating plainly the changes to be made in the schedules then in force and the time when the changes will go into effect. The commission, for good cause shown, may allow changes to take effect without requiring the 30 days’ notice by an order specifying the changes to be made, the time when they shall take effect, and the manner in which they shall be filed and published.

(b) Whenever any new schedule is filed pursuant to subsection (a) of this Code section, the commission shall have authority, either upon written complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the utility but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service. Pending such hearing and the decision thereon, the commission, upon filing with such schedule and delivering to the utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a period longer than five months beyond the time when it would otherwise go into effect, provided that the commission may apply to the Superior Court of Fulton County for an extension of such period, as provided for in Code Section 46-2-57. After such hearings as are required, whether they are completed before or after the rate, charge, classification, or service goes into effect, the commission may make such orders as are proper with reference thereto within the authority vested in the commission. The commission is empowered to reduce or revoke any such suspension with respect to all or any part of such schedule. If the proceeding has not been concluded and an order not made at the expiration of the suspension period, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period; but in case of a proposed increased rate or charge, the commission shall by order require the interested utility to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid; and upon completion of the hearing and the rendering of a decision, the commission shall by further order require such utility to refund, with interest at the maximum legal rate, in such manner as the commission may direct, such portion of such increased rates or charges as by its decision shall be found not justified. Any portion of such refunds not thus refunded to patrons or

customers of the utility shall be refunded or disposed of by the utility as the commission may direct, provided that no such funds shall accrue to the benefit of the utility. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the utility, and the commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(c) Before any increased rate or charge shall go into effect without the approval of the commission, the commission shall by order require the interested utility to file with the commission a bond written by a surety who is approved by the commission and who is authorized to transact business in this state. The bond shall be fixed by the commission in an amount not to exceed \$250,000.00. The bond shall be payable to the Governor and conditioned upon the faithful performance of the requirements of the refund order entered by the commission, the requirements of this Code section, and the requirements of the rules and regulations of the commission.

(d) Any action taken by the commission under this Code section shall be reduced to writing by the commission and signed by the chairman and secretary thereof. All such actions and orders shall be effective from the date such actions are reduced to writing and are signed as provided by this subsection. No such action or order of the commission may be given retroactive effect. A full and complete record shall be kept of the votes taken in connection with any such action, said record to be entered upon the official minutes of the commission.

(e) Nothing in this Code section shall be construed as limiting the authority granted to the commission by Code Sections 46-2-20 and 46-2-23 to initiate an earnings review hearing. (Code 1933, § 93-307.1, enacted by Ga. L. 1972, p. 137, § 1; Ga. L. 1976, p. 419, § 1; Ga. L. 2002, p. 475, § 2.)

The 2002 amendment, effective April 25, 2002, added subsection (e).

Cross references. — Authority of General Assembly regarding regulation of public utility rates, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Prohibition against gratuities, Ga. Const. 1983, Art. III, Sec. VI, Para. VI.

Editor's notes. — Ga. L. 2002, p. 475, § 1,

not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Natural Gas Consumers' Relief Act.'"

Law reviews. — For note on the 2002 enactment of this chapter, see 19 Ga. St. U.L. Rev. 285 (2002).

JUDICIAL DECISIONS

Effect of 1976 amendment to section. — The 1976 amendment to former Code 1933, § 93-307.1 (see O.C.G.A. § 46-2-25), which added subsection (d), was a recognition by the legislature that section prior to amendment did not prohibit the effectuating of

rates according to the date of billing, which would therefore cover some electricity used prior to the date of the effectuating order. *Moore v. Georgia Pub. Serv. Comm'n*, 242 Ga. 182, 249 S.E.2d 549 (1978).

Entitlement to lower rate must be shown

to challenge increase on constitutional grounds. — Utility customers must show they have a legal entitlement to or a vested right in the utility rates being charged before any proposed increase, before they can claim any property rights protected by the United States Constitution. *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975).

Utility customers have no vested rights in fixed utility rates. *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975).

Utility customers have no property interest in rate increases. — Utility customers have no sufficient property interest in given utility rate increase to invoke procedural protections of due process clause of U.S. Const., Amend. 14. *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975).

Collective ratemaking activities carried on by "rate bureaus" immune from antitrust liability. — Collective ratemaking activities carried on by "rate bureaus" composed of motor common carriers operate in several states, although not compelled by the states involved, "clearly articulated state policy" and thus were immune from antitrust liability. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985).

Recovery of costs of demand-side programs. — The commission had authority under O.C.G.A. § 46-3A-9 to allow a utility to recover the costs of demand-side energy conservation programs and interruptible service credits through riders or surcharges outside of a general rate case and the test year statute. *Georgia Power Co. v. Georgia Indus. Group*, 214 Ga. App. 196, 447 S.E.2d 118 (1994).

Order addressing disposition of overearnings authorized. — Neither the Public Service Commission's determination that Tier 2 local exchange companies' return on equity earnings exceeded that authorized, nor its order for the application of over-earnings to reduce intrastate access rates violated either subsection (d) of O.C.G.A. § 46-2-25, which prohibits rate-making orders with retroactive effect, or O.C.G.A. § 46-5-166(f)(2), regarding adjustments to intrastate access rates. *Georgia Pub. Serv. Comm'n v. ALLTEL Ga. Communications Corp.*, 244 Ga. App. 645, 536 S.E.2d 542 (2000).

What constitutes a rate case. — A hearing before the commission to consider a utility's proposed alternate rate plan that did not recommend or request any rate changes for customers did not constitute a rate case requiring a full hearing. *Georgia Public Serv. Comm'n v. Campaign for a Prosperous Ga.*, 229 Ga. App. 28, 492 S.E.2d 916 (1997).

Sufficiency of findings of fact. — Where the Public Service Commission granted a rate increase, but disallowed some of the utility company's costs in calculating the rate base for a fair increase because it concluded that some of the costs were the result of the company's imprudent management of the project, the agency's decision was within its authority, and was supported by the facts. *Georgia Power Co. v. Georgia Pub. Serv. Comm'n*, 196 Ga. App. 572, 396 S.E.2d 562 (1990), cert. denied, 196 Ga. App. 908, 396 S.E.2d 562 (1990).

Cited in *Georgia Power Co. v. Georgia Pub. Serv. Comm'n*, 231 Ga. 339, 201 S.E.2d 423 (1973); *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975); *Bryan v. Georgia Pub. Serv. Comm'n*, 238 Ga. 572, 234 S.E.2d 784 (1977).

OPINIONS OF THE ATTORNEY GENERAL

Companies within scope of section. — Common carriers and transportation companies as well as power utilities are covered by former Code 1933, § 93-307.1 (see O.C.G.A. § 46-2-25). 1972 Op. Att'y Gen. No. 72-34.

Limitation on suspension of schedule by commission. — Commission may not suspend schedule beyond five months, unless a utility by its own action manifests an intent to

withdraw or extend the effective date of a scheduled increase. 1973 Op. Att'y Gen. No. 73-70.

Section is exclusive method for suspending tariff revision implementation. — Former Code 1933, § 93-307.1 (see O.C.G.A. § 46-2-25) was exclusive method by which commission may suspend implementation of tariff revision. 1973 Op. Att'y Gen. No. 73-6.

Commission's responsibility not altered by

conditional approval of tariff amendment.

— Conditional approval by the commission of tariff amendment during 30-day period provided by former Code 1933, § 93-307.1 (see O.C.G.A § 46-2-25) did not alter substantive responsibility and authority of the commission. 1973 Op. Att’y Gen. No. 73-6.

Implemented tariff amendment not to be suspended during subsequent examination.

— A tariff amendment which has been implemented by a utility, either by virtue of the expiration of the 30-day period without commission action or by virtue of such conditional approval by the commission during that period, may not be later suspended by the commission during subsequent examination pending a final determination by the commission. 1973 Op. Att’y Gen. No. 73-6.

Later examination possible even after decision not to suspend tariff revision.

— If the commission in the exercise of its discretion determines that a tariff revision should not be suspended under former Code 1933, § 93-307.1 (see O.C.G.A § 46-2-25), the commission was not foreclosed from later examining the tariff provision, on its own initiative or upon the filing of a complaint. 1973 Op. Att’y Gen. No. 73-6.

Terminating utility service to persons outside municipality.

— A municipality which provides utility services to persons located outside the limits of the municipality may terminate such utility services in accordance with the provisions of Article 2 of the UCC. 1987 Op. Att’y Gen. No. U87-27.

RESEARCH REFERENCES

C.J.S. — 73B C.J.S., Public Utilities, §§ 15, 18-22, 45-49, 53-55.

ALR. — Power of federal government over intrastate rates, 14 ALR 454; 22 ALR 1100.

Power of Public Service Commission to increase franchise rates, 28 ALR 587; 29 ALR 356.

Validity, construction, and effect of provisions for the appropriation of excess income of public utility, 33 ALR 488.

Service contract by public utility in consideration of conveyance of property by individual or private corporations as affected by public utility acts, 41 ALR 257.

Power of state or municipality to fix minimum public utility rates, 68 ALR 1002.

Profit factor in determining rates for municipally owned or operated public utility, 90 ALR 700.

Allowance in fixing rates of public utility for depletion or amortization in respect of natural resources, 91 ALR 1413.

Right of customers of public utility with respect to fund representing a refund from another supplying utility upon reduction of latter’s rates, 18 ALR2d 1343.

Variations of utility rates based on flat and meter rates, 40 ALR2d 1331.

Validity of “fuel adjustment” or similar clauses authorizing electric utility to pass on increased cost of fuel to its customers, 83 ALR3d 933.

Advertising or promotional expenditures of public utility as part of operating expenses for ratemaking purposes, 83 ALR3d 963.

Public utility’s right to recover cost of nuclear power plants abandoned before completion, 83 ALR4th 183.

46-2-25.1. County-wide local calling; modification of existing rate schedules; plans for implementing service; methods of funding; rate-making power of commission not affected.

(a) Except as provided in subsection (b) of this Code section, on and after July 1, 1990, the commission shall not approve any rate schedule which authorizes a long-distance charge for calls between two telephones within the same county. Where two or more telephone companies operate in the same county, each company shall provide county-wide local calling to and from telephones within the area served by the other company or companies

in the county. Rate schedules approved prior to July 1, 1990, shall be amended to comply with this Code section by not later than July 1, 1991.

(b) All rate schedules approved pursuant to this Code section may be modified at the discretion of the commission upon a good and sufficient showing of geographic, economic, or technological infeasibility by a telephone company.

(c) All rate schedules approved pursuant to this Code section shall take into account the following:

(1) The reasonable cost of providing such service to customers of the telephone company throughout the entire service area of such telephone company and the increased value resulting from such expanded calling areas;

(2) The average annual contributions made by such telephone company to the intra-LATA toll pool if such pool exists; and

(3) The reasonable rate of return on investment authorized in the rate schedule approved by the commission for such telephone company.

(d) The commission shall, on or before December 31, 1990, implement a plan whereby all telephone companies subject to its jurisdiction will provide to each telephone subscriber, in addition to its present service arrangements and the intracounty service mandated under the provisions of this Code section, expanded community of interest toll free calling beyond county boundary lines and/or a reduction in intra-LATA toll rates to a level comparable to present inter-LATA toll rates.

(e) Any plan to implement county-wide local calling shall be subject to the approval of the commission. In developing a plan, the commission shall require telephone companies to enter into negotiations to provide for county-wide local calling throughout their service areas. If the companies are unable to reach an agreement within a time frame consistent with the requirements of this Code section and the instructions of the commission, the commission may impose its own plan. The commission shall have the authority to determine the method of funding this service. In determining the method of funding this service, the commission shall first utilize any available earnings of the telephone companies in excess of those authorized in their respective tariffs; provided, however, that the commission shall not mandate any plan that requires the transfer of funds to implement county-wide local calling from one telephone company to another unless or until all other remedies are exhausted. Any telephone company seeking to recover any portion of its expenses or lost toll revenues resulting from the implementation of such county-wide local calling plan shall demonstrate its financial hardship to the commission before such recovery shall be allowed. It shall be within the discretion of the commission to determine the methodology and source of recovery for any such affected telephone

company. Such methodology and source may include, but not be limited to, increases in the affected telephone company's rates and charges, sharing of lost revenues and increased expenses by any other telephone company included in the plan under review, and any other methodology which has as its goal the maintenance of reasonable telephone rates for all subscribers in the state.

(f) The commission shall be authorized to consider and adopt alternative forms of regulation for telephone companies which may include, but will not be limited to, establishing plans which require the sharing with its subscribers of telephone company earnings above preestablished levels or regulating the maximum prices of basic local exchange services for which there are no readily available substitutes. In determining what actions, if any, are to be taken under this subsection, the commission shall consider the factors contained in subsection (c) of Code Section 46-2-23.

(g) Nothing in this Code section shall be interpreted as amending, modifying, or repealing Code Section 46-2-23, relating to the rate-making power of the commission generally and special provisions concerning telecommunications companies. (Code 1981, § 46-2-25.1, enacted by Ga. L. 1990, p. 1672, § 1.)

Code Commission notes. — Pursuant to Code Section § 28-9-5, in 1991, "Code section" was substituted for "Code Section" near the beginning of subsection (g).

Law reviews. — For note on 1990 enactment of this Code section, see 7 Ga. St. U.L. Rev. 352 (1990).

JUDICIAL DECISIONS

Violations of O.C.G.A. § 46-2-25.1 or O.C.G.A. § 46-2-25.2 did not impose any duties or obligations upon telecommunication providers, a violation of which would

give rise to a cause of action under O.C.G.A. § 46-2-90. *Lang v. Standard Tel. Co.*, 243 Ga. App. 301, 533 S.E.2d 162 (2000).

46-2-25.2. Sixteen-mile toll-free telephone calling; modification of rate schedules; recovery of expenses or lost revenues by telephone companies; rate-making power of Public Service Commission not affected.

(a) It is the goal of this Code section to provide for toll-free calling between two telephones where the central offices serving such telephones are within 16 miles of each other.

(b) Except as provided in subsection (e) of this Code section, on and after July 1, 1992, the Public Service Commission shall not approve any new rate schedule which authorizes a long-distance charge for calls between two telephones where the central offices serving such telephones are within 16 miles of each other.

(c) Except as provided in subsection (e) of this Code section, on and after July 1, 1992, rate schedules approved by the Public Service Commission prior to July 1, 1992, shall be amended so as to reduce by one-half the long-distance charge for calls between two telephones where the central offices serving such telephones are within 16 miles of each other.

(d) On or before July 1, 1993, the Public Service Commission shall conduct hearings and accept evidence and upon consideration of such evidence shall determine any further reductions in long-distance charges for calls between two telephones where the central offices serving such telephones are within 16 miles of each other. Such determination shall consider the availability of funds and other revenue sources to affected companies to offset the costs associated with such further reductions.

(e) All rate schedules approved pursuant to this Code section may be modified at the discretion of the Public Service Commission upon a good and sufficient showing of geographic, economic, or technological infeasibility by a telephone company.

(f) All rate schedules approved pursuant to this Code section shall take into account the following:

(1) The reasonable cost of providing such service to customers of the telephone company throughout the entire service area of such telephone company and the increased value resulting from such expanded calling areas; and

(2) The reasonable rate of return on investment authorized in the rate schedule approved by the Public Service Commission for such telephone company.

(g) Any telephone company seeking to recover any portion of its expenses or lost toll revenues resulting from the implementation of the 16 mile toll free calling plan contained in this Code section shall demonstrate its financial hardship to the Public Service Commission before such recovery shall be allowed. It shall be within the discretion of the Public Service Commission to determine the methodology and source of recovery for any such affected telephone company. In determining the method of offsetting the costs associated with the 16 mile plan, the Public Service Commission shall first utilize any available earnings at the telephone companies seeking assistance in excess of those authorized in their respective tariffs. Such methodology and source for offsetting costs shall include but not be limited to recovery from the Universal Service Fund as permitted under Code Section 50-5-200.

(h) Nothing in this Code section shall be interpreted as amending, modifying, or repealing Code Section 46-2-23, relating to the rate-making power of the Public Service Commission generally and special provisions concerning telecommunications companies. (Code 1981, § 46-2-25.2, enacted by Ga. L. 1992, p. 480, § 2; Ga. L. 2004, p. 631, § 46.)

The 2004 amendment, effective May 13, 2004, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (a).

JUDICIAL DECISIONS

Violations of O.C.G.A. § 46-2-25.1 or O.C.G.A. § 46-2-25.2 did not impose any duties or obligations upon telecommunication providers, a violation of which would give rise to a cause of action under O.C.G.A. § 46-2-90. *Lang v. Standard Tel. Co.*, 243 Ga. App. 301, 533 S.E.2d 162 (2000).

46-2-25.3. Toll-free calls within 22 miles of exchange; hearings; “net gain” defined.

(a) On and after June 1, 1998, there shall be toll-free calling between two telephones within a 22 mile radius of an exchange serving such telephones as such 22 mile calling areas are designated on maps on file with the commission in any local exchange as provided in subsection (b) or (c) of this Code section; provided, however, that the provisions of this Code section shall not apply to a subscriber who has elected an optional plan. Such calls made in the 22 mile radius shall be considered local calls. Nothing in this subsection shall preclude the offer of optional rate plans.

(b)(1) For each telephone company which has not elected to have its rates, terms, and conditions for services determined pursuant to the alternative regulation provided for in Article 4 of Chapter 5 of this title, the Public Service Commission may conduct hearings and accept evidence and, upon consideration of such evidence, shall determine if any telephone company should be authorized to increase its rates for basic exchange service to cover the reasonable costs of providing such toll-free service to customers of the telephone company throughout the 22 mile calling areas and to continue a reasonable rate of return on investment authorized in the rate schedule previously approved by the Public Service Commission for such telephone company. Such determination shall consider the availability of funds and other revenue sources to affected companies to offset the costs associated with such toll-free calling areas. It shall be within the discretion of the Public Service Commission to determine the methodology and source of recovery for any such affected telephone company. In determining the method of offsetting the costs associated with the 22 mile plan, the Public Service Commission shall first utilize any available earnings at the telephone companies seeking assistance in excess of those authorized in their respective tariffs. The commission shall be authorized to approve any increase in rates which the commission determines to be necessary to implement and accomplish the toll-free calling requirements of this Code section.

(2) If the rate of increase determined pursuant to paragraph (1) of this subsection does not exceed \$2.00 or 25 percent of the basic service rate then in effect, the commission shall require the concurrent imple-

mentation of a 22 mile toll-free expanded calling area and the increase in basic local exchange service rates for that exchange, and the local exchange company shall be permitted to increase the basic local exchange service rates notwithstanding any provision of Chapter 5 of this title to the contrary.

(3) If the rate of increase determined pursuant to paragraph (1) of this subsection exceeds \$2.00 or 25 percent of the basic service rate then in effect, the commission shall conduct balloting of the subscribers in each local exchange proposed to receive the 22 mile toll-free expanded calling area service. If a majority of those subscribers who return ballots is in favor of both the service and the requisite increase in basic local exchange service rates, the commission shall require the concurrent implementation of a 22 mile toll-free expanded calling area and the increase in basic local exchange service rates for that exchange, and the local exchange company shall be permitted to increase the basic local exchange service rates notwithstanding any provision of Chapter 5 of this title to the contrary.

(c)(1) For each telephone company which has elected to have its rates, terms, and conditions for services determined pursuant to the alternative regulation provided for in Article 4 of Chapter 5 of this title, the commission shall determine for each local exchange company the increase in rates for basic local exchange services necessary to recover fully all revenues which would be lost if a 22 mile toll-free expanded calling area were implemented in that local exchange.

(2) If the rate of increase determined pursuant to paragraph (1) of this subsection does not exceed \$2.00 or 25 percent of the basic service rate then in effect, the commission shall require the concurrent implementation of a 22 mile toll-free expanded calling area and the increase in basic local exchange service rates for that exchange, and the local exchange company shall be permitted to increase the basic local exchange service rates notwithstanding any provision of Chapter 5 of this title to the contrary.

(3) If the rate of increase determined pursuant to paragraph (1) of this subsection exceeds \$2.00 or 25 percent of the basic service rate then in effect, the commission shall conduct balloting of the subscribers in each local exchange proposed to receive the 22 mile toll-free expanded calling area service. If a majority of those subscribers who return ballots is in favor of both the service and the requisite increase in basic local exchange service rates, the commission shall require the concurrent implementation of a 22 mile toll-free expanded calling area and the increase in basic local exchange service rates for that exchange, and the local exchange company shall be permitted to increase the basic local exchange service rates notwithstanding any provision of Chapter 5 of this title to the contrary.

(d)(1) As used in this subsection, the term “net gain” means the net revenue impact from the implementation less costs incurred as a result of the implementation of a 22 mile toll-free calling area.

(2) The commission shall adopt a methodology to provide that any net gain which a telecommunications company experiences as a result of implementing this Code section be passed on to end user customers.

(e) Nothing in this Code section shall be interpreted as amending, modifying, or repealing Code Section 46-2-23, relating to the rate-making power of the Public Service Commission generally and special provisions concerning telecommunications companies, or Article 4 of Chapter 5 of this title, “The Telecommunications and Competition Development Act of 1995.” (Code 1981, § 46-2-25.3, enacted by Ga. L. 1997, p. 1056, § 1; Ga. L. 1998, p. 128, § 46.)

46-2-26. Restriction as to utilization of fuel-adjustment tariffs; procedure for rate change by utility based solely on change in fuel costs; extent of commission’s power over rate changes; disclosure requirements for utilities seeking rate change.

(a) As used in this Code section, the term:

(1) “Fuel costs” of a utility company means the cost of fuel as defined in the utility company’s tariffs in effect on July 1, 1979, as such tariffs may be changed from time to time by order of the commission as provided by law.

(2) “Utility” means any retail supplier of electricity subject to the rate-making jurisdiction of the commission.

(b) No utility regulated by the commission shall automatically increase any customer’s billing for intrastate utility services by reason of application of any fuel adjustment tariff. Rate changes based solely on increases or decreases in the cost of fuel may be determined as set forth in this Code section. Code Section 46-2-25 shall not apply to proceedings conducted pursuant to this Code section.

(c) On or before May 15, 1979, each utility shall file with the commission an estimate of fuel costs and an estimate of retail sales for the three calendar months beginning on July 1, 1979, and proposed base rate tariffs to recover those costs. Thereafter, a utility may change its base rates solely because of increased or decreased fuel costs only after filing with the commission an estimate of its fuel costs and retail sales for the next three consecutive calendar months and proposed base rates to recover those costs, adjusted as required by subsection (g) of this Code section.

(d) Not less than ten days after any such filings or after a commission show-cause order concerning such base rates, the commission shall conduct

a public hearing on the information so filed for the purpose of determining its accuracy. The utility's testimony shall be under oath and shall, with any corrections thereto, constitute the utility's affirmative case. At any hearing conducted pursuant to this Code section, the burden of proof to show that an increased rate, based on fluctuations in fuel costs, is just and reasonable shall be upon the utility. Formal intervention by customers of the utility shall be permitted. The staff of the commission and formal intervenors shall have the right to examine all utility records used in the preparation of the testimony and exhibits of the utility, to cross-examine utility witnesses, and to present rebuttal testimony, subject to cross-examination by all parties.

(e) Following such hearing, the commission shall issue an order stating the base rates to be used by the utility during the next three consecutive calendar months, or until changed as provided in this Code section. Should the commission fail or refuse to issue such order by the ninetieth day after the utility's filing, the base rates proposed by the utility shall thereupon be deemed adopted by operation of law.

(f) Each utility shall compute, record, and report to the commission monthly the most current data available showing the monthly and accumulated overrecovery or underrecovery of actual fuel costs resulting from application of its base rates.

(g) Each base rate amendment shall include an adjustment based on actual expense to date in order that the accumulated retail fuel costs of the utility shall equal, as nearly as possible, the revenues recovered pursuant to the fuel recovery allowance contained in its base rates. The resulting adjustment in the charge, if any, shall be made to the nearest 0.0001¢ per kilowatt hour.

(h) The commission shall disallow and make appropriate adjustment for any reported fuel cost that is the result of illegal or clearly imprudent conduct on the part of the utility.

(i) All commission orders issued pursuant to this Code section shall contain the commission's findings of fact and conclusions of law upon which the commission's action is based. Such order shall be deemed a final order subject to judicial review under Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(j) The commission shall not prohibit or limit the operation of a rate schedule or other tariff of a utility to the extent that it permits rate increases or decreases to adjust for increased or decreased purchased power costs, where such increased or decreased purchased power costs shall have become effective under the procedures of a federal regulatory agency or under a contract approved by a federal regulatory agency. Any subsequent refunds received by any such utility with respect to any such increased purchased power costs which become effective under procedures of a

federal regulatory agency, or otherwise, shall be refunded by the utility to its customers in the manner directed by the commission.

(k) In filing any estimate of fuel costs under subsection (c) of this Code section, each utility shall disclose the name and address of each person from whom the utility expects to purchase fuel or the transportation of fuel during the period covered by such estimate. Each such filing shall also disclose, when applicable, any financial interest the utility has in any firm or corporation expected to supply or transport fuel to the utility during the period covered by the estimate. It shall be the duty of the commission to make public at each public hearing held pursuant to subsection (d) of this Code section any information disclosed by a utility pursuant to the requirements of this subsection. It shall constitute a financial interest within the meaning of this subsection:

(1) For any member of the board of directors of the utility to be a member of the board of directors of a corporation supplying or transporting fuel to the utility;

(2) For any member of the board of directors of the utility to be the proprietor of or a partner in any business supplying or transporting fuel to the utility; or

(3) For any member of the board of directors of the utility, or for the utility itself, to own 10 percent or more of the stock of any corporation supplying or transporting fuel to the utility. (Code 1933, § 93-307.2, enacted by Ga. L. 1979, p. 1312, § 1; Ga. L. 1984, p. 22, § 46; Ga. L. 2002, p. 475, § 3.)

The 2002 amendment, effective April 25, 2002, substituted “ninetieth day” for “forty fifth day” in the last sentence of subsection (e).

Editor’s notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, pro-

vides that: “This Act shall be known and may be cited as the ‘Natural Gas Consumers’ Relief Act.’”

Law reviews. — For note on the 2002 enactment of this chapter, see 19 Ga. St. U.L. Rev. 285 (2002).

JUDICIAL DECISIONS

Cited in National Council on Comp. Ins. v. Caldwell, 154 Ga. App. 528, 268 S.E.2d 793 (1980).

RESEARCH REFERENCES

ALR. — Validity of service charge for gas meter, 20 ALR 225.

Allowance in fixing rates of public utility for depletion or amortization in respect of natural resources, 91 ALR 1413.

Public utility’s right to recover cost of nuclear power plants abandoned before completion, 83 ALR4th 183.

46-2-26.1. Accounting methods to be used by electric utilities in rate-making proceedings.

(a) The accounting treatments specified in this Code section shall apply in any proceeding before the commission to determine the rates to be charged by an electric utility.

(b) In any proceeding to determine the rates to be charged by an electric utility, the electric utility shall file jurisdictionally allocated cost of service data on the basis of a test period, and the commission shall utilize a test period, consisting of actual data for the most recent 12 month period for which data are available, fully adjusted separately to reflect estimated operations during the 12 months following the utility's proposed effective date of the rates. After the initial filing and until new rates go into effect, the utility shall file actual cost of service data as they become available for each month following the actual data which were filed. The utility shall have the burden of explaining and supporting the reasonableness of all estimates and adjustments contained in its cost of service data.

(c) In any case after March 2, 1981, in which an electric utility transfers partial or total ownership of any electric plant, the electric utility shall return to its ratepayers, in such manner as the commission may prescribe, the ratepayers' cash contribution to the cost of construction, plus the income taxes paid, accrued, and collected by the electric utility in respect thereof, and a portion of the profit, if any, on such transfer.

(1) The ratepayers' contribution to the cost of construction shall be determined by first multiplying the amount of construction and preconstruction expenditures included in the rate base by the authorized return allowed by the commission for the electric utility on the jurisdictional rate base during the period or periods such expenditures were included in the rate base, and then subtracting therefrom any carrying costs capitalized in respect of such construction and preconstruction expenditures included in the rate base. In the event an electric utility transfers partial or total ownership of any electric plant after it has commenced commercial operation, the ratepayers' contribution to the cost of construction shall be reduced in proportion to the remaining life of the electric plant.

(2) The profit, if any, on such transfer shall be allocated between the electric utility and its ratepayers in proportion to their respective contributions to the cost of construction. For the purposes of this calculation, the ratepayers' contribution shall be determined as provided by paragraph (1) of this subsection. The electric utility's contribution shall be the cost, including carrying costs, of the transferred electric plant as recorded on the books and records of the electric utility. The amount of profit, if any, shall be determined by deducting the sum of the ratepayers' and the electric utility's contributions to the cost of construc-

tion from the gross proceeds of the transfer. (Code 1933, § 93-307.3, enacted by Ga. L. 1981, p. 121, § 5.)

JUDICIAL DECISIONS

Recovery of costs of demand-side programs. — The commission had authority under O.C.G.A. § 46-3A-9 to allow a utility to recover the costs of demand-side energy conservation programs and interruptible service credits through riders or surcharges outside of a general rate case and the test year statute. *Georgia Power Co. v. Georgia Indus. Group*, 214 Ga. App. 196, 447 S.E.2d 118 (1994).

Test period. — The commission was not required to comply with the test period requirements of O.C.G.A. § 46-2-26.1 at a hearing to consider a utility's proposed alternate rate plan that did not recommend or request any rate changes for customers. *Georgia Public Serv. Comm'n v. Campaign for a Prosperous Ga.*, 229 Ga. App. 28, 492 S.E.2d 916 (1997).

RESEARCH REFERENCES

ALR. — Amount paid by public utility to affiliate for goods or services as includable in utility's rate base and operating expenses in rate proceeding, 16 ALR4th 454.

Public utility's right to recover cost of nuclear power plants abandoned before completion, 83 ALR4th 183.

46-2-26.2. Tax accounting by utilities in rate-making proceedings.

For purposes of determining a utility's cost of service in rate-making proceedings, the income tax expense portion shall be calculated on the basis of net income before income taxes. Any difference between income based on the utility's accounting records and income determined in accordance with United States Internal Revenue Service laws and regulations will be accounted for as required by generally accepted accounting principles governing all businesses. (Code 1933, § 93-307.4, enacted by Ga. L. 1981, p. 121, § 5.)

46-2-26.3. Recovery of costs of conversion from oil-burning to coal-burning generating facility; filing of request; public hearing; determination of rate; adjustments.

(a) A utility regulated by the Public Service Commission which has 25 percent or more of its total generating capacity as oil-fired generation and operates any electric generating facility which was in the process of being converted on January 1, 1982, and which will be converted and in commercial operation as a coal-fired facility on or before December 31, 1982, after conversion from oil to coal-fired operation may file with the commission an application to determine the appropriate rate to recover the cost of conversion and to demonstrate the fuel cost savings resulting from said conversion.

(b) For the purposes of this Code section, the following words or terms shall have the following meanings:

- (1) "Coal" shall mean coal used as a primary energy source.
- (2) "Commission" shall mean the Georgia Public Service Commission.

(b)(3)(A) "Cost of conversion" shall mean costs as determined by the commission to be reasonable and necessary for the conversion of an oil-burning electric generating facility to the burning of coal. Such costs shall include, but not be limited to, engineering, administrative, and legal costs, the cost of environmental studies and control equipment, coal-handling and storage equipment, including rail facilities, equipment and facilities necessary to permit the combustion of coal, the cost of retrofitting or refurbishing boilers to permit the combustion of coal, the cost of on-site and off-site facilities for handling, storing, and disposing of wastes resulting from the combustion of coal, and the cost of all other facilities reasonable and necessary to allow the conversion of an oil-burning electric generating facility to burn coal. Such costs shall also include the reasonable cost of capital for such conversion and for carrying the cost of such conversion until such costs are recovered as provided in this Code section. In no case shall cost of conversion include any costs incurred pursuant to an expansion of an electric generating facility's generating capacity above the generating capacity of said facility that existed prior to the conversion from oil to coal.

(B) "Cost of conversion" shall not include the amount financed by the company through tax-exempt pollution control bonds, if any, of any portion of the project certified by the Environmental Protection Division of the Department of Natural Resources, or other agency vested with similar authority, to be a pollution control facility and therefore eligible for financing under Section 103 of the Internal Revenue Code and the regulations thereunder or other similar law or regulation now or hereafter adopted.

(4) "Fuel cost savings" shall mean the amount of fuel savings to be obtained by operating the facility converted from oil to coal-fired operation during the facility's first full 12 months of operation using coal as its primary fuel as compared to the operation of such facility on oil, had it been so operated, during the same 12 month period.

(5) "Utility" shall mean any retail supplier of electricity subject to the rate-making jurisdiction of the commission.

(c) Any utility meeting the qualifications under subsection (a) of this Code section may file with the commission a request to establish an appropriate adjustment in its rates and charges in order to recover the costs of conversion of an oil-burning generating facility to coal-fired operation as provided herein. After receipt of such filing, the commission shall hold a public hearing to determine the cost of conversion of the generating facility

and the fuel cost savings anticipated. Unless it is determined by the commission that the cost of conversion will be less than the projected fuel cost savings accruing to retail customers over the remaining life of the generating facility, no further action shall be taken by the commission. Upon making such determination that the fuel cost savings exceed the cost of conversion, the commission shall then determine the appropriate rate to recover the cost of conversion as provided in subsection (d) of this Code section.

(d) In determining the appropriate rate, the commission shall consider the cost of conversion, and an appropriate period of time, but not more than seven years, to amortize such cost. The appropriate rate shall be an amount which is not less than the amount necessary to amortize the cost of conversion, as herein defined over a period of not more than seven years on a per kilowatt-hour basis taking into consideration the estimated kilowatt hours to be generated for sale by the utility during the first full 12 months in operation of the facility. In determining the rate to recover the cost of conversion, the commission shall permit recovery by the utility of the cost of conversion net of such federal, state, or local taxes based on revenue and income which may be imposed upon the utility for receipt of proceeds of the fuel-savings-allocation which cannot be reasonably avoided by the utility using due diligence. All revenues derived through the rate herein provided shall be applied solely to the cost of conversion of said facility.

(e) The utility shall compute, record, and report to the commission monthly the amount collected under any rate herein authorized and the amount applied to the cost of conversion and the balance remaining to be recovered.

(f) Upon recovery by the utility of the cost of conversion as herein provided, the utility shall no longer charge any rate authorized to recover the cost of conversion. Upon such termination, the utility shall file a report with the commission and the consumers' utility counsel within 30 days, sworn to by an officer of the utility, that its fuel-savings-allocation revenues are in compliance with all commission orders issued pursuant to this Code section. In the event such revenue is lesser or greater than the utility's cost of conversion, the commission shall make such determinations and issue such orders as are necessary to result in the full recovery, but no more, of the cost of conversion.

(g) In the event the utility should become entitled, by reason of the conversion, to any federal or state grant and receive same, the commission shall make such determinations and issue such orders as are necessary to reduce the amount of conversion costs which the utility would otherwise recover by means of the rate provided herein. If such grant is received after termination of such adjustment, the utility shall promptly report such receipt and the commission shall make such determinations and issue such orders as are necessary to result in the utility receiving no more than the cost of conversion after taking into account such grant.

(h) Once the utility charges the rate to recover the cost of conversion, the commission shall not recognize for rate-making purposes any costs of conversion which are recovered by the utility through the rate provided herein.

(i) At any hearing or any proceeding under this Code section formal intervention by customers of the utility shall be permitted. All commission orders issued pursuant to this Code section shall be rendered within 180 days from the date of any filing or the institution of any proceeding hereunder and shall contain, unless waived by all parties, the commission's findings of fact and conclusions of law upon which the commission's action is based. Such order shall be deemed a final order subject to judicial review under Chapter 13 of Title 50, known as the "Georgia Administrative Procedure Act."

(j) Any recovery of costs of conversion provided or allowed hereunder shall not affect the recovery of fuel costs provided in Code Section 46-2-26. (Code 1933, § 93-307.5, enacted by Ga. L. 1982, p. 412, § 1; Code 1981, § 46-2-26.3, enacted by Ga. L. 1982, p. 412, § 2; Ga. L. 1983, p. 3, § 35; Ga. L. 1984, p. 22, § 46; Ga. L. 1987, p. 191, § 9; Ga. L. 1989, p. 14, § 46; Ga. L. 1992, p. 6, § 46.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, "consumers' utility counsel" was substituted for "Consumers' Utility Counsel" in subsection (f).

Editor's notes. — Ga. L. 1987, p. 191, § 10, not codified by the General Assembly, provides that this Act is applicable to taxable years ending on or after March 11, 1987, and that a taxpayer with a taxable year ending on or after January 1, 1987, and before March 11, 1987, may elect to have the provisions of that Act apply.

Ga. L. 1987, p. 191, § 10, not codified by

the General Assembly, also provided that tax, penalty, and interest liabilities and refund eligibility for prior taxable years shall not be affected by that Act.

Ga. L. 1987, p. 191, § 10, not codified by the General Assembly, also provided that provisions of the federal Tax Reform Act of 1986 and of the Internal Revenue Code of 1986 which as of January 1, 1987, were not yet effective become effective for purposes of Georgia taxation on the same dates as they become effective for federal purposes.

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 46-2-26.3 is not unconstitutional as a special law for which provision has been made by existing general law because O.C.G.A. § 46-2-23 does not divest the General Assembly of its power to regulate public utilities. *Lasseter v. Georgia Pub. Serv. Comm'n*, 253 Ga. 227, 319 S.E.2d 824 (1984).

O.C.G.A. § 46-2-26.3 does not create an unconstitutional classification although its application is in fact limited to only one plant, because it is possible to conclude that O.C.G.A. § 46-2-26.3 does not confer a special benefit upon the utility. *Lasseter v. Georgia Pub. Serv. Comm'n*, 253 Ga. 227, 319 S.E.2d 824 (1984).

46-2-26.4. Accounting procedures in gas utility rate proceedings.

(a) The accounting treatments specified in this Code section shall apply in any proceeding before the commission to determine the rates to be charged by a gas utility.

(b) In any proceeding commenced after April 1, 2002, to determine the rates to be charged by a gas utility, the gas utility shall file jurisdictionally allocated cost of service data on the basis of a test period, and the commission shall utilize a test period, consisting of actual data for the most recent 12 month period for which data are available, fully adjusted separately to reflect estimated operations during the 12 months following the proposed effective date of the rates. After the initial filing, and until new rates go into effect, the utility shall file actual cost of service data as they become available for each month following the actual data which were filed. The utility shall have the burden of explaining and supporting the reasonableness of all estimates and adjustments contained in its cost of service data. (Code 1981, § 46-2-26.4, enacted by Ga. L. 1991, p. 1705, § 1; Ga. L. 2002, p. 475, § 4.)

The 2002 amendment, effective April 25, 2002, in the first sentence of subsection (b), inserted “commenced after April 1, 2002,” near the beginning and substituted “12 months following the” for “12 month period commencing five months from the” near the end.

Editor’s notes. — Ga. L. 2002, p. 475, § 1,

not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Natural Gas Consumers’ Relief Act.’”

Law reviews. — For note on the 2002 enactment of this chapter, see 19 Ga. St. U.L. Rev. 285 (2002).

JUDICIAL DECISIONS

Cited in Atlanta Gas Light Co. v. Georgia Pub. Serv. Comm’n, 212 Ga. App. 575, 442 S.E.2d 860 (1994).

46-2-26.5. Gas supply plans and adjustment factors; filings and hearing procedures; recovery of purchase gas cost.

(a) As used in this Code section, the term:

(1) “Adjustment factor” means a factor used pursuant to a purchased gas adjustment rate to recover purchased gas costs.

(2) “Commission” means the Georgia Public Service Commission.

(3) “Firm customer” means a customer who purchases gas from a gas utility on a firm basis which ordinarily is not subject to interruption or curtailment.

(4) “Gas supply plan” means the particular array of available gas supply, storage, and transportation options selected by a gas utility to supply the requirements of its firm customers.

(5) "Gas utility" means a gas utility subject to the jurisdiction of the commission.

(6) "Purchased gas adjustment rate" means a purchased gas adjustment rider or similar rate, provision, or clause in the tariff of a gas utility pursuant to which purchased gas costs are billed to the firm customers of the gas utility.

(7) "Purchased gas costs" means all costs incurred by a gas utility for the purpose of acquiring gas delivered to its system in order to supply its firm customers, including without limitation the costs incurred in purchasing gas from sellers; the costs incurred in transactions involving rights to buy and sell gas; the costs incurred in gathering gas for transportation to the gas utility; the costs incurred in transporting gas to the facilities of the gas utility; the costs incurred in acquiring and using gas storage service from others, including the costs of injecting and withdrawing gas from storage; and all charges, fees, and rates incurred in connection with such purchases, rights, gathering, storage, and transportation.

(8) "Recovery year" means the 12 calendar months commencing October 1, 1994, and ending September 30, 1995, and each succeeding 12 calendar month period thereafter.

(b) Commencing October 1, 1994, the requirements of this Code section shall apply to any purchased gas adjustment rate. The requirements of Code Section 46-2-25 shall not apply to filings made or proceedings conducted pursuant to this Code section.

(c) On or before August 1 of each year, each gas utility shall file with the commission its gas supply plan for the following recovery year. The gas utility shall include with such filing the adjustment factors it proposes for recovering its purchased gas costs during such following recovery year, together with the calculations that produced such factors.

(d) Not less than ten days after any such filing by a gas utility, the commission shall conduct a public hearing on such filing. The gas utility's testimony shall be under oath and shall, with any corrections thereto, constitute the gas utility's affirmative case. At any hearing conducted pursuant to this Code section, the burden of proof to show that the proposed gas supply plan and adjustment factors are appropriate shall be upon the gas utility.

(e) Following such a hearing, the commission shall issue an order approving the gas supply plan filed by the gas utility or adopting a gas supply plan for the gas utility that the commission deems appropriate. In addition, the commission in its order shall approve the adjustment factors proposed by the gas utility or adopt adjustment factors that the commission deems appropriate. The adjustment factors approved or adopted by the commis-

sion, or otherwise made effective under this Code section, shall be applied uniformly to all firm customers upon the effective date of such factors. The adjustment factors to be effective during the recovery year commencing October 1, 1994, shall be set at levels appropriate to account for underrecoveries or overrecoveries, if any, under the purchased gas adjustment rate of the gas utility in effect prior to October 1, 1994. The adjustment factors to be applicable during each recovery year commencing October 1, 1995, and thereafter, shall be set at levels appropriate to account for underrecoveries or overrecoveries during the preceding recovery year. Should the commission fail or refuse to issue an order by the forty-fifth day after the gas utility's filing which either approves the gas supply plan filed by the gas utility or adopts a different gas supply plan for the gas utility, the gas supply plan proposed by the gas utility shall thereupon be deemed approved by operation of law. Similarly, should the commission fail or refuse to issue an order by such date which either approves the adjustment factors proposed by the gas utility or adopts different adjustment factors for the gas utility, the adjustment factors proposed by the gas utility shall thereupon be deemed approved by operation of law.

(f) The provisions of law relating to parties, intervention, and discovery in proceedings before the commission shall apply with respect to proceedings under this Code section.

(g) Each gas utility shall file with the commission monthly its actual monthly purchased gas costs and accumulated purchased gas costs during the recovery year. The gas utility shall include in such filing information which demonstrates whether such purchased gas costs were incurred in accordance with a gas supply plan which had become effective in accordance with the provisions of this Code section.

(h) Each gas utility shall also file with the commission monthly the most current data available showing the monthly and accumulated overrecoveries or underrecoveries of actual purchased gas costs resulting from application of its purchased gas adjustment rate.

(i) At least every three calendar months, the gas utility shall file proposed revisions to the adjustment factors based on actual unrecovered purchased gas costs in order that the revenues to be recovered pursuant to such rate during the remainder of the current recovery year shall equal, as nearly as possible, the gas utility's unrecovered purchased gas costs through the end of such recovery year. The revisions to the adjustment factors, if any, shall be made to the nearest 0.01¢ per therm. Unless the commission directs otherwise, such revised adjustment factors shall become effective on the first day of the first calendar month that begins at least 15 days after the date of such filing.

(j) All commission orders issued pursuant to this Code section shall contain the commission's findings of fact and conclusions of law upon

which the commission's action is based. Any such order shall be deemed a final order subject to judicial review under Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(k) The commission shall not prohibit or limit the operation of a purchased gas adjustment rate of a gas utility to the extent that the adjustment permits increases or decreases to adjust for increased or decreased purchased gas costs when such increased or decreased purchased gas costs shall have become effective under the procedures of a federal regulatory agency or under a contract approved by a federal regulatory agency. Any subsequent refunds received by a gas utility with respect to any such increased purchased gas costs which become effective under procedures of a federal regulatory agency, or otherwise, shall be treated by the gas utility in such manner as the commission may direct.

(l) Any purchased gas costs which are incurred by a gas utility in accordance with a gas supply plan which was in effect pursuant to the provisions of this Code section at the time such costs were incurred may be recovered by the gas utility under its purchased gas adjustment rate and shall not be disallowed retroactively by the commission nor by any court which reviews the action of the commission in the absence of fraud or willful misconduct on the part of the gas utility; provided, however, that the commission may disallow and make appropriate adjustments for any purchased gas costs that were not incurred in accordance with such a gas supply plan if the same resulted in higher purchased gas costs and were the result of clearly imprudent conduct on the part of the gas utility. The provisions of this Code section shall not prohibit the commission from authorizing a gas utility to recover under a purchased gas adjustment rate costs or amounts in addition to purchased gas costs, nor shall the provisions of this Code section prohibit the commission from removing from purchased gas costs those costs incurred by a gas utility for the purpose of acquiring gas to supply customers who are not firm customers.

(m) After a gas supply plan has become effective under the provisions of this Code section as a result of a proceeding before the commission, the commission shall retain jurisdiction of the proceeding for the balance of the recovery year for the purposes set forth in this subsection. Upon the application of the affected gas utility or upon its own initiative, the commission may, after affording due notice and opportunity for hearing to the affected gas utility and the intervenors in the proceeding, amend the gas supply plan of the affected gas utility for the remainder of the recovery year. The amended gas supply plan shall become effective upon the date of the commission's order and shall not have retroactive effect. (Code 1981, § 46-2-26.5, enacted by Ga. L. 1994, p. 630, § 2.)

46-2-27. Notation on bill of charges for fuel adjustment, meter reading and consumption, and where rates charged may be obtained.

Upon the face or back of each periodic and terminal billing for retail consumption of electric, gas, and water services, there shall appear a conspicuous notation of charges for fuel adjustment and a notation of the meter reading upon which the billing was computed, including the previous reading and consumption. Where a customer is on a voluntary "budget bill" or "levelized bill" agreement, the actual consumption for any period of time may be omitted until the annual anniversary account billing. The rates on which the bill was computed shall be made readily available to the customer upon demand; and a notation of where the rates can be obtained shall appear on the face of the bill. (Code 1933, § 93-309.3, enacted by Ga. L. 1975, p. 574, § 1.)

RESEARCH REFERENCES

ALR. — When does statute of limitations commence to run against action to recover back overcharge for public utility service, 108 ALR 751.

Variations of utility rates based on flat and meter rates, 40 ALR2d 1331.

46-2-28. Procedure for issuance of stocks, bonds, notes, or other debt by companies under commission's jurisdiction.

(a) Each of the companies over which the commission has jurisdiction shall be required to furnish the commission a list of any stocks and bonds the issuance of which is contemplated.

(b) It shall be unlawful for any of such companies to issue stocks, bonds, notes, or other evidences of debt, payable more than 12 months after the date of issuance, except upon the approval of the commission, and then only when necessary and for such amount as may be reasonably required for the acquisition of property; the construction and equipment of power plants and carsheds; the completion, extension, or improvement of its facilities or properties; the improvement or maintenance of its service; the discharge or lawful refunding of its obligations; or other lawful corporate purposes falling within the spirit of this Code section.

(c) The decision of the commission shall be final as to the validity of the issuance of stocks, bonds, notes, or other evidences of debt by companies under the jurisdiction of the commission.

(d) Before issuing stocks, bonds, notes, or other evidence of debt, a company under the jurisdiction of the commission shall secure an order from the commission authorizing such issue, the amount thereof, and the purpose and use for which the issue is authorized. For the purpose of enabling it to determine whether such order should be issued, the commission shall make such inquiry or investigation, hold such hearings,

and examine such witnesses, books, papers, documents, or contracts as it may deem advisable or necessary.

(e) Notwithstanding any other provision of this Code section, a company under the jurisdiction of the commission may issue notes or other evidences of debt for proper and lawful corporate purposes, payable at periods of not more than 12 months from the date of issuance, without the consent of the commission, provided that no such notes or other evidences of debt shall, in whole or in part, directly or indirectly, be refunded by any issue of stocks, bonds, or other evidences of debt running for more than 12 months without the consent of the commission.

(f) Notwithstanding any other provision of this Code section, motor common carriers and motor contract carriers regulated under Chapter 7 of this title shall be exempt from the provisions of this Code section. (Ga. L. 1907, p. 72, § 8; Civil Code 1910, § 2665; Code 1933, § 93-414; Ga. L. 1986, p. 1518, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Commission hearing required for application for loan approval. — Public Service Commission is required to afford hearing on application for approval of a loan; such a proceeding is accurately characterized as one in which “the legal rights, duties, or privileges of a party are required by law to be

determined by an agency after an opportunity for hearing,” and is, therefore, a contested case within the meaning of the Georgia Administrative Procedure Act (see O.C.G.A. Ch. 13, T. 50). 1975 Op. Att’y Gen. No. 75-139.

46-2-29. Requirement of confidentiality of information obtained by commission member or employee in a proceeding under Code Section 46-2-28.

(a) No member or employee of the commission shall, except when legally called upon by a court of competent jurisdiction, disclose or impart to anyone any fact which was obtained in his official capacity from or through any proceeding filed with the commission under Code Section 46-2-28, provided that this Code section shall not apply to any fact or information which is obtained through public hearings or which is not confidential in nature.

(b) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1907, p. 72, § 8; Civil Code 1910, § 2665; Code 1933, § 93-319.)

46-2-30. Power of commission to make rules and regulations generally.

The commission shall have full power and authority to make rules and regulations to effectuate and implement all laws conferring powers and duties upon the commission. Any rule or regulation adopted by the

commission shall be transmitted to the chairman of the appropriate committees of the House of Representatives and the Senate for review by such committees and recommendations by such committees to the General Assembly for appropriate action. (Code 1933, § 93-308.1, enacted by Ga. L. 1975, p. 404, § 2.)

Cross references. — Provisions of Administrative Procedure Act pertaining specifically to commission, §§ 50-13-10, 50-13-17, 50-13-19.

RESEARCH REFERENCES

ALR. — Power of state to require interstate carrier to make track connections with other roads, 22 ALR 1078.
Incidental provision of utility services, by regulation by state regulatory authority, 85 ALR4th 894.
Public service commission's implied authority to order refund of public utility revenues, 41 ALR5th 783.

46-2-31. Annual report by commission to Governor.

It shall be the duty of the commission to make annual reports of its activities to the Governor and to recommend from time to time such legislation as it may deem advisable. (Ga. L. 1878-79, p. 125, § 14; Code 1882, § 719n; Ga. L. 1889, p. 133, § 1; Civil Code 1895, § 2201; Civil Code 1910, § 2644; Code 1933, § 93-318.)

46-2-32. Payment of fines into state treasury; cumulative nature of remedies provided by this title.

All fines recovered under this title shall be paid into the general fund of the state treasury, to be used for such purposes as the General Assembly may provide. The remedies provided in this title shall be regarded as cumulative of all other remedies given by law against railroad companies, and this title shall not be construed as repealing any statute giving such remedies. (Ga. L. 1878-79, p. 125, § 11; Code 1882, § 719k; Civil Code 1895, § 2198; Civil Code 1910, § 2641; Code 1933, § 93-418.)

RESEARCH REFERENCES

ALR. — Recovery of cumulative statutory penalties, 71 ALR2d 986.

ARTICLE 2A

UTILITY FINANCE SECTION

46-2-40. Creation of Utility Finance Section; composition of section.

There is established a Utility Finance Section of the commission staff, which section shall have the powers and duties specified in this article. The

section shall consist of a director, an assistant director, and such accountants, statisticians, experts, and clerical personnel as the commission may employ, as authorized by the General Assembly. (Code 1933, § 93-201a, enacted by Ga. L. 1981, p. 121, § 4.)

46-2-41. Appointment of director of Utility Finance Section; compensation; supervisory role of director of utilities; qualifications and responsibilities of director of section generally.

(a) On or before December 31, 1981, the commission by order shall employ an individual qualified by knowledge and experience to serve as director of the Utility Finance Section. The director shall be compensated in an amount determined by the commission. He shall serve at the pleasure of the commission and shall report to the director of utilities of the commission.

(b) The director of the Utility Finance Section must possess at least five years' experience in the field of public regulation of business, whether through employment with a state or federal agency, in industry, in education, or through the practice of law. This individual must have graduated from a four-year college with a major in either accounting, finance, business, or management or have graduated from a law school and been admitted to the State Bar of Georgia.

(c) The director shall be responsible for the:

(1) Preparation of the budget of the section for submittal to the director of utilities;

(2) Administration of the section;

(3) Supervision of the work of the section; and

(4) Presentation of the commission staff's position during electric utility rate proceedings. (Code 1933, § 93-202a, enacted by Ga. L. 1981, p. 121, § 4; Ga. L. 1982, p. 1174, §§ 1, 2.)

OPINIONS OF THE ATTORNEY GENERAL

Position created is unclassified. — The Georgia Public Service Commission positions of the director of utilities, the public information officer and the director and assistant director of the Utility Finance Section are, as a matter of law, unclassified positions. 1981 Op. Att'y Gen. No. 81-39.

46-2-42. Employment of assistant director of Utility Finance Section; employment of accountants, statisticians, experts, and clerical personnel; classification of employees.

(a) The director of the Utility Finance Section shall employ an assistant director who shall be employed at the pleasure of the commission and as provided by law.

(b) The director shall employ such accountants, statisticians, experts, and clerical personnel as are necessary for the effective performance of the duties of the section.

(c) With the concurrence of the state merit system compensation board, certain employees of the section may be included in the "unclassified service" in addition to those currently provided by paragraph (15) of Code Section 45-20-2. The state merit system regulations and restrictions concerning compensation and promotion shall not apply to such employees. (Code 1933, § 93-203a, enacted by Ga. L. 1981, p. 121, § 4.)

OPINIONS OF THE ATTORNEY GENERAL

Positions in unclassified service. — The Georgia Public Service Commission positions of the director of utilities, the public information officer and the director and assistant director of the Utility Finance Section are, as a matter of law, unclassified positions. 1981 Op. Att'y Gen. No. 81-39.

Accountant, statistician, expert, and clerical positions of Utilities Finance Section may be placed in unclassified service if State Personnel Board concurs. 1981 Op. Att'y Gen. No. 81-39.

46-2-43. Director, assistant director, or any other employee of Utility Finance Section prohibited from having any interest in or being employed by electric utilities.

During the period of his employment and for one year following the termination of his employment, neither the director of the Utility Finance Section, the assistant director of the section, nor any other employee of the section shall own any interest of any kind in or be retained or employed by any electric utility or own any controlling interest in or be retained or employed by any person who has a vested interest in the outcome of any proceeding in which the section participates. (Code 1933, § 93-204a, enacted by Ga. L. 1981, p. 121, § 4.)

Cross references. — Conflicts of interest of state officers and employees generally, § 45-10-20 et seq.

46-2-44. Duties of Utility Finance Section generally.

The duties of the Utility Finance Section shall include the following:

(1) Preparing a budget for the section for submission by the director of the section to the director of utilities to secure the necessary appropriations to finance the activities of the section;

(2) Investigating the rates and auditing the books and records of any electric utility other than transportation utilities, municipal electric systems, and electric membership corporations when so directed by the director of utilities;

(3) Appearing in any proceeding to determine rates of an electric utility. In such capacity, the section shall:

(A) Form an independent evaluation concerning whether the electric utility rates in question are just and reasonable;

(B) Present testimony by its employees or specially retained experts concerning the electric utility rates in question;

(C) Provide to the commission all technical assistance, data, and calculations concerning the electric utility rates in question, as the commission may require;

(D) Assist the commission in any judicial review of a commission determination of the rates of an electric utility; and

(E) When it will not interfere with the section's participation in utility rate proceedings, perform such other duties regarding any utility matter which the director of utilities may establish. (Code 1933, § 93-205a, enacted by Ga. L. 1981, p. 121, § 4.)

46-2-45. Relationship of Utility Finance Section to commission.

The Utility Finance Section shall have the following authority and relationship to the commission:

(1) The section shall be part of the commission staff; and

(2) The section shall be deemed a party to any proceeding to consider rates in which it participates, provided that it shall not have standing to appeal or contest the final order entered by the commission in such a proceeding. (Code 1933, § 93-206a, enacted by Ga. L. 1981, p. 121, § 4.)

ARTICLE 3

INVESTIGATIONS AND HEARINGS

Administrative rules and regulations. — Georgia, Rules of Georgia Public Service Practice and procedure, Official Compilation of Rules and Regulations of State of Commission, Chapter 515-2-1.

46-2-50. Conducting of hearings and investigations generally.

The commission shall conduct hearings and investigations in different parts of the state when, in the opinion of the commission, such hearings and investigations will best serve the interest and convenience of the public. (Ga. L. 1922, p. 143, § 3; Code 1933, § 93-502.)

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Carriers, § 593. **C.J.S.** — 13 C.J.S., Carriers, §§ 444, 465, 503, 577, 595.

46-2-51. Prescription by commission of rules of procedure and rules of evidence; promulgation of rules and regulations as to rehearing, reconsideration, and oral argument of orders.

The commission shall prescribe the rules of procedure and the rules for the taking of evidence in all matters that may come before it. In the investigation, preparation, and hearing of cases, the commission shall not be bound by the strict technical rules of pleading and evidence but may exercise such discretion as will facilitate its efforts to ascertain the facts bearing upon the right and justice of the matters before it. When deemed necessary, in all formal cases heard and determined, the commission shall render an opinion setting out the issues involved in the case and its decision, ruling, and findings thereon. The commission is authorized to provide by rule and regulation for the procedure to be observed in the rehearing, reconsideration, and oral argument of all orders entered by the commission. (Ga. L. 1922, p. 143, § 3; Code 1933, § 93-501; Ga. L. 1945, p. 356, § 2.)

Law reviews. — For comment on *Tamiami Trail Tours, Inc. v. Georgia Pub. Serv. Comm'n*, 213 Ga. 418, 99 S.E.2d 225 (1957), see 20 Ga. B.J. 247 (1957).

JUDICIAL DECISIONS

Public Service Commission may perform quasi-judicial functions as well as quasi-legislative functions. The distinction between the two types of functions has been deemed of importance because where a proceeding is judicial or quasi-judicial in nature, the parties whose rights are adjudicated are entitled to the protection afforded by judicial forms of procedure. *Tamiami Trail Tours, Inc. v. Georgia Pub. Serv. Comm'n*, 213 Ga. 418, 99 S.E.2d 225 (1957), commented on in 20 Ga. B.J. 247 (1957); *RTC Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 165 Ga. App. 539, 301 S.E.2d 896 (1983).

Due process rights inapplicable to hear-

ings on applications for certificates of public convenience. — A hearing on an application for a certificate of public convenience and necessity, whether granted or denied, is not a judicial or quasi-judicial proceeding to which due process rights applicable in such proceedings attach. *RTC Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 165 Ga. App. 539, 301 S.E.2d 896 (1983).

Administrative Procedure Act inapplicable to hearings on certificate of convenience and necessity. — The administrative procedure applicable on an application for, or a proceeding to amend, a motor carrier's certificate of convenience and necessity is not

that prescribed by the Georgia Administrative Procedure Act in view of Ga. L. 1975, p. 404, which made the Public Service Commission otherwise subject to the GAPCA except any rate, charge, classification, service hearing, procedure or matter which shall pertain to any motor contract carrier, motor common carrier, or railroad. The applicable procedure is that established by O.C.G.A. § 46-2-51. *RTC Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 165 Ga. App. 539, 301 S.E.2d 896 (1983).

Commission authorized to adopt rules of evidence and procedure. — Commission is authorized to adopt rules of evidence and procedure in carrying out its duties, and is not bound by strict rules of evidence in conducting its hearings. *Tamiami Trail Tours, Inc. v. Georgia Pub. Serv. Comm'n*, 213 Ga. 418, 99 S.E.2d 225 (1957), for comment, see 20 Ga. B.J. 247 (1957).

Discretion of commission to grant certificate applications. — Whether or not commission grants application for certificate is matter of discretion and not one of absolute right. *Tamiami Trail Tours, Inc. v. Georgia Pub. Serv. Comm'n*, 213 Ga. 418, 99 S.E.2d 225 (1957), for comment, see 20 Ga. B.J. 247 (1957).

Court cannot enjoin investigation of company under show cause order. — An order

requiring a power company to show cause why rates, if voluntarily made applicable to people in one city, should not be made effective throughout the territory served by the company is a rule nisi and the court cannot enjoin the commission from investigation of the company. *Georgia Pub. Serv. Comm'n v. Georgia Power Co.*, 172 Ga. 31, 157 S.E. 98 (1931).

Mere introduction of ex parte affidavits does not invalidate order of commission, upon a hearing on an application for a certificate of public convenience and necessity. *Tamiami Trail Tours, Inc. v. Georgia Pub. Serv. Comm'n*, 213 Ga. 418, 99 S.E.2d 225 (1957), for comment, see 20 Ga. B.J. 247 (1957).

Expert witness' qualifications. — In rate increase request hearings, where the power company failed to object to an expert witness' qualifications either before or during the witness's testimony, any objection it might have had was waived. *Georgia Power Co. v. Georgia Pub. Serv. Comm'n*, 196 Ga. App. 572, 396 S.E.2d 562 (1990), cert. denied, 196 Ga. App. 908, 396 S.E.2d 562 (1990).

Cited in *Coleman v. Drake*, 183 Ga. 682, 188 S.E. 897 (1936).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Carriers, §§ 608 et seq., 1144. 64 Am. Jur. 2d, Public Utilities, §§ 183, 190.

C.J.S. — 13 C.J.S., Carriers, §§ 433, 436, 437, 444, 465, 466, 503, 577, 579-584, 590.

ALR. — Representation of another before state public utilities or service commission as involving practice of law, 13 ALR3d 812.

46-2-52. Keeping of records of proceedings on formal investigations; transcribing of testimony.

A full and complete record as provided in paragraph (8) of subsection (a) of Code Section 50-13-13 shall be kept of all proceedings conducted before the commission on any formal investigation; and all testimony shall be transcribed by the official reporter appointed by the commission. (Ga. L. 1922, p. 143, § 4; Code 1933, § 93-503.)

46-2-53. Reports, rate schedules, orders, rules, or regulations of commission as admissible evidence in court proceedings.

The printed reports of the commission, published by its authority, shall be admissible as evidence in any court in this state without further proof. The schedules of rates made by the commission, and any order passed or rule or regulation prescribed by the commission, shall be admissible in evidence in any court in this state upon the certificate of the secretary of the commission. (Ga. L. 1907, p. 72, § 5; Civil Code 1910, § 2626; Ga. L. 1922, p. 143, § 1; Code 1933, § 93-504.)

JUDICIAL DECISIONS

Court of Appeals may not take judicial notice of rules and regulations of Public Service Commission. Atlanta Gas Light Co. v. Newman, 88 Ga. App. 252, 76 S.E.2d 536 (1953).

Cited in Wadley S. Ry. v. State, 137 Ga. 497, 73 S.E. 741 (1912); City of Atlanta v. Georgia Ry. & Power Co., 149 Ga. 411, 100 S.E. 442 (1919).

46-2-54. Power to issue subpoenas; payments to witnesses; failure or refusal to obey subpoenas.

(a) In making any examination for the purpose of obtaining information pursuant to this title, the commission shall have the power to issue subpoenas for the attendance of witnesses by such rules as it may prescribe.

(b) Witnesses shall receive for such attendance the same fees and mileage as prescribed by law in civil cases in the superior court. Such compensation shall be ordered paid by the Governor upon presentation of subpoenas and statements as to the number of days served and miles traveled. Such statements shall be sworn to by the witnesses before the clerk of the commission, who shall have the power to administer oaths.

(c) If any person willfully fails or refuses to obey such subpoena, it shall be the duty of the judge of the superior court of any county, upon application of the commission, to issue an attachment for such witness and compel him to attend the meeting of the commission and give his testimony upon such matters as shall be lawfully required by such commission. The court shall have power to punish for contempt as in other cases of refusal to obey the process and order of the court. (Ga. L. 1878-79, p. 125, § 15; Code 1882, § 7190; Civil Code 1895, § 2210; Civil Code 1910, § 2653; Ga. L. 1922, p. 143, § 5; Code 1933, § 93-505.)

RESEARCH REFERENCES

Am. Jur. 2d. — 64 Am. Jur. 2d, Public Utilities, §§ 146, 147, 152.

46-2-55. Compelling witnesses to testify before commission as to the giving or granting of rebates or as to discriminations in rates and charges by common carriers.

In investigating complaints of violations by common carriers of the laws prohibiting the giving or granting of rebates and prohibiting unjust discrimination in rates and charges, the commission may exercise the power and authority to compel the shipper or consignee, or any officer, agent, or employee of a common carrier to give evidence relating to such complaints. Before any such person shall be compelled to give evidence relating to such complaints, the commission shall make an order that such witness is required by the commission to testify and that he will be exempt thereafter from indictment or prosecution for any transaction about which he is compelled to testify. When such order is made, the witness shall be compelled to give evidence touching such complaints, and he shall be forever free from indictment or prosecution in any court touching the matters about which he is compelled to testify. (Ga. L. 1896, p. 57, § 1; Civil Code 1910, § 2636; Ga. L. 1922, p. 143, § 5; Code 1933, § 93-506.)

Cross references. — Prohibition against compelled self-incrimination, Ga. Const. 1983, Art. I, Sec. I, Para. XVI. General prohibition against unjust discrimination in freight-transportation rates by common carriers, § 46-9-52.

JUDICIAL DECISIONS

Cited in Jenkins v. State, 65 Ga. App. 16, 14 S.E.2d 594 (1941).

RESEARCH REFERENCES

ALR. — Constitutional provision against self-incrimination as applicable to questions asked or testimony given in proceeding before nonjudicial officer or body, 68 ALR 1503.

Testimony of incriminating character

which witness was compelled to give, by virtue of immunity statute or otherwise, as admissible in a prosecution of the witness for an offense subsequently committed, 157 ALR 428.

46-2-56. Compelling witnesses to testify against common carriers or any other person in court.

If a witness is exempted from indictment or prosecution as provided in Code Section 46-2-55, he may also be compelled to give evidence in any action or prosecution instituted in any of the courts of this state against any common carrier or against any other person on account of the transactions about which he is compelled to testify before the commission. (Ga. L. 1896, p. 57, § 2; Civil Code 1910, § 2637; Ga. L. 1922, p. 143, § 5; Code 1933, § 93-507.)

JUDICIAL DECISIONS

Cited in *Jenkins v. State*, 65 Ga. App. 16, 14 S.E.2d 594 (1941).

RESEARCH REFERENCES

ALR. — Constitutional provision against self-incrimination as applicable to questions asked or testimony given in proceeding before nonjudicial officer or body, 63 ALR 1503.

46-2-57. Obtaining of discovery by employees and agents of commission; petitions by commission for necessary orders, injunctions, and subpoenas; extension of suspension period by Superior Court of Fulton County; time of hearing of applications and petitions from commission.

(a) In any case pending before it, the commission, in addition to its now existing authority to do so, is authorized to issue an order permitting its employees and agents to take depositions and otherwise obtain discovery of any matter, not privileged, which is relevant to the subject matter involved in the investigation, proceeding, or petition before the commission, in the same manner prescribed in Chapter 11 of Title 9 for discovery in civil actions. In any case involving an application of a gas company to establish just and reasonable rates pursuant to Code Section 46-2-23.1 or 46-4-154, intervenors who are granted party status pursuant to Code Section 46-2-59, as well as the gas company subject to the particular proceeding, shall have all discovery rights available under Chapter 11 of Title 9.

(b) The commission, its agents and employees as directed by the commission, and intervenors and gas companies which are granted discovery rights under subsection (a) of this Code section are authorized to petition the Superior Court of Fulton County for all orders, injunctions, and subpoenas necessary to carry out the provisions of this Code section which would otherwise be authorized or necessary under Chapter 11 of Title 9; and the judges and clerks of the court are authorized to issue all such orders, injunctions, and subpoenas and to take all other actions necessary to carry out this Code section which would otherwise be authorized or necessary under Chapter 11 of Title 9.

(c) In addition to the sanctions which may be imposed under Code Section 9-11-37, the Superior Court of Fulton County is further authorized to extend the period of suspension of the operation of any new schedules and defer the use of such rates, charges, classifications, or service beyond the time authorized by Code Section 46-2-25, if the court, upon application of the commission, determines that the failure of any regulated utility to comply with a discovery request of the commission, its agents, or its employees is unreasonable and requires such extension. No such extension

of the period of suspension shall be considered by the court unless the utility has failed completely to respond to a valid deposition or discovery request.

(d) Any application or petition made by the commission, its agents, or its employees pursuant to this Code section shall be heard within 20 days of the filing of the application or petition, irrespective of whether any response to the application or petition has previously been made, and shall be disposed of promptly. (Ga. L. 1922, p. 145, § 5; Code 1933, § 93-508; Ga. L. 1979, p. 1084, § 1; Ga. L. 1997, p. 798, § 3.)

Law reviews. — For article commenting on the 1997 amendment of this section, see 14 Georgia St. U.L. Rev. 264 (1997).

46-2-58. Conducting of hearings by hearing officers.

(a) The commission shall employ one or more hearing officers to perform the duties set forth in this Code section. Hearing officers shall be persons qualified by knowledge and experience to conduct hearings on utility and transportation matters. In addition, the commission may employ part-time hearing officers, if necessary, to handle the caseload.

(b) In all utility proceedings commenced after July 1, 1981, any hearing may be conducted by a hearing officer, who shall have authority to:

- (1) Administer oaths and affirmations;
- (2) Sign and issue subpoenas for discovery or trial;
- (3) Rule upon offers of proof;
- (4) Regulate the course of the hearing, setting the time and place for continued hearings;
- (5) Permit persons to make limited appearances as provided in Code Section 46-2-59;
- (6) Take official notice of judicially recognizable facts;
- (7) Reprimand or exclude from the hearing any person for any indecorous or improper conduct committed at or during a hearing;
- (8) Exercise such other powers necessary for the efficient and expeditious conduct of the hearing, to the end that a complete and orderly record may be developed; and
- (9) Make written findings of fact based upon evidence in the record.

(c) The hearing officer or commission shall permit only the Commissioners, the hearing officer, the parties, or the attorneys of record of the Commissioners, hearing officers, or parties to examine or cross-examine witnesses, except with the consent of the witness.

(d) Within 30 days after the conclusion of a hearing, the hearing officer shall prepare and certify a record of the evidence to the commission. The hearing officer shall also transmit to the commission proposed written findings of fact based upon evidence in the record. A copy of the record and findings of fact shall be provided all parties of record by the hearing officer. The hearing officer may render an initial or recommended decision in uncontested cases, if directed to do so by the commission. Any such recommended decision shall also be served upon the parties of record, who shall be provided an opportunity to file with the commission its objections or comments. (Code 1933, § 93-501a, enacted by Ga. L. 1981, p. 121, § 6; Ga. L. 1981, p. 409, § 3.)

Cross references. — Procedure for contested cases in administrative proceedings generally, § 50-13-13.

46-2-59. Permissible parties in proceedings before commission; intervention in proceedings generally; limited appearances; procedure for granting leave to intervene.

(a) In all proceedings before the commission, the parties to such proceeding shall consist of the affected applicant, any person who is permitted to intervene as provided in this Code section, and the Utility Finance Section established pursuant to Article 2A of this chapter.

(b) Any person on whom a statute confers an unconditional right to intervene may intervene by filing a notice of intervention with the commission or hearing officer, as appropriate.

(c) Any other person desiring to intervene must file an application for leave to intervene within 30 days following the first published notice of the proceeding. Any such application shall be in writing, shall be verified either by the party intervening or by his attorney on information and belief, shall identify the party requesting the intervention, and shall set forth with particularity the facts pertaining to his interest and the grounds upon which his application for intervention are based. Such application shall be served on all other parties in the proceeding, including those who have previously applied for leave to intervene. No untimely application for leave to intervene shall be granted by the presiding authority except for good cause shown.

(d) Any party or person who has previously applied for leave to intervene in a proceeding in which leave to intervene is sought by another person may file a response to the application for leave to intervene within 15 days after the application is served.

(e) The commission or hearing officer shall permit only the following persons to intervene:

(1) A person upon whom a statute confers an unconditional right to intervene;

(2) A person who demonstrates a legal, property, or other interest in the proceeding. In determining whether to permit intervention, the hearing officer may consider whether the person's interest is adequately represented by other parties and whether the intervention will unduly delay the proceedings or prejudice the rights of other parties;

(3) Any member of the General Assembly of the State of Georgia, who may without fee intervene on behalf of his constituents with the full rights and privileges of a designated party.

(f) The commission or hearing officer may condition any order permitting intervention so as to assure the orderly conduct of the proceeding.

(g) A person who is not a party may make a limited appearance by making an oral or written statement of his position on the issues within such limits and on such conditions as may be fixed by the hearing officer; but he may not otherwise participate in the proceeding.

(h) A party granted leave to intervene shall be present, absent good cause shown, during that portion of the proceedings for which that party has indicated a desire to be heard.

(i) An order by a hearing officer denying or conditioning an application for leave to intervene shall be immediately reviewable by the commission. An order by the commission denying or conditioning an application for leave to intervene shall be immediately reviewable as provided by law for the judicial review of final commission orders.

(j) Nothing in this Code section shall be construed to prohibit the commission from taking any action prior to the expiration of the 30 day period during which persons are permitted to file applications for leave to intervene. (Code 1933, § 93-502a, enacted by Ga. L. 1981, p. 121, § 6.)

Cross references. — Intervention in administrative proceedings generally, § 50-13-14.

Law reviews. — For annual survey of administrative law, see 38 Mercer L. Rev. 17 (1986).

JUDICIAL DECISIONS

Where intervention application granted without condition, intervenor actual party to proceedings. — Where the Georgia Public Service Commission (PSC) was authorized to condition the basis upon which intervention would be allowed and the scope of participation by the intervenor in a proceeding and the application which had prayed for leave to intervene "with full rights as a party" was granted without any such condi-

tion by the PSC, the intervenor was an actual party to the contested proceedings. *Campaign For A Prosperous Ga. v. Georgia Power Co.*, 174 Ga. App. 263, 329 S.E.2d 570, aff'd, 255 Ga. 253, 336 S.E.2d 790 (1985).

Party must be "aggrieved" to seek judicial review. — One who has been made a party to a Public Service Commission regulatory proceeding under the provisions of O.C.G.A. § 46-2-59 does not have automatic standing

to petition for judicial review of the Public Service Commission's decision without the necessity of being an "aggrieved person" under O.C.G.A. § 50-13-19(a). Georgia Power Co. v. Campaign For A Prosperous Ga., 255 Ga. 253, 336 S.E.2d 790 (1985).

ARTICLE 4

ALLOCATION OF GAS AND ELECTRICITY TO PROTECT PUBLIC HEALTH AND SAFETY

Administrative rules and regulations. — Disconnection of gas or electric utility service, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Public Service Commission, Chapter 515-3-2.

46-2-70. Definitions.

As used in this article, the term:

(1) "Corporation" means any private corporation, municipal corporation, joint-stock company, partnership, association, business trust, or other organized group of persons, whether incorporated or not, or a receiver or trustee of any of the foregoing.

(2) "Person" means an individual or a corporation.

(3) "Utility" means any person who supplies, furnishes, or sells a utility service.

(4) "Utility service" means gas or electricity which is supplied, sold, or furnished by any person subject to the jurisdiction of the commission. (Ga. L. 1972, p. 470, § 1.)

RESEARCH REFERENCES

ALR. — Implied obligation with respect to character or extent of service by gas company, 21 ALR 671. Landlord supplying electricity, gas, water, or similar facility to tenant as subject to utility regulation, 75 ALR3d 1204.

Measure and amount of damages for breach of duty to furnish water, gas, light, or power service, 108 ALR 1174.

46-2-71. Power of commission to allocate utility service and to alter, amend, suspend, or terminate existing rates, schedules, contracts, rules, or regulations; findings required before commission exercises powers of allocation.

(a) Subject to subsection (b) of this Code section, the commission shall have the power and authority to allocate any utility service in such manner as it deems proper in order to protect the public health, safety, or welfare, including for such purposes the power and authority to alter, amend, suspend, or terminate any existing rate, schedule, contract, rule, or regulation affecting such utility service and to prescribe new or additional

rates, schedules, contracts, rules, or regulations affecting such utility service, provided that in any event such rates, schedules, contracts, rules, or regulations as are altered, amended, or prescribed by the commission shall be just and reasonable.

(b) Before the commission may exercise the power and authority granted by subsection (a) of this Code section, it must:

(1) Find, after a hearing respecting the manner, if any, in which the commission should exercise such power and authority, as well as the necessity therefor, such hearing to be initiated by the commission on its own motion or by any person and to be preceded by notice to the persons affected, that there exists a shortage in the quantities of such utility service available in this state or in any portion of the state, or that such a shortage is imminent, and that it is necessary for the commission to exercise such power and authority in order to protect the public health, safety, or welfare; or

(2) Find that an emergency exists with respect to the quantities of such utility service available in this state or in any portion of the state, and that it is necessary for the commission to exercise such power and authority in order to protect the public health, safety, or welfare before notice and hearing can be afforded to the persons affected; provided, however, that the directives, rulings, and orders of the commission respecting such utility service based upon a finding that an emergency exists pursuant to this paragraph shall be temporary and provisional and the commission shall, as soon as practicable under the circumstances, afford notice and hearing to the persons affected as to whether such directives, rulings, or orders of the commission shall be continued, modified, made permanent, or otherwise affected. (Ga. L. 1972, p. 470, § 2.)

Cross references. — Limitation on power of Governor upon declaration of state of energy emergency, § 38-3-51(h).

JUDICIAL DECISIONS

Commission cannot require utility to buy, merge with, or sell power to another utility. — Public Service Commission has no power to require electric public utility to buy or merge with a separate and distinct neighboring electric public utility, or to sell power to such other public utility where it has never undertaken as such public utility to provide such service. *Georgia Power Co. v. Georgia Pub. Serv. Comm'n*, 211 Ga. 223, 85 S.E.2d 14 (1954).

Right of utilities to contract. — Public utilities have the right to enter into contracts between themselves, or with others, free from control or supervision of the state, so long as such contracts are not unconscionable or oppressive and do not impair the obligation of the utility to discharge its public duties. *Georgia Power Co. v. Georgia Pub. Serv. Comm'n*, 211 Ga. 223, 85 S.E.2d 14 (1954).

RESEARCH REFERENCES

Am. Jur. 2d. — 27A Am. Jur. 2d, Energy and Power Sources, §§ 40, 46, 154.

C.J.S. — 29 C.J.S., Electricity, §§ 3, 30, 31. 38 C.J.S., Gas, §§ 6, 17 et seq., 64 et seq.

ALR. — Implied obligation with respect to character or extent of service by gas company, 21 ALR 671.

Measure and amount of damages for breach of duty to furnish water, gas, light, or power service, 108 ALR 1174.

Special requirements of consumer as giving rise to implied contract by public utility to furnish particular amount of electricity, gas, or water, 13 ALR2d 1233.

Civil rights: racial or religious discrimination in furnishing of public utilities services or facilities, 53 ALR3d 1027.

Validity of imposition, by state regulation, of natural gas use priorities, 84 ALR3d 541.

46-2-72. Immunity from liability of persons acting in accordance with ruling or order of commission entered pursuant to Code Section 46-2-71.

Any person who supplies, furnishes, sells, limits, withholds, receives, or otherwise acts with respect to any utility service in accordance with a directive, ruling, or order entered by the commission pursuant to the authority granted by Code Section 46-2-71 will not be held liable to any other person by reason thereof in any action at law or in equity. (Ga. L. 1972, p. 470, § 3.)

RESEARCH REFERENCES

ALR. — Implied obligation with respect to character or extent of service by gas company, 21 ALR 671.

ARTICLE 5

MISCELLANEOUS OFFENSES AND PENALTIES

Cross references. — General prohibition against unjust discrimination in freight-transportation rates by common carriers, § 46-9-52.

46-2-90. Liability of companies subject to jurisdiction of commission generally; venue for actions generally; award of attorney's fee.

If any company under the jurisdiction of the commission does, causes to be done, or permits to be done any act which is prohibited, forbidden, or declared to be unlawful, or fails to do any act which is required either by a law of this state or by an order of the commission, such company shall be liable to the persons affected thereby for all loss, damage, or injury caused thereby or resulting therefrom. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any such person. In case of recovery, if the jury finds that such act or failure to act was willful, it may fix a reasonable attorney's fee, which shall be taxed and collected as part of the costs of the case. (Ga. L. 1907, p. 72, § 9; Civil Code 1910, § 2666; Code 1933, § 93-415.)

Law reviews. — For article advocating that payment of attorneys fees be assigned to the losing party, see 18 Ga. B.J. 439 (1956). For

annual survey of recent developments, see 38 Mercer L. Rev. 473 (1986).

JUDICIAL DECISIONS

Former Civil Code 1910, § 2666 (see O.C.G.A. § 46-2-90) did not repeal former Civil Code 1910, § 2640 (see O.C.G.A. § 46-1-2), providing for actions against railroad companies. *Atlantic Log & Export Co. v. Central of Ga. Ry.*, 171 Ga. 175, 155 S.E. 525 (1930).

The combined intent of O.C.G.A. §§ 46-2-90 and 46-1-2 is to provide for the recovery of compensatory and exemplary damages as well as attorney fees for the tortious infliction of property damages upon the owner or possessor of property where the damage is inflicted as the result of a wilful act. *Southern Ry. v. Malone Freight Lines*, 174 Ga. App. 405, 330 S.E.2d 371 (1985).

Violations of O.C.G.A. § 46-2-25.1 or O.C.G.A. § 46-2-25.2 did not impose any duties or obligations upon telecommunication providers, a violation of which would give rise to a cause of action under O.C.G.A. § 46-2-90. *Lang v. Standard Tel. Co.*, 243 Ga. App. 301, 533 S.E.2d 162 (2000).

"Law of the state" is to be construed as referring to statute law. *Southern Bell Tel. & Tel. Co. v. Beach*, 8 Ga. App. 720, 70 S.E. 137 (1911).

"Order of the commission" construed. — Expression "order of the commission," refers to special orders of the commission, and not to its general rules. *Southern Bell Tel. & Tel. Co. v. Beach*, 8 Ga. App. 720, 70 S.E. 137 (1911).

No right of action for difference in rates. — Former Code 1933, § 93-415 (see O.C.G.A. § 46-2-90) only gave a right of action for loss, damage or injury; there was no statute giving a right of action for difference in rates. *Columbia Baking Co. v. Atlanta Gas Light Co.*, 78 Ga. App. 241, 50 S.E.2d 382 (1948).

Liability relating to "order of the commission." — Only liability relating to "order of the commission" is for omission to perform such order or mere nonfeasance and does not include liability for the positive acts of charging and collecting freight in excess of

the rates and tariffs fixed by the commission. *Atlantic Log & Export Co. v. Central of Ga. Ry.*, 171 Ga. 175, 155 S.E. 525 (1930).

No liability for rate difference where provided for in approved contract. — A gas company under the jurisdiction of the Public Service Commission is not liable to an industrial consumer for the difference between the rates charged to it and those charged to other industrial users of gas when the latter rates are provided for in contracts filed with the commission which it permits to go into effect. *Columbia Baking Co. v. Atlanta Gas Light Co.*, 78 Ga. App. 241, 50 S.E.2d 382 (1948).

Action by shipper against railroad for overcharges held not authorized. — Former Civil Code 1910, § 2666 (see O.C.G.A. § 46-2-90) did not confer right on shipper to bring action against railroad company for recovery of freight overcharges paid on intrastate shipments in excess of the rates and tariff fixed by the Public Service Commission. *Atlantic Log & Export Co. v. Central of Ga. Ry.*, 171 Ga. 175, 155 S.E. 525 (1930).

Liability for failure to restore electric power. — City was liable for the actual damages caused by its violations of federal law in refusing immediately to restore electric power upon receiving notice of debtor's bankruptcy petition. *Tarrant v. City of Douglas*, 190 Bankr. 704 (Bankr. S.D. Ga. 1995).

When attorneys' fees may not be awarded. — Former Civil Code 1910, § 2666 (see O.C.G.A. § 46-2-90) did not authorize the recovery of attorneys' fees (in cases where they were not otherwise recoverable under the general law) where the thing done or omitted had not been forbidden by some statutory enactment in this state or by some order of the commission. *Southern Bell Tel. & Tel. Co. v. Beach*, 8 Ga. App. 720, 70 S.E. 137 (1911).

Cited in *Savannah Elec. Co. v. Lowe*, 27 Ga. App. 350, 108 S.E. 313 (1921); *Harrison v. Harrison*, 208 Ga. 70, 65 S.E.2d 173 (1951).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Carriers, §§ 1205, 1206, 1207, 1210. 65 Am. Jur. 2d, Railroads, § 281.

ALR. — Injury to one other than passenger or employee from fall of trolley pole or other part of streetcar, 5 ALR 1336.

Liability of street railway company to passenger struck by vehicle not subject to its control, 31 ALR 572; 44 ALR 162.

Liability of street railway company or municipality for injury due to condition of part of street occupied by street railway, 54 ALR 1291.

Liability of motorbus carrier to passenger injured through fall while alighting at place other than regular bus stop, 7 ALR4th 1031.

46-2-91. Penalties recoverable before commission.

(a) Any person, firm, or corporation (referred to in this Code section as a “utility”) subject to the jurisdiction of the commission, which utility willfully violates any law administered by the commission or any duly promulgated regulation issued thereunder or which fails, neglects, or refuses to comply with any order after notice thereof, shall be liable to a penalty not to exceed \$15,000.00 for such violation and an additional penalty not to exceed \$10,000.00 for each day during which such violation continues.

(b)(1) The commission, after a hearing conducted after not less than 30 days’ notice, shall determine whether any utility has willfully violated any law administered by the commission or any duly promulgated regulation issued thereunder, or has failed, neglected, or refused to comply with any order of the commission. Upon an appropriate finding of a violation, the commission may impose by order such civil penalties as are provided by subsection (a) of this Code section. In each such proceeding, the commission shall maintain a record as provided in paragraph (8) of subsection (a) of Code Section 50-13-13 including all pleadings, a transcript of proceedings, a statement of each matter of which the commission takes official notice, and all staff memoranda or data submitted to the commission in connection with its consideration of the case. All penalties and interest thereon (at the rate of 10 percent per annum) recovered by the commission shall be paid into the general fund of the state treasury.

(2) Any party aggrieved by a decision of the commission may seek judicial review as provided in subsection (c) of this Code section.

(c)(1) Any party who has exhausted all administrative remedies available before the commission and who is aggrieved by a final decision of the commission in a proceeding described in subsection (b) of this Code section may seek judicial review of the final order of the commission in the Superior Court of Fulton County.

(2) Proceedings for review shall be instituted by filing a petition within 30 days after the service of the final decision of the commission or, if a

rehearing is requested, within 30 days after the decision thereon. A motion for rehearing or reconsideration after a final decision by the commission shall not be a prerequisite to the filing of a petition for review. Copies of the petition shall be served upon the commission and all parties of record before the commission.

(3) The petition shall state the nature of the petitioner's interest, the facts showing that the petitioner is aggrieved by the decision, and the ground, as specified in paragraph (6) of this subsection, upon which the petitioner contends that the decision should be reversed. The petition may be amended by leave of court.

(4) Within 30 days after service of the petition, or within such further time as is stipulated by the parties or as is allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceedings under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate that the record be limited may be taxed for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(5) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence be taken before the commission upon such procedure as is determined by the court. The commission may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(6) The review shall be conducted by the court without a jury and shall be confined to the record. The court shall not substitute its judgment for that of the commission as to the weight of the evidence on questions of fact. The court may affirm the decision of the commission or remand the case for further proceedings. The court may reverse the decision of the commission if substantial rights of the petitioner have been prejudiced because the commission's findings, inferences, conclusions, or decisions are:

- (A) In violation of constitutional or statutory provisions;
- (B) In excess of the statutory authority of the commission;
- (C) Made upon unlawful procedure;
- (D) Clearly not supported by any reliable, probative, and substantial evidence on the record as a whole; or
- (E) Arbitrary or capricious.

(7) A party aggrieved by an order of the court in a proceeding authorized under subsection (b) of this Code section may appeal to the Supreme Court of Georgia or to the Court of Appeals of Georgia in accordance with Article 2 of Chapter 6 of Title 5, the "Appellate Practice Act." (Code 1933, § 93-309.2, enacted by Ga. L. 1973, p. 677, § 2; Ga. L. 1992, p. 1640, § 1; Ga. L. 1997, p. 708, § 1; Ga. L. 2004, p. 366, § 1.)

The 2004 amendment, effective July 1, 2004, deleted "or by subsection (a) of Code Section 46-2-94" following "this Code section" at the end of the second sentence in paragraph (b)(1).

Administrative rules and regulations. — Natural Gas Marketers' Terms of Service, Official Compilation of Rules and Regulations of State of Georgia Public Service Commission, Gas Utilities, Chapter 515-7-9.

RESEARCH REFERENCES

ALR. — Validity of service charge for gas meter, 20 ALR 225.

Liability of gas, electric, or water company

for delay in commencing service, 97 ALR 838.

46-2-92. Penalties recoverable by state through civil action.

(a) Every company under the jurisdiction of the commission, and all officers, agents, and employees of every such company, shall obey, observe, and comply with every order made by the commission under authority of law. Any company under the jurisdiction of the commission, or any officer, agent, or employee thereof, who or which violates any provision of this Code section, or who or which fails, omits, or neglects to obey, observe, and comply with any rule, regulation, order, direction, or requirement of the commission, shall forfeit to the state a sum of not more than \$5,000.00 for each offense, the amount to be fixed by the presiding judge. Every violation of this Code section or any other Code section, or of any rule, regulation, order, direction, or requirement of the commission shall be a separate and distinct offense; in case of a continued violation, every day a violation thereof takes place shall be deemed a separate and distinct offense.

(b) An action for the recovery of the penalty provided in subsection (a) of this Code section may be brought in the county of the principal office in this state of such company, or in the county of the state where such violation occurs and such wrong is perpetrated, or in any county in this state through which the company operates. Where the violation consists of an excessive charge for the carriage of freight or passengers or for any other service rendered, as such violation is described in Code Section 46-9-250, an action may be brought in any county in which the charges are made, or through which counties it was intended that such passengers or freight should have been carried, or through which counties such company operates. Any action pursuant to this Code section shall be brought in the name of the state by direction of the Governor.

(c) Any proceeding to enforce the penalty provided in subsection (a) of this Code section may be tried at the first term of the court to which it is

brought and shall be given precedence over other business by the presiding judge. The court shall not be adjourned until such proceeding is legally continued or disposed of. The decision in such case may be taken to the Court of Appeals as in other cases. (Ga. L. 1907, p. 72, § 12; Civil Code 1910, § 2667; Code 1933, § 93-416; Ga. L. 1946, p. 726, § 1.)

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 46-2-92 is not unconstitutional under U.S. Const., Amend. 14 as denying an opportunity to be heard. *Wadley S. Ry. v. Georgia*, 235 U.S. 651, 35 S. Ct. 214, 59 L. Ed. 405 (1915).

Effect of obtaining certificate from federal agency on failure to comply with order of commission. — Where telegraph company obtained a certificate of public convenience from the Federal Communications Commission authorizing it to change the character and nature of the services rendered it by one of its local offices, failure of telegraph company to comply with rule of the Public Service Commission does not constitute a lawful basis for a recovery of a penalty by the state. *Western Union Tel. Co. v. State*, 207 Ga. 675, 63 S.E.2d 878 (1951).

Commission not authorized to grant reparations or compensatory damages. — Public Service Commission is not authorized to grant reparations or compensatory damages, either by reason of a public utility collecting unreasonable rates, or by reason of the violation of any rule or regulation of the commission. The commission does not have the power to impose forfeitures or to pro-

vide for pecuniary recoveries. *Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618 (1949).

Penalty provisions apply only after commission order found lawful. — Where judicial review is timely sought, the penalty provisions of the law apply only to subsequent violations after the order of the commission has been judicially established to be lawful order. *Southern Ry. v. Georgia Pub. Serv. Comm'n*, 218 Ga. 157, 127 S.E.2d 12 (1962).

Action to be brought in name of state. — Under former Civil Code 1910, § 2666 (see O.C.G.A. § 46-2-92) an action for a penalty for disobedience to the order of the commission must be brought in the name of the state by direction of the Governor. *Wadley S. Ry. v. State*, 137 Ga. 497, 73 S.E. 741 (1912), *aff'd*, 235 U.S. 651, 35 S. Ct. 214, 59 L. Ed. 405 (1914).

Cited in *Savannah Elec. Co. v. Lowe*, 27 Ga. App. 350, 108 S.E. 313 (1921); *Georgia Power Co. v. Georgia Pub. Serv. Comm'n*, 211 Ga. 223, 85 S.E.2d 14 (1954); *Gas Light Co. v. Georgia Power Co.*, 313 F. Supp. 860 (M.D. Ga. 1970).

OPINIONS OF THE ATTORNEY GENERAL

Commission may not enforce rules, orders, or regulations by injunction. — There is no provision of law which allows Public Service Commission to restrain any violations of its rules, orders or regulations by application for injunctive relief; the commis-

sion has the authority substantially similar to the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. §§ 1671-1686) to enforce its rules, orders and regulations by monetary sanctions, but not by injunction. 1969 Op. Att'y Gen. No. 69-48.

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Carriers, §§ 1205, 1206, 1207, 1210.

C.J.S. — 13 C.J.S., Carriers, § 354.

ALR. — Special services or facilities afforded by shipper as a factor in carrier's rates, 25 ALR 191.

Right to maintain action against carrier on ground that rates which were filed and published by carrier pursuant to law were excessive, 97 ALR 406.

Recovery of cumulative statutory penalties, 71 ALR2d 986.

46-2-93. Criminal penalty; venue for actions; calling of agents and employees of company as witnesses; use of testimony against agents and employees.

Every officer, agent, or employee of any company under the jurisdiction of the commission who violates or procures, aids, or abets any violation by any such company of any provision of this title; or who fails to obey, observe, or comply with any order of the commission; or who aids or abets any such company in its failure to obey, observe, and comply with any such order, direction, or provision, shall be guilty of a misdemeanor. Such officer, agent, or employee shall be subject to prosecution in any county in which the company or the officer, agent, or employee violates any provision of this title or any provision of any order of the commission, or in any county through which the company operates. Such officer, agent, or employee shall also be subject to prosecution under this title in any county in which a subordinate agent or employee of the company violates any provision of this title, by the approval or direction, or in consequence of the approval or direction, of such officer, agent, or employee; and the agent or employee who locally in any county violates the rules or directions of said commission pursuant to the direction or authority of a superior officer may be called as a witness and be compelled to testify as to the authority by which he acted. Such testimony shall not be used against such subordinate employee or agent, nor shall he thereafter be subject to prosecution for said offense. (Ga. L. 1907, p. 72, § 13; Civil Code 1910, § 2668; Penal Code 1910, § 527; Code 1933, § 93-9901; Ga. L. 1982, p. 3, § 46.)

Cross references. — Prohibition against compelled self-incrimination, Ga. Const. 1983, Art. I, Sec. I, Para. XVI.

JUDICIAL DECISIONS

Penalty provisions apply only after commission order found lawful. — Where judicial review is timely sought, the penalty provisions of the law apply only to subsequent violations after the order of the commission has been judicially established to be a lawful order. *Southern Ry. v. Georgia Pub. Serv. Comm'n*, 218 Ga. 157, 127 S.E.2d 12 (1962).

Cited in *Wight v. Pelham & H.R.R.*, 18 Ga.

App. 195, 89 S.E. 176 (1916); *Savannah Elec. Co. v. Lowe*, 27 Ga. App. 350, 108 S.E. 313 (1921); *Jenkins v. State*, 65 Ga. App. 16, 14 S.E.2d 594 (1941); *Georgia Power Co. v. Georgia Pub. Serv. Comm'n*, 211 Ga. 223, 85 S.E.2d 14 (1954); *Gas Light Co. v. Georgia Power Co.*, 313 F. Supp. 860 (M.D. Ga. 1970).

46-2-94. Operation as household goods carrier for hire without having valid certificate prohibited.

Reserved. Repealed by Ga. L. 2004, p. 366, § 2, effective July 1, 2004.

Editor's notes. — This Code section was based on Code 1981, § 46-2-94, enacted by Ga. L. 1992, p. 1640, § 2.

46-2-95. Civil actions; standard for obtaining an injunction.

The commission may bring a civil action to enjoin the violation of any law administered by the commission or any rule, order, or regulation established by the commission. It shall not be necessary to allege or prove that there is no adequate remedy at law to obtain an injunction under this Code section. (Code 1981, § 46-2-95, enacted by Ga. L. 2002, p. 475, § 5.)

Effective date. — This Code section became effective April 25, 2002.

Editor's notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may

be cited as the 'Natural Gas Consumers' Relief Act.'"

Law reviews. — For note on the 2002 enactment of this chapter, see 19 Ga. St. U.L. Rev. 285 (2002).

CHAPTER 2A

ELECTRIC UTILITIES GENERALLY

Sec.		Sec.	
46-2A-1.	Annual audit of affairs of electric utilities.	46-2A-2.	Management audit of electric utilities.

46-2A-1. Annual audit of affairs of electric utilities.

(a) Each electric utility shall provide for the appointment by its board of directors of an audit committee consisting solely of directors who are not officers or employees of the electric utility. Such audit committee shall make an annual examination into the affairs of the electric utility and report the result of such audit in writing to the board of directors at its next regular meeting.

(b) The report provided for in subsection (a) of this Code section shall state whether the electric utility is in a sound condition and whether adequate internal audit controls and procedures are being maintained and shall recommend to the board of directors such changes in the manner of conducting the affairs of the electric utility as shall be deemed advisable. The board of directors shall report in writing to the commission that such audit has been made and reviewed by the board of directors. (Code 1933, § 93-1001, enacted by Ga. L. 1981, p. 121, § 7.)

46-2A-2. Management audit of electric utilities.

(a) Not more frequently than every five years, the commission shall cause to be performed a management audit of each electric utility to determine whether it is being managed in an efficient and effective manner.

(b) The management audit provided for in this Code section shall be performed by a qualified and reputable management auditor of national reputation, to be selected by the commission from a list of not less than three such auditors, which list shall be made up by mutual agreement of the commission and the electric utility. The management auditor shall report the results of the audit to the commission.

(c) In the event that the commission and the electric utility are unable to agree on a list of management auditors, either party may petition the Superior Court of Fulton County to select, within 30 days of filing, such a list after a hearing on the petition.

(d) The audited electric utility shall pay for the management audit. The cost of the management audit shall be recognized by the commission as an operating expense of the utility; and the utility's rates shall be fixed by the commission to recover this retail expense amortized over such period as the

commission may direct. (Code 1933, § 93-1002, enacted by Ga. L. 1981, p. 121, § 7.)

CHAPTER 3

ELECTRICAL SERVICE

Article 1		Sec.	
Generation and Distribution of Electricity Generally			poles, and other facilities of electric suppliers in streets, alleys, and public ways.
PART 1		46-3-15.	Effect of part on charges of public utilities owned or operated by counties or municipalities.
ALLOCATION OF TERRITORIAL RIGHTS TO ELECTRIC SUPPLIERS			
Sec.			PART 2
46-3-1.	Short title.		HIGH-VOLTAGE SAFETY
46-3-2.	Legislative findings and declaration of policy.	46-3-30.	Short title.
46-3-3.	Definitions.	46-3-31.	Purpose of part.
46-3-4.	Assignment or declaration as unassigned areas-B of geographic areas outside municipal limits as of March 29, 1973.	46-3-32.	Definitions.
46-3-5.	Assignment of geographic areas within municipal limits as of March 29, 1973.	46-3-33.	Required conditions for commencing work within ten feet of high-voltage line.
46-3-6.	Assignment and unassignment of geographic areas included within wholly new municipalities after March 29, 1973.	46-3-34.	Utilities protection center; funding of activities; notice of work; delay; responsibility for completing safety requirements.
46-3-7.	Assignment and unassignment of geographic areas annexed to municipalities after March 29, 1973.	46-3-35.	Allocation of expense of precautionary measures taken pursuant to public highway construction.
46-3-8.	Exceptions, grandfather rights, and other rights.	46-3-36.	Administration and enforcement of part by Commissioner of Labor [Repealed].
46-3-9.	Limitation on power of electric membership corporations to furnish service within municipalities.	46-3-37.	Applicability of part to railway systems, electrical engineering system or other entities.
46-3-10.	Limitation on power of electric suppliers to condemn property of other electric suppliers.	46-3-38.	Applicability of part to moving or transportation of houses or buildings.
46-3-11.	Application by electric supplier of discriminatory rates, charges, or service rules or regulations; prohibited acts by electric suppliers generally.	46-3-39.	Restriction on liability of owners and operators of high-voltage lines; effect of part on duty or degree of care.
46-3-12.	Jurisdiction of commission over electric membership corporations.	46-3-40.	Criminal penalty; strict liability for injury or damage; indemnification; liability for cost of delay.
46-3-13.	Enforcement of part by commission.		PART 3
46-3-14.	Effect of part on municipal police powers over erection and maintenance of electric wires,		SALE OF ELECTRICITY BY FACILITY GENERATING ELECTRICITY, STEAM, OR OTHER FORMS OF ENERGY FOR ITS OWN CONSUMPTION
		46-3-50.	Short title.

Sec.	
46-3-51.	Legislative determinations and declarations.
46-3-52.	Jurisdiction of commission over cogeneration facility the energy from which is used solely by operator.
46-3-53.	Jurisdiction of commission over cogeneration facilities.
46-3-54.	Electric service providers; rates and fees.
46-3-55.	Measurement and payment of energy flow.
46-3-56.	Requirement to purchase energy from customer generator; safety standards and regulations.

Article 2

Nonprofit Rural Electrification Membership Corporations

46-3-70 through 46-3-97 [Repealed].

Article 3

Municipal Electric Authority of Georgia

46-3-110.	Declaration of necessity.
46-3-111.	Definitions.
46-3-112.	Creation of authority; status of authority as instrumentality of state; location of principal office and legal situs or residence of authority.
46-3-113.	Number of members of authority; creation of Municipal Electric Committee of Georgia Membership Election Committee; designation of members; selection of officers; receiving of nominations, election and terms of first members of authority.
46-3-114.	Residency requirements for authority members; ineligibility of election committee representatives for membership; eligibility of members to succeed themselves.
46-3-115.	Terms of authority members generally; time of meeting of election committee prior to annual meeting of authority.
46-3-116.	Selection of additional representatives to election committee by political subdivisions sub-

Sec.	
	sequently contracting with authority.
46-3-117.	Manner of distribution of votes among representatives to election committee; quorum of election committee.
46-3-118.	Vacancies on authority.
46-3-119.	Officers of authority.
46-3-120.	Quorum of authority; action by majority vote; adjournment of meetings at which less than a majority is present.
46-3-121.	Annual meeting of authority; special meetings; notice of meetings; waiver of notice; regular meetings other than annual meeting.
46-3-122.	Reimbursement of members for expenses; making of rules and regulations by authority; employment of staff and personnel; designation of assistant secretary-treasurer.
46-3-123.	Removal of authority members from office.
46-3-124.	Books and records generally.
46-3-125.	Purpose of authority.
46-3-126.	Powers of authority generally.
46-3-127.	Policy as to nonprofit operation of projects by authority; fixing of rates, fees, and charges by authority.
46-3-128.	Declaration of authority property as public property; payments by authority in lieu of taxes; tax exemption for authority property, income, obligations, and debt interest.
46-3-129.	Contracts between authority and political subdivisions for use of projects and facilities of authority.
46-3-130.	Eligibility of political subdivisions to contract with authority.
46-3-131.	Issuance of revenue bonds and bond anticipation notes in general.
46-3-132.	Validation of contracts for payments pledged as security for bonds.
46-3-133.	Failure of district attorney to pursue judicial validation of bonds.
46-3-134.	Bonds as legal investments; de-

Sec.		Sec.	
	positing bonds with public officers and bodies of state.		fees, tolls, charges, gifts, grants, or other contributions as trust funds; lien of bond owners on funds.
46-3-135.	Pledge of authority's revenues and earnings to payment of principal of and interest on bonds; setting aside of pledged revenues and earnings into sinking funds.	46-3-150.	Audits of authority and of funds established in connection with its debt.
46-3-136.	Securing of bonds by trust agreement or indenture.	46-3-151.	Venue of actions.
46-3-137.	Application of bond proceeds to cost of projects; issuance of additional bonds to remedy deficit in proceeds from bond issue; application of surplus proceeds.	46-3-152.	Jurisdiction of commission over rates, services, and practices of authority.
46-3-138.	Mutilated, lost, stolen, or destroyed bonds and coupons.	46-3-153.	Applicability of other laws to meetings and records of authority.
46-3-139.	Interest on bonds.	46-3-154.	Supplemental nature of powers conferred by article.
46-3-140.	Cancellation of evidences of indebtedness and interest coupons.	46-3-155.	Construction of article.
46-3-141.	Records of evidences of indebtedness issued.		
46-3-142.	Paying agents for bonds.		
46-3-143.	Bond anticipation notes.		
46-3-144.	Negotiability of bonds, notes, and other evidences of debt.		
46-3-145.	Liability of members of authority on bonds and notes; obligations of state and political subdivisions in regard to issued bonds or notes; requirement as to recital on face of bonds and notes.		
46-3-146.	Preservation of interests and rights of owners of bonds and notes.		
46-3-147.	Appointment of receiver for authority for default on bonds; duties of receiver; termination of receivership; jurisdiction of court over receiver.		
46-3-148.	Fixing, revising, and collecting fees, tolls, and charges for use of projects; application of revenues; time of payment; indemnity by political subdivisions; enforcement; assignment of payments; issuing resolutions governing disposition of revenues.		
46-3-149.	Status of authority's funds received from revenue bonds,		

Article 4

Electric Membership Corporations and Foreign Electric Cooperatives

PART 1

GENERAL PROVISIONS

46-3-170.	Short title.
46-3-171.	Definitions.
46-3-172.	Applicability of article.
46-3-173.	Effect of affixing corporate seal; signing of documents; affixing of seal as optional; signing of deeds after dissolution of an electric membership corporation.
46-3-174.	Filing of documents with Secretary of State; filing of articles of correction.
46-3-175.	Receipt of certificates and certified copies in evidence; certification of documents by Secretary of State.
46-3-176.	Obligations issued to secure payment of federal loans as constituting securities; exemption of obligations and membership certificates from Georgia securities laws.
46-3-177.	Jurisdiction of commission.
46-3-178.	Intent of article as regards authority of electric membership corporations to own or operate cable television systems.
46-3-179.	Validity of transactions entered into before July 1, 1981; preser-

Sec.

vation of rights, duties, and interests arising from such transactions.

- 46-3-180. Effect of article on cause of action, liability, penalty, or special proceeding accrued, existing, incurred, or pending as of July 1, 1981.
- 46-3-181. Reservation of power by General Assembly.
- 46-3-182. Construction of article as against Part 1 of Article 1 of this chapter, the "Georgia Territorial Electric Service Act."

PART 2

CORPORATE PURPOSES AND POWERS

- 46-3-200. Purposes of electric membership corporations.
- 46-3-201. Existence of electric membership corporations under articles of incorporation; duration of corporations; powers of corporations generally.
- 46-3-202. Defense of ultra vires.
- 46-3-203. Unauthorized assumption of corporate powers.
- 46-3-204. Limitations as to actions growing out of acquisition of rights of way, easements, or occupation of lands of others; damages recoverable.

PART 3

CORPORATE NAME

- 46-3-220. Requirements as to corporate name generally.
- 46-3-221. Reservation of names.

PART 4

REGISTERED OFFICE, REGISTERED AGENTS, SERVICE OF PROCESS, AND VENUE

- 46-3-240. Registered office and registered agent.
- 46-3-241. Change of registered office or registered agent.
- 46-3-242. Service of process on electric membership corporations.
- 46-3-243. Venue in proceedings against electric membership corpora-

Sec.

tions and foreign electric cooperatives generally.

PART 5

MEMBERS

- 46-3-260. Qualifications of members; provision by articles of incorporation or bylaws for transfer, classification, and termination of memberships.
- 46-3-261. Liability of members.
- 46-3-262. Meetings of members generally.
- 46-3-263. Notice of members' meetings.
- 46-3-264. Closing of record books and fixing of record date.
- 46-3-265. Quorum of members; adjournment of meeting by majority of members represented at meeting.
- 46-3-266. Voting by members generally.
- 46-3-267. Effect of voting requirements provided for in articles of incorporation or bylaws.
- 46-3-268. Voting by proxy generally.
- 46-3-269. Dissenters' rights.
- 46-3-270. Credentials and elections committee.
- 46-3-271. Maintenance of books and records of account; inspection of books and records by members; preparation of annual financial statements.
- 46-3-272. Derivative actions by members.

PART 6

DIRECTORS AND OFFICERS

- 46-3-290. Management of business and affairs of electric membership corporation by board of directors; knowledge of limitations on directors' authority required; qualifications; compensation and reimbursement for expenses.
- 46-3-291. Number of directors; statement of names and addresses of initial directors in articles of incorporation; duration of director's service in office.
- 46-3-292. Provisional director.
- 46-3-293. Classification of directors; division of service territory into districts.

- Sec.
- 46-3-294. Vacancies on board of directors generally.
- 46-3-295. Removal of directors.
- 46-3-296. Quorum of directors; action by majority vote; conducting of meetings of board or committees by conference calls.
- 46-3-297. Executive committee and other committees.
- 46-3-298. Place, time, and notice of directors' meetings; waiver of notice; adjournment of meetings; notice of adjournment; manner of calling meetings.
- 46-3-299. Action by directors without a meeting.
- 46-3-300. Dissent by a director.
- 46-3-301. Election or appointment of officers generally.
- 46-3-302. Removal of officers; filling of vacancies.
- 46-3-303. Duty of directors and officers to act in good faith and with due diligence, care, and skill; reliance on financial information prepared by others.
- 46-3-303.1. Standard of care for directors and officers in discharge of duties on or after July 1, 1988; reliance upon financial information.
- 46-3-304. Actions against directors and officers.
- 46-3-305. Interested directors and officers.
- 46-3-306. Indemnification of officers, directors, employees, and agents; purchase and maintenance of liability insurance; notice to members of payment of indemnification.

PART 7

ORGANIZATION OF ELECTRIC MEMBERSHIP CORPORATIONS

- 46-3-320. Number of incorporators; age requirement.
- 46-3-321. Signing of articles of incorporation; contents of articles of incorporation.
- 46-3-322. Filing articles of incorporation; issuance of certificate of incorporation; forwarding of copy of

- Sec.
- certificate to clerk of superior court; rejection of articles of incorporation; publication of notice; commencement of corporate existence.
- 46-3-323. Effect of issuance of certificate of incorporation.
- 46-3-324. Organization meeting of directors.
- 46-3-325. Adoption of initial bylaws; authority to alter, amend, repeal, or adopt new bylaws; contents of bylaws generally.
- 46-3-326. Adoption of bylaws for emergency conditions; emergency powers of board of directors generally.

PART 8

OPERATION OF ELECTRIC MEMBERSHIP CORPORATIONS GENERALLY

- 46-3-340. Nonprofit operation of electric membership corporations required; rates and fees to cover costs of operation and interest payments and for maintaining reserves; bylaw provisions concerning revenues, assets, and member classification.
- 46-3-341. Return of revenues upon death of member.

PART 9

AMENDMENT AND RESTATEMENT OF ARTICLES OF INCORPORATION OF ELECTRIC MEMBERSHIP CORPORATIONS

- 46-3-360. Right of electric membership corporation to amend articles of incorporation.
- 46-3-361. Procedure to amend articles of incorporation generally.
- 46-3-362. Manner of execution of articles of amendment; contents of articles of amendment.
- 46-3-363. Obtaining of certificate from Secretary of State upon amendment of name of electric membership corporation; filing articles of amendment; issuance of certificate of amendment; forwarding of copy of certificate to superior court; rejection of arti-

Sec.		Sec.	
	cles of amendment; publication of notice.	46-3-421.	Filing of statement of intent to dissolve with Secretary of State and state revenue commissioner.
46-3-364.	Time of effectiveness of amendment; effect of amendment on pending causes of action.	46-3-422.	Effect of filing of statement of intent to dissolve.
46-3-365.	Restated articles of incorporation.	46-3-423.	Procedure after filing statement of intent to dissolve.
PART 10		46-3-424.	Revocation of voluntary dissolution proceedings by electric membership corporation.
MERGERS AND CONSOLIDATIONS INVOLVING ELECTRIC MEMBERSHIP CORPORATIONS AND FOREIGN ELECTRIC COOPERATIVES		46-3-425.	Filing of statement of revocation of voluntary dissolution proceedings with Secretary of State.
46-3-380.	Procedure for merger generally.	46-3-426.	Effect of filing of statement of revocation of voluntary dissolution proceedings.
46-3-381.	Procedure for consolidation generally.	46-3-427.	Execution of articles of dissolution; contents of articles of dissolution.
46-3-382.	Approval of merger or consolidation plan by members.	46-3-428.	Filing of articles of dissolution with Secretary of State; procedure involving filing, issuance, and rejection of certificate of dissolution; time of cessation of existence of electric membership corporation.
46-3-383.	Contents of articles of merger or articles of consolidation; obtaining of certificate from Secretary of State upon use of new name; procedures involving filing, issuance, rejection, and publication of articles of merger or articles of consolidation.	46-3-429.	Commencement of actions for involuntary dissolution of electric membership corporations by superior courts.
46-3-384.	Effect of merger or consolidation.	46-3-430.	Venue and service of process in action for involuntary dissolution.
46-3-385.	Merger or consolidation of electric membership corporations and foreign electric cooperatives.	46-3-431.	Jurisdiction of court to liquidate assets and business of electric membership corporation.
PART 11		46-3-432.	Procedure in liquidation of electric membership corporation by court.
SALE AND OTHER DISPOSITION OF CORPORATE ASSETS		46-3-433.	Qualification of receivers; giving of bond.
46-3-400.	Secured transactions and other dispositions of assets not requiring member approval.	46-3-434.	Filing of claims in liquidation proceedings; effect of failure to file claims.
46-3-401.	Sale, lease, exchange, or other disposition of corporate assets requiring member approval.	46-3-435.	Discontinuance of liquidation proceedings.
PART 12		46-3-436.	Entry of decree of involuntary dissolution; time of cessation of existence of electric membership corporation.
DISSOLUTION OF ELECTRIC MEMBERSHIP CORPORATIONS		46-3-437.	Filing of decree of involuntary
46-3-420.	Commencement of proceedings for voluntary dissolution of an electric membership corporation generally.		

Sec.		Sec.	
	dissolution; giving of notice of entry of decree.	46-3-459.	Service of process on foreign electric cooperative authorized to transact business in this state.
46-3-438.	Deposit with Department of Administrative Services of amount due unknown, disabled, or unlocatable creditors or members; disposition of unclaimed amounts; time limitation.	46-3-460.	Filing of amendment to articles of incorporation of foreign electric cooperative.
46-3-439.	Survival of remedy after dissolution.	46-3-461.	Effect of merger whereby foreign electric cooperative is surviving entity.
46-3-440.	Revival of electric membership corporation after dissolution by expiration of period of duration.	46-3-462.	Amending of certificate of authority.
		46-3-463.	Contents of application for withdrawal; execution of application and attestation by officers; obtaining of certificate from state revenue commissioner.

PART 13

POWERS AND DUTIES OF FOREIGN
ELECTRIC COOPERATIVES
TRANSACTIONING BUSINESS
IN STATE GENERALLY

46-3-450.	Requirement of obtaining certificate of authority by foreign electric cooperative; applicability of state laws generally; acts not constituting transaction of business in this state.	46-3-464.	Filing of application for withdrawal; issuance of certificate of withdrawal; time of cessation of authority to transact business.
46-3-451.	Powers of foreign electric cooperatives under certificate of authority generally.	46-3-465.	Effect of termination of existence of foreign electric cooperative.
46-3-452.	Name of foreign electric cooperative.	46-3-466.	Grounds for revocation of certificate of authority; giving notice of revocation.
46-3-453.	Change of name by foreign electric cooperative.	46-3-467.	Issuance of certificate of revocation; time of cessation of authority to transact business.
46-3-454.	Contents of application for certificate of authority; submission of consent to appointment as registered agent; execution of application by officers of foreign electric cooperative.	46-3-468.	Application for reinstatement of certificate of authority.
46-3-455.	Filing of application for certificate of authority; issuance of certificate of authority by Secretary of State.	46-3-469.	Transacting business without certificate of authority.
46-3-456.	Effect of certificate of authority.		
46-3-457.	Designation of registered office and registered agent of foreign electric cooperative; maintenance by Secretary of State of offices and agents; consent to appointment as agent.		
46-3-458.	Change of registered office or registered agent of foreign electric cooperative.		

PART 14

ANNUAL REPORTS

46-3-480.	Requirement of annual reports by electric membership corporation and foreign electric cooperative.
46-3-481.	Filing of annual reports; correction of reports.

PART 15

FEES AND CHARGES

46-3-500.	Authority of Secretary of State to charge and collect fees generally.
46-3-501.	Fees for filing documents and issuing certificates.
46-3-502.	Fees for furnishing certified copies of documents, instru-

Sec.

ments, and papers and for furnishing a certificate of search or a certificate of good standing.

46-3-503. Fees for advertising.

PART 16

PROVISIONS RELATING TO THE SECRETARY OF STATE

46-3-520. Powers of Secretary of State generally.

46-3-521. Propounding of interrogatories by Secretary of State.

46-3-522. Disclosure of facts and information obtained from interrogatories.

46-3-523. Notification of actions taken by Secretary of State; appeal of

Sec.

Secretary of State's decision to superior court; appeal by foreign electric cooperative whose certificate is revoked; appeal of decision of superior court.

PART 17

PENALTIES

46-3-540. Civil penalties for actions or omissions by electric membership corporations and foreign electric cooperatives.

46-3-541. Civil and criminal penalties for actions or omissions by officers and directors of electric membership corporations and foreign electric cooperatives.

Cross references. — Exercise of power of eminent domain for construction and operation of electric power plants, § 22-3-20 et

seq. Accounting methods to be used by electric utilities in rate-making proceedings, etc., § 46-2-26.1.

RESEARCH REFERENCES

ALR. — Placement, maintenance, or design of standing utility pole as affecting private utility's liability for personal injury resulting from vehicle's collision with pole within or beside highway, 51 ALR4th 602.

Liability of electric utility to nonpatron for interruption or failure of power, 54 ALR4th 667.

Products liability: Sufficiency of evidence to support product misuse defense in actions concerning electrical generation and transmission equipment, 55 ALR4th 1010.

Products liability: electricity, 60 ALR4th 732.

ARTICLE 1

GENERATION AND DISTRIBUTION OF ELECTRICITY GENERALLY

Administrative rules and regulations. — Allocation of electric utility service, Official Compilation of Rules and Regulations of

State of Georgia, Rules of Georgia Public Service Commission, Chapter 515-11-1.

PART 1

ALLOCATION OF TERRITORIAL RIGHTS TO ELECTRIC SUPPLIERS

JUDICIAL DECISIONS

No conspiracy in restraint of trade by limiting service to assigned areas. — Provid-

ers of electricity do not engage in an unlawful conspiracy in restraint of trade by limit-

ing their service to those areas assigned to them by the Public Service Commission under the authority of this part. Jack Gresham,

Inc. v. North Ga. Elec. Membership Corp., 166 Ga. App. 779, 305 S.E.2d 642 (1983).

46-3-1. Short title.

This part shall be known as the “Georgia Territorial Electric Service Act.” (Ga. L. 1973, p. 200, § 1.)

Law reviews. — For annual survey of local government law, see 43 Mercer L. Rev. 317

(1991). For annual survey of local government law, see 44 Mercer L. Rev. 309 (1992).

JUDICIAL DECISIONS

This part not unconstitutional. — Neither this part of Ga. L. 1973, p. 200 (see O.C.G.A. Ch. 3, T. 46) nor any provision thereof operates in a nonuniform manner as prohibited by Ga. Const. 1976, Art. I, Sec. II, Para. VII (Ga. Const. 1983, Art. III, Sec. VI, Para. IV). *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

No provision requiring electricity in home. — Nowhere in this part of Ga. L. 1973, p. 200 (see O.C.G.A. Ch. 3, T. 46) is it provided that plaintiff must have electricity in plaintiff’s home. *Frier v. City of Douglas*, 233 Ga. 775, 213 S.E.2d 607 (1975).

Cited in *Jackson Elec. Membership Corp. v. Georgia Power Co.*, 257 Ga. 772, 364 S.E.2d 556 (1988).

46-3-2. Legislative findings and declaration of policy.

The public interest requires, and it is declared to be the policy of the State of Georgia, that, in order (1) to assure the most efficient, economical, and orderly rendering of retail electric service within the state, (2) to inhibit duplication of the lines of electric suppliers, (3) to foster the extension and location of electric supplier lines in the manner most compatible with the preservation and enhancement of the state’s physical environment, and (4) to protect and conserve lines lawfully constructed by electric suppliers, it is necessary and appropriate that the state establish and implement a plan whereby every geographic area within the state shall be either assigned to an electric supplier or declared unassigned as to any electric supplier; that, to accomplish such a plan, it is necessary that all electric suppliers within the state be subject to this part; that the commission be delegated power, authority, and jurisdiction with respect to such plan; and that all electric membership corporations and all municipalities which furnish retail electric service be additionally subject to regulation by the commission in the same manner as provided for regulation of electric light and power companies, except as to the fixing of their rates, charges, and service rules and regulations, it being determined by the General Assembly that such electric membership corporations and municipalities, which by their corporate nature are wholly or substantially controlled by their consumers, should for regulatory purposes be classified differently in certain respects from electric light and power companies. (Ga. L. 1973, p. 200, § 2.)

JUDICIAL DECISIONS

Purposes of chapter appropriate. — Purposes of this part of Ga. L. 1973, p. 200 (see O.C.G.A. Ch. 3, T. 46) enumerated in Ga. L. 1973, p. 200, § 2 (see O.C.G.A. 46-3-2) are appropriate and are put into effect completely and thoroughly by other provisions of this part. *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

Cited in *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345 (N.D. Ga. 1986); *Marietta Bd. of Lights & Water v. Georgia Pub. Serv. Comm'n*, 182 Ga. App. 702, 356 S.E.2d 737 (1987); *Colquitt Elec. Membership Corp. v. City of Moultrie*, 197 Ga. App. 794, 399 S.E.2d 497 (1990).

RESEARCH REFERENCES

ALR. — Grant of perpetual franchise to public service corporation, 2 ALR 1105.

46-3-3. Definitions.

As used in this part, the term:

(1) "Assigned area" means an enclosed geographic area assigned to only one electric supplier by the commission or by this part, and inside which the assignee electric supplier shall have the exclusive right to extend and continue furnishing service to new premises, except as otherwise provided in this part.

(2) "Electric membership corporation" means a corporation organized under Article 2 of this chapter.

(3) "Electric supplier" means any electric light and power company subject to regulation by the commission, any electric membership corporation furnishing retail service in this state, and any municipality which furnishes such service within this state.

(4) "Line" means any conductor for the distribution or transmission of electricity other than a conductor operating at a potential of 120,000 volts or more. However, a conductor that initially constitutes a line shall not cease being a line if, after March 29, 1973, it is operating at a potential in excess of 120,000 volts.

(5) "Municipality" means:

(A) Any geographically defined political subdivision of this state, other than a county, performing or authorized to perform multiple and substantial municipal functions, specifically including either the function of furnishing retail electric service or the function of granting to electric suppliers street franchise rights for use in furnishing retail electric service;

(B) Any geographically defined political subdivision, or agency thereof, of this state if at any relevant time it lawfully furnishes retail electric service; and

(C) Any political subdivision of any other state which furnishes retail electric service within this state.

(6) "Premises" means the building, structure, or facility to which electricity is being or is to be furnished, provided that two or more buildings, structures, or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric consumer shall together constitute one premises; provided, however, that any such building, structure, or facility shall not, together with any other building, structure, or facility, constitute one premises if the permanent service to it is separately metered and the charges for such service are calculated independently of charges for service to any other building, structure, or facility; provided, further, that an outdoor security light, or an outdoor sign requiring less than 2200 watts, shall not constitute a premises.

(7) "Primary supplier" within a municipality in existence on March 29, 1973, means, either:

(A) That electric supplier which, on March 29, 1973, is furnishing service to the majority or to a plurality, whichever is the case, of the retail electric meters then inside the corporate limits of the municipality; or

(B) That electric supplier to which the commission has reassigned a geographic area, previously assigned to another electric supplier, located within such municipality as its limits existed on March 29, 1973.

(8) "Secondary supplier" within a municipality in existence on March 29, 1973, means any electric supplier which owns lines on that date within such municipality and which is not a primary supplier.

(9) "Service" means retail electric service and includes temporary or construction service as well as permanent service but excludes wholesale service and sales for resale.

(10) "To own" or "to belong" or the like means, wherever used in reference to lines being used by an electric supplier, to have any proprietary or possessory interest.

(11) "Unassigned area-A" means a geographic area which, between March 29, 1973, and Sept. 1, 1975, was not an assigned area and was not declared to be an unassigned area-B.

(12) "Unassigned area-B" means a geographic area which has not been assigned and which has been declared by the commission to be, or by operation of this part becomes, an unassigned area-B, and inside which an electric supplier shall have the right to extend and thereafter continue furnishing service to new premises locating therein if chosen by the consumer utilizing such premises, provided that an electric supplier whose line, as it exists on March 29, 1973, or as thereafter lawfully

constructed to serve new premises pursuant to this part, is at least partially within 500 feet of such new premises shall have the exclusive right to extend and continue furnishing service to such premises if the line of every other electric supplier so existing or so thereafter constructed is at that time wholly more than 500 feet from such premises.

(13) "Wholly new municipality" means a municipality initially coming into existence after March 29, 1973, but not one resulting from the reincorporation of all or any portion of a geographic area theretofore contained in a previously existing municipality or from the merger, consolidation, or any other combination of two or more political subdivisions which are counties or incorporated cities. (Ga. L. 1973, p. 200, § 3; Ga. L. 1982, p. 3, § 46.)

Law reviews. — For article, "Administrative Law," see 53 Mercer L. Rev. 81 (2001).

JUDICIAL DECISIONS

Paragraph 4 of Ga. L. 1973, p. 200, § 3 (see O.C.G.A. 46-3-3), is not an arbitrary or capricious definition, but instead is reasonably related to the purposes of this part of Ga. L. 1973, p. 200 (see O.C.G.A. Ch. 3, T. 46). *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

New premises distinct from older facility. — A new jail built on land owned by a county and on which an existing correctional facility is also located, although connected by permanent enclosed covered walkways to a new, free-standing dining facility which was built at the same time as the new jail was not an addition to or extension of the existing correctional facility, but was a new premises physically separate from the existing facility, physically distinct with a separate electric system. The two facilities constituted two separate entities in terms of purpose and

operation with two different legal entities responsible for operating the different facilities. *Colquitt Elec. Membership Corp. v. City of Moultrie*, 197 Ga. App. 794, 399 S.E.2d 497 (1990).

Unified government may be "municipality." — Where a unified government is a geographically defined political subdivision of the state performing or authorized to perform multiple and substantial municipal functions, so long as it is "other than a county," it is a "municipality." *Athens-Clarke County v. Walton Elec. Membership Corp.*, 265 Ga. 229, 454 S.E.2d 510 (1995).

Cited in *North Georgia Elec. Membership Corp. v. City of Dalton*, 197 Ga. App. 386, 398 S.E.2d 209 (1990); *City of LaGrange v. Troup County Elec. Membership Corp.*, 200 Ga. App. 418, 408 S.E.2d 708 (1991).

46-3-4. Assignment or declaration as unassigned areas-B of geographic areas outside municipal limits as of March 29, 1973.

After March 29, 1973, and continuing thereafter as rapidly as it is administratively practicable to do so, the commission is authorized and directed to assign to electric suppliers or to declare as unassigned areas-B all geographic areas in this state that were, on March 29, 1973, located outside the corporate limits of any municipality. Such assignments and declarations of unassignment shall be effected by the commission in accordance with the following standards:

(1) Assigned areas shall be described by defined boundaries on maps to be filed with the commission and incorporated by it in its orders. Where deemed necessary or appropriate, the commission may require boundaries to be additionally described by written metes and bounds;

(2) Each geographic area assigned shall be assigned to only one electric supplier, as determined by public convenience and necessity, having primary regard for the location of electric suppliers' lines but having no regard for differences in electric suppliers' retail rates or for the fact that retail consumers are not then being served from such lines;

(3) Each geographic area assigned shall be so assigned that its boundaries enclose land spaces in which the assignee electric supplier owns all or a preponderance of the lines, provided that a geographic area may be so assigned or declared unassigned even though it is completely surrounded by the inner boundaries of another geographic area assigned to an electric supplier. Boundaries will be located around the perimeter of such land spaces so as to be approximately 1,000 feet from the nearest of the assignee electric supplier's lines so enclosed, provided that if the lines of two or more electric suppliers are closer together than 2,000 feet, the boundary shall be located approximately halfway between them; provided, however, that where compelling factors of public convenience and necessity so require, including the need for using natural and manmade landmarks for boundary references, the location of a boundary may vary somewhat more or somewhat less than such 1,000 foot or halfway distance; provided, further, that such 1,000 foot or halfway distance standards shall not apply to any lines of the assignee electric supplier which extend from inside the assigned area outside such area or to any lines of any other electric supplier which extend from outside the area inside or completely across such area and which do not otherwise occasion assignment or unassignment of land space, the rights and restrictions applying to such other electric supplier's lines inside such area being as provided for in paragraph (4) of this Code section;

(4) A line of an electric supplier which extends into or completely crosses a land space in which another electric supplier owns a preponderance of the lines may nevertheless be considered as the basis for assigning or declaring unassigned land space related thereto; but, unless such line so occasions an assignment or an unassignment, then, from and after the date of the assignment to an electric supplier of the geographic area within which such line is enclosed and based upon the location of both suppliers' lines on that date, the electric supplier owning such enclosed line shall have the exclusive right to extend and continue furnishing service to all new premises locating at least partially within 500 feet of such line and wholly more than 500 feet from the assignee electric supplier's lines and shall have the right, if chosen by the consumer utilizing such premises, to extend and continue furnishing service to new

premises locating at least partially within 500 feet of both electric suppliers' lines but shall not otherwise have the right, unless so agreed by the assignee electric supplier and the consumer utilizing such premises, to extend and furnish service to any other premises locating inside such assigned area;

(5) Except where public convenience and necessity require their assignment, the commission shall declare as unassigned areas-B those land spaces which are not assigned to an electric supplier pursuant to any other provision of this part; and

(6) Not inconsistent with Code Section 46-3-8, any electric supplier may apply to the commission for assignment to it of one or more geographic areas or for the commission to declare one or more geographic areas to be unassigned areas-B. (Ga. L. 1973, p. 200, § 4.)

JUDICIAL DECISIONS

No unconstitutional delegation of legislative power. — Ga. L. 1973, p. 200, § 4 (see O.C.G.A. 46-3-4) is not an unconstitutional delegation of legislative power pursuant to Ga. Const. 1976, Art. III, Sec. I, Para. I (Ga. Const. 1983, Art. III, Sec. I, Para. I). *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

Bases of assignments of service areas not unconstitutional. — Basing assignments of service areas primarily on the presence or absence of electric lines does not violate Ga. Const. 1976, Art. I, Sec. II, Para. VII (Ga. Const. 1983, Art. III, Sec. VI, Para. IV). *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

Restraint on competition for benefit of public. — To the extent the assignment of service areas under Ga. L. 1973, p. 200, § 4 (see O.C.G.A. 46-3-4) restrains competition, the restraint is for the benefit of the public

in minimization of duplication of facilities and prevention of other adverse economic and environmental effects and thus does not violate Ga. Const. 1976, Art. III, Sec. VIII, Para. VIII (Ga. Const. 1983, Art. III, Sec. VI, Para. V). *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

Method of accomplishment of goals of furnishing electric service and minimizing interference. — Both the goals of the orderly furnishing of electric service and minimizing interference stated in Ga. L. 1973, p. 200, § 2 (see O.C.G.A. § 46-3-2) can be accomplished by basing assignments of electricity service areas primarily upon the location of electric lines pursuant to paragraph (2) of Ga. L. 1973, p. 200, § 4 (see O.C.G.A. 46-3-4). *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

RESEARCH REFERENCES

ALR. — Duty to extend electrical service or supply individual applicant as affected by cost involved, 58 ALR 537.

46-3-5. Assignment of geographic areas within municipal limits as of March 29, 1973.

Except as otherwise provided in subsection (a) of Code Section 46-3-8, all geographic areas inside the corporate limits of every municipality, as such limits existed on March 29, 1973, are assigned to the primary supplier,

subject to the rights and restrictions applying to electric suppliers owning lines therein, as follows: Based upon the location of all electric suppliers' lines therein on March 29, 1973, every secondary supplier shall have the exclusive right to extend and continue furnishing service to new premises locating therein at least partially within 300 feet of its line and wholly more than 300 feet from the lines of every other electric supplier; and shall have the right, if chosen by the consumer utilizing such premises, to extend and continue furnishing service to new premises locating therein at least partially within 300 feet of both its lines and the lines of any other electric supplier; but shall not otherwise have the right, unless so agreed by the primary supplier and by any other secondary supplier whose lines are located at least partially within 300 feet thereof and the consumer utilizing such premises, to extend and continue furnishing service to any other premises locating therein, which shall be the exclusive right of the primary supplier or such other secondary supplier, if such be the case. (Ga. L. 1974, p. 200, § 5; Ga. L. 1982, p. 3, § 46.)

JUDICIAL DECISIONS

Bases of assignments of service areas not unconstitutional. — Basing assignments of service areas primarily on the presence or absence of electric lines does not violate Ga.

Const. 1976, Art. I, Sec. II, Para. VII (Ga. Const. 1983, Art. III, Sec. VI, Para. IV). *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

46-3-6. Assignment and unassignment of geographic areas included within wholly new municipalities after March 29, 1973.

As to geographic areas which, after March 29, 1973, are included within the initial limits of a wholly new municipality, the rights and restrictions applying to electric suppliers shall be as follows:

(1) Any portion of such geographic area then already assigned to an electric supplier shall continue to be so assigned until and unless reassigned by the commission to another electric supplier pursuant to paragraph (1) of subsection (d) of Code Section 46-3-8; and

(2) Any portion of such geographic area which is then unassigned shall continue to be so unassigned until and unless it is assigned by the commission, taking into account the recommendation, if any, of the municipality itself, to an electric supplier pursuant to paragraph (2) of subsection (d) of Code Section 46-3-8. (Ga. L. 1973, p. 200, § 6; Ga. L. 1982, p. 3, § 46.)

JUDICIAL DECISIONS

Bases of assignments of service areas not unconstitutional. — Basing assignments of service areas primarily on the presence or absence of electric lines does not violate Ga.

Const. 1976, Art. I, Sec. II, Para. VII (Ga. Const. 1983, Art. III, Sec. VI, Para. IV). *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

46-3-7. Assignment and unassignment of geographic areas annexed to municipalities after March 29, 1973.

Whenever, after March 29, 1973, any geographic area is annexed to a municipality including the inclusion of a geographic area in a new municipality formed by the merger, consolidation, or any other combination of a then existing municipality and one or more other geographically defined political subdivisions, if the resulting political subdivision constitutes a municipality as defined in Code Section 46-3-3, such geographic area shall be assigned or assignable or become unassigned, and the rights and restrictions applying to electric suppliers therein shall be as follows:

(1) In so much of such geographic area, if any, as was immediately theretofore within the limits of a municipality as they existed on March 29, 1973, or as they existed on the date on which a wholly new municipality came into existence, and if such annexation is caused by the merger, consolidation, or any other combination of such previously existing municipality and one or more other geographically defined political subdivisions, resulting in a political subdivision which constitutes a municipality as defined in Code Section 46-3-3, the rights and restrictions applying to all electric suppliers therein shall continue to be governed by Code Section 46-3-5 or 46-3-6, whichever is applicable;

(2) As to such geographic areas other than those provided for in paragraph (1) of this Code section:

(A) So much of such geographic area, if any, as was already assigned to a primary supplier within a municipality which was in existence on March 29, 1973, shall continue to be so assigned, provided that if such annexation is caused by the merger, consolidation, or any other combination of two or more such municipalities having different primary suppliers, such assignments shall continue in favor of such primary suppliers respectively;

(B) If the annexation is to a wholly new municipality, then so much of such geographic area, if any, as was already assigned to an electric supplier then serving as an assignee electric supplier within such municipality shall continue to be so assigned;

(C) If such annexation includes one or more wholly new municipalities or one or more municipalities which were in existence on March 29, 1973, then so much of such geographic area, if any, as was then contiguous to a wholly new municipality and was already assigned to an assignee electric supplier within such wholly new municipality, or which was contiguous to a municipality which was in existence on March 29, 1973, and was already assigned to the primary supplier within such municipality, shall continue to be so assigned;

(D) As to such geographic areas which are annexed by other than merger, consolidation, or other combination of a previously existing

municipality and one or more other geographically defined political subdivisions so as to result in a political subdivision which constitutes a municipality as defined in Code Section 46-3-3 but are not provided for in paragraph (1) of this Code section or in subparagraphs (A), (B), and (C) of this paragraph, so much of such geographic area, if any, as was already assigned to any electric supplier shall continue to be so assigned. In the event the primary supplier delivers, not less than 45 nor more than 90 days prior to the effective date of such annexation, written notice of such annexation upon every other electric supplier owning lines within the county or counties in which the annexing municipality is located (or, though not in the same county, within one mile of any portion of such geographic area), such portions of such geographic area as shall not have been already assigned to any other electric supplier shall by operation of this part become assigned to the primary supplier unless, on or before the effective date of such annexation, there is filed with the commission one or more applications by one or more other electric suppliers for the assignment of any portion of such geographic area. If such an application or applications are filed, then, until there is a final determination with respect to such application or applications, the service rights and restrictions applying to electric suppliers in so much of such geographic area as is the subject matter of the application or applications shall continue as they were immediately prior to the effective date of annexation. In such a proceeding, the commission, acting in accordance with Code Section 46-3-4, may make assignments of all or any portion of such geographic area to one or more applicant electric suppliers. Any portion of such geographic area not so assigned to any other electric supplier shall, effective as of the final determination of such application or applications, be assigned by operation of this part to the primary supplier, provided that if the commission finds and determines upon complaint that such assignment to the primary supplier of any such portion thereof will be grossly inimical to the public interest, it shall designate such portion as an unassigned area-B. In any geographic area assigned by operation of this part pursuant to this subparagraph, every secondary supplier shall have, based upon the location of all secondary suppliers' lines therein on the effective date of the annexation, the exclusive right to extend and continue furnishing service to new premises locating therein at least partially within 300 feet of its line and wholly more than 300 feet from the lines of every other electric supplier; and shall have the right, if chosen by the consumer utilizing such premises, to extend and continue furnishing service to new premises locating therein at least partially within 300 feet of both its lines and the lines of any other electric supplier; but shall not otherwise have the right, unless so agreed by the assignee electric supplier and by any other secondary supplier whose lines are located at least partially within 300 feet thereof and the consumer utilizing such premises, to

extend and continue furnishing service to any other premises locating therein, which shall be the exclusive right of the assignee electric supplier or such other secondary supplier, if such be the case; or

(E) If such geographic area was already an unassigned area-A or an unassigned area-B and was annexed by merger, consolidation or other combination of a previously existing municipality and one or more other geographically defined political subdivisions so as to result in a political subdivision which constitutes a municipality as defined in Code Section 46-3-3, or if such an unassigned area-A or unassigned area-B was otherwise annexed but the notice of annexation required by subparagraph (D) of this paragraph was not given, such geographic area shall, on the effective date of the annexation, become or continue to be, as the case may be, an unassigned area-B until and unless the commission assigns all or any portion thereof to an electric supplier pursuant to paragraph (2) of subsection (d) of Code Section 46-3-8. (Ga. L. 1973, p. 200, § 7; Ga. L. 1982, p. 3, § 46.)

Cross references. — Annexation of territory by municipalities generally, Ch. 36, T. 36.

JUDICIAL DECISIONS

Bases of assignments of service areas not unconstitutional. — Basing assignments of service areas primarily on the presence or absence of electric lines does not violate Ga. Const. 1976, Art. I, Sec. II, Para. VII (Ga. Const. 1983, Art. III, Sec. VI, Para. IV). *City of Calhoun v. North Ga. Elec. Membership*

Corp., 233 Ga. 759, 213 S.E.2d 596 (1975).

Statutory scheme created by subparagraph (2)(D) of O.C.G.A. § 46-3-7 is clear and unambiguous. *Marietta Bd. of Lights & Water v. Georgia Pub. Serv. Comm'n*, 182 Ga. App. 702, 356 S.E.2d 737 (1987).

46-3-8. Exceptions, grandfather rights, and other rights.

(a) Notwithstanding any other provision of this part, but subject to subsections (b) and (c) of this Code section, after March 29, 1973, service to one or more new premises (but if more than one, such premises must be located on the same tract or on contiguous tracts of land), if utilized by one consumer and having single-metered service and a connected load which, at the time of initial full operation of the premises, is 900 kilowatts or greater (excluding redundant equipment), may be extended and furnished, if chosen by the consumer:

(1) By the primary supplier within a municipality if the premises are located anywhere within the limits of such municipality as they existed on March 29, 1973;

(2) By a secondary supplier within the limits of a municipality as they existed on March 29, 1973, if the premises are located at least partially within 300 feet of the lines of such secondary supplier;

(3) By any electric supplier if the premises are located within the initial corporate limits of a wholly new municipality;

(4) By any electric supplier owning lines in a municipality if the premises are located in a geographic area annexed in any manner to such municipality after March 29, 1973; and

(5) By any electric supplier if the premises are located outside the limits of a municipality.

(b) Notwithstanding any other provision of this part, but subject to subsections (c) and (h) of this Code section, every electric supplier shall have the exclusive right to continue serving any premises lawfully served by it on March 29, 1973, or thereafter lawfully served by it pursuant to this part, including any premises last and previously served by it which before or after March 29, 1973, have become disconnected from service for any reason, and including premises which before or after March 29, 1973, have been destroyed or dismantled and which are reconstructed after March 29, 1973, in substantial kind on approximately the same site.

(c) Notwithstanding any other provision of this part:

(1) Upon its own complaint or the complaint of any other electric supplier or any other interested party, the commission shall have the authority and jurisdiction, after notice to all affected electric suppliers and after hearing, if a hearing is requested by any affected electric supplier or any other interested party, to find and determine that the service of an electric supplier then serving a premises or exclusively entitled under this part to serve such premises is not adequate or dependable or that such electric supplier's rates, charges, service rules and regulations, or the application thereof unreasonably discriminate in favor of or against the consumer utilizing such premises, or that an electric supplier is in violation of subsection (b) of Code Section 46-3-11. Upon such determination, the commission shall have the authority and jurisdiction to order such electric supplier within a reasonable time to make such improvements as will make its service adequate and dependable, or to order such electric supplier within not less than 30 days to cease employing such discriminatory rates, charges, service rules and regulations, or the application thereof or the practices prohibited by subsection (b) of Code Section 46-3-11 and to substitute in lieu thereof, subject to approval by the commission, rates, charges, service rules and regulations, and practices of application thereof which are not unreasonably discriminatory, or practices in conformity with subsection (b) of Code Section 46-3-11. If the commission finds and determines in its first consideration of the matter that such electric supplier is unwilling or unable within a reasonable time to make its service adequate and dependable, or is unwilling within 30 days to cease and correct such unreasonable discrimination or practices, or if it finds in a subsequent

consideration of the matter that its order to improve service, its order to cease and correct the unreasonable discrimination, or its order to cease and correct such practices has not been timely and in good faith complied with, it may then order such electric supplier to cease or desist from serving such premises and order any other electric supplier which may reasonably do so to extend and furnish service to such premises; and

(2) Upon the joint application of the affected electric suppliers, the commission shall have the authority and jurisdiction, after notice to all affected persons and after hearing, if a hearing is requested, to find and determine that the public convenience and necessity require, and thereupon to approve, the transfer of service from one electric supplier to another electric supplier.

(d) Notwithstanding any other provision of this part, but subject to subsection (b) of this Code section, the commission may:

(1) If it determines that an assignee electric supplier has breached the tenets of public convenience and necessity therein, reassign all or any portion of an area assigned to that assignee electric supplier to another electric supplier; and

(2) If it determines that public convenience and necessity so require, assign to any electric supplier all or any portion of a geographic area which theretofore has been an unassigned area-A or an unassigned area-B.

(e) Notwithstanding any other provision of this part:

(1) No portion of a line constructed after March 29, 1973, by an electric supplier inside another electric supplier's assigned area, inside an unassigned area-A, or inside a municipality to serve premises which, but for the exception provided for in subsection (a) of this Code section, it would not have had the right to serve shall acquire any other service rights therein or impair or diminish any service rights of an assignee electric supplier or the service rights accruing to the lines of any electric supplier inside any assigned area, unassigned area-A, or municipality, provided that such electric supplier may extend and furnish service from such line to any other premises which it otherwise has the right to serve;

(2) No portion of a line constructed after March 29, 1973, by an electric supplier inside an unassigned area-B to serve premises which, but for the exception provided for in subsection (a) of this Code section, it would not have had the right to serve shall impair or diminish any service rights accruing to the lines of any other electric supplier inside such unassigned area-B, provided that such electric supplier may extend and furnish service from such line to any other premises which it otherwise has the right to serve;

(3) No portion of a line constructed after March 29, 1973, by an electric supplier for the initial sole purpose of furnishing service at

wholesale shall acquire any other service rights or impair or diminish the service rights of any assignee electric supplier or the service rights accruing to the lines of any electric supplier, provided that such electric supplier may extend and furnish service from such line to any other premises which it otherwise has the right to serve;

(4) No electric supplier shall, after March 29, 1973, construct its lines to serve new premises except in accordance with sound electric utility standards. If, after a hearing involving the affected electric suppliers and any other interested party, the commission determines that an electric supplier is about to violate, is violating, or has violated such standards so as arbitrarily to preempt areas or arbitrarily to gain service rights for such a line, the commission is authorized and directed:

(A) To order the offending electric supplier to cease and desist such construction or to alter and relocate the same; or

(B) To declare that such line or any offending portion thereof shall not be taken into account in assigning an area or in locating an assigned area boundary or shall not acquire any service rights that would otherwise accrue thereto or impair or diminish any service rights accruing to the lines of any other electric supplier;

(5) Any electric supplier may extend and furnish service to any of its own premises devoted to public service, whether the same shall have already been served by another electric supplier, but no line constructed for such purpose after March 29, 1973, shall acquire any other service right or impair or diminish the service rights of any assignee electric supplier or the service rights accruing to the lines of any electric supplier, provided that such electric supplier may extend and furnish service from such line to other premises which it otherwise has the right to serve;

(6) No line of a secondary supplier constructed prior to March 29, 1973, which on that date is not providing retail service to one or more premises within the limits of the municipality as they exist on that date shall acquire any service rights to provide retail service to any premises located within such municipal limits as they exist on that date.

(f) The time at which an electric supplier, based upon the location or proximity of electric suppliers' lines as in this part provided for, shall be considered as having the right to extend and furnish, or as being restricted from extending and furnishing, service to new premises shall be the time at which written application for temporary construction or permanent service is made to any electric supplier by the consumer utilizing such premises or the time at which construction of such premises is commenced, whichever first occurs. The location of a premises for temporary construction service shall be deemed to be the same as the location of the premises which shall require permanent service after construction. If temporary construction service is required at one site for the purpose of beginning the construction

of premises at two or more sites, this subsection shall not preclude an electric supplier, if chosen by the builder and having the right to serve at least one of the premises to be constructed, from furnishing all of such temporary construction service, notwithstanding the fact that one or more other electric suppliers may have and may exercise the exclusive right thereafter to extend and furnish the permanent service to one or more of the premises being constructed.

(g) Whenever, after March 29, 1973, any new premises requiring service are so sited as to be located partially within an assigned area, an unassigned area-A, or an unassigned area-B and also partially within any other assigned area, unassigned area-A, or unassigned area-B, such premises may be served by that electric supplier chosen by the consumer utilizing such premises from among the electric suppliers which are eligible under this part to extend and furnish such service within any of such areas.

(h) Notwithstanding any other provisions of this part, if a majority of those voters of a municipality which was not rendering electric service on March 29, 1973, approve, by means of referendum vote, the purchase, construction, extension, operation, and maintenance of an electric distribution system by that municipality, such municipality is granted the right of eminent domain to condemn all of the lines and other facilities of the primary supplier within such municipality and any secondary supplier located within the corporate limits of such municipality and used to serve customers therein at retail. This right shall expire, with respect to each such municipality, one year after the date the results of such referendum are declared unless, before that date, such municipality institutes proceedings to acquire such lines and other facilities under any of the statutory methods provided for the condemnation of private property. Upon a final order of condemnation of such lines and other facilities, such municipality shall become the primary supplier therein, the rights of the former primary supplier and any such secondary suppliers under subsection (b) of this Code section shall cease, and the consumers served thereby within such corporate limits shall be thereafter served by the municipality as the new primary supplier. The transfer of service shall be accomplished as nearly as practicable without interruption of service to the consumers. Electric suppliers are authorized to negotiate the sale and purchase of all or any part of any such lines and other facilities, and upon the transfer of title thereto the rights of the selling supplier under subsection (b) of this Code section shall cease. (Ga. L. 1973, p. 200, § 9.)

Law reviews. — For article, “Administrative Law,” see 53 Mercer L. Rev. 81 (2001).

JUDICIAL DECISIONS

No unconstitutional denial of equal protection in subsection (a). — The exemption in subsection (a) of Ga. L. 1973, p. 200, § 9 (see O.C.G.A. § 46-3-8) allowing large load

customers free choice was not arbitrary, capricious, or wholly unreasonable but based upon real differences between two groups of customers and between the effects upon electric utilities and the communities in which they locate. Therefore, that subsection is not a denial of equal protection prohibited by Ga. Const. 1976, Art. I, Sec. II, Para. III (Ga. Const. 1983, Art. I, Sec. I, Para. II). *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

This section not unlawful attempt to regulate or fix charges of municipal utilities. — Ga. L. 1973, p. 200, § 9 (see O.C.G.A. § 46-3-8) does not attempt to interfere with either the municipality or the electric membership corporation in the establishment of their rate levels. Therefore, it is clear that the section does not constitute an unlawful attempt to regulate or fix the charges of municipal utilities prohibited by Ga. Const. 1976, Art. III, Sec. VIII, Para. IX (Ga. Const. 1983, Art. III, Sec. VI, Para. V), subject to the exception in Ga. Const. 1976, Art. IX, Sec. VIII, Para. I (Ga. Const. 1983, Art. IX, Sec. VI, Para. I, II; Art. XI, Sec. I, Para. IV). *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

Subsection (a) of Ga. L. 1973, p. 200, § 8 (see O.C.G.A. § 46-3-8) not shown to be unconstitutional under Const. 1976, Art. I, Sec. II, Para. VII. *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

Office park not within "large load" exception. — Multi-building office park did not qualify for the benefit of the "large load" exception of O.C.G.A. § 46-3-8(a), where the premises was not conceived as a unified rental premises for its entire useful life and the metering arrangement for the premises did not comply in substance with the single-meter requirement of the exception. *City of Norcross v. Georgia Power Co.*, 197 Ga. App. 891, 399 S.E.2d 725 (1990).

"Large load" exception strictly construed. — The "large load" exception of O.C.G.A. § 46-3-8(a), being an exception to the general rule of competitive restriction, must be strictly construed. *City of Norcross v. Georgia Power Co.*, 197 Ga. App. 891, 399 S.E.2d 725 (1990).

The large-load exception did not apply. — An individually-metered apartment complex

in which the complex's owner installed separate meters that were combined under a master or pass-through meter, notwithstanding that the owner paid the bill for the entire complex and employed an outside company to read the separate meters and bill each tenant for their individual usage did not qualify for the large load exception. *Sawnee Elec. Membership Corp. v. Georgia Pub. Serv. Comm'n*, 273 Ga. 702, 544 S.E.2d 158 (2001).

Supplier not empowered to supply electricity to one not wanting any. — Subsection (b) of Ga. L. 1973, p. 200, § 9 (see O.C.G.A. § 46-3-8) does not empower the city to supply electricity to one who does not want any electricity at all. *Frier v. City of Douglas*, 233 Ga. 775, 213 S.E.2d 607 (1975).

Subsection (b) inapplicable to temporary service. — Subsection (b) of O.C.G.A. § 46-3-8, the grandfather clause, does not authorize a supplier of temporary electrical services to a large load consumer the exclusive right to later furnish permanent services to the consumer; therefore, a city's provision of temporary electrical service to a large load consumer at a construction site does not preclude the consumer under paragraph (a)(4) and subsection (f) from choosing another authorized supplier for permanent service to the completed site. *City of LaGrange v. Georgia Power Co.*, 185 Ga. App. 60, 363 S.E.2d 286 (1987), cert. denied, 185 Ga. App. 909, 363 S.E.2d 286 (1988).

Electric supplier determined at time consumer applies for service. — The fact that a consumer later builds a formerly un contemplated structure in an area which would qualify the consumer for service by a secondary supplier does not abrogate the provision of O.C.G.A. § 46-3-8(f) that the electrical supplier is determined at the moment the consumer makes an application for service. *City of Marietta Bd. of Lights & Water v. Georgia Power Co.*, 176 Ga. App. 123, 335 S.E.2d 467 (1985).

Nonretail service to premises outside agreed territory. — Commission properly found city's plan to provide service to its own facility outside of service area did not violate Territorial Agreement. See *North Ga. Elec. Membership Corp. v. City of Calhoun*, 195 Ga. App. 382, 393 S.E.2d 510 (1990).

New premises distinct from older facility. — A new jail built on land owned by a county

and on which an existing correctional facility is also located, although connected by permanent enclosed covered walkways to a new, free-standing dining facility which was built at the same time as the new jail was not an addition to or extension of the existing correctional facility, but was a new premises physically separate from the existing facility, physically distinct with a separate electric system. The two facilities constituted two separate entities in terms of purpose and

operation with two different legal entities responsible for operating the different facilities. *Colquitt Elec. Membership Corp. v. City of Moultrie*, 197 Ga. App. 794, 399 S.E.2d 497 (1990).

Cited in *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345 (N.D. Ga. 1986); *Jackson Elec. Membership Corp. v. Georgia Power Co.*, 257 Ga. 772, 364 S.E.2d 556 (1988).

RESEARCH REFERENCES

ALR. — Duty to extend electrical service or supply individual applicant as affected by cost involved, 58 ALR 537.

46-3-9. Limitation on power of electric membership corporations to furnish service within municipalities.

Notwithstanding any other provision of law, no electric membership corporation shall be authorized or empowered to furnish service inside the corporate limits of any municipality except:

(1) If it is already furnishing service therein on March 29, 1973, or if its lines become annexed, including annexation that may be caused by the merger, consolidation, or any other combination of a then existing municipality and one or more other geographically defined political subdivisions, if the resulting political subdivision constitutes a municipality as defined in Code Section 46-3-3, or if its lines become included in a wholly new municipality, in any of which events the other relevant Code sections of this part shall apply and prevail;

(2) To extend and furnish service initially inside a municipality the population of which at the time of such initial service is 1,500 or less, but not inconsistently with the other Code sections of this part; or

(3) Notwithstanding paragraphs (1) and (2) of this Code section, if the municipality and all electric suppliers then furnishing service inside such municipality or furnishing electric service to the municipality at wholesale so consent. (Ga. L. 1973, p. 200, § 13; Ga. L. 1982, p. 3, § 46.)

RESEARCH REFERENCES

C.J.S. — 29 C.J.S., Electricity, § 10.

46-3-10. Limitation on power of electric suppliers to condemn property of other electric suppliers.

Notwithstanding any other provision of law, no electric supplier shall be authorized or empowered to exercise the power of eminent domain for the purpose of acquiring any property, whether real or personal, of another electric supplier which property is devoted to the public use in furnishing wholesale or retail electric service if such acquisition would destroy or unduly impair or interfere with the operation or use of such property by such other electric supplier. (Ga. L. 1973, p. 200, § 14.)

RESEARCH REFERENCES

ALR. — Furnishing electricity to public as eminent domain may be exercised, 44 ALR public use or purpose for which power of 735; 58 ALR 787.

46-3-11. Application by electric supplier of discriminatory rates, charges, or service rules or regulations; prohibited acts by electric suppliers generally.

(a) Every electric supplier is prohibited from having or applying any rate, charge, or service rule or regulation which unreasonably discriminates against or in favor of (1) any member of a class of consumers as opposed to any other consumer who is or should be in the same class of consumers for such purposes, or (2) any class of its consumers as opposed to another class of consumers for such purposes, provided that this prohibition shall not apply to any rate, charge, or service rule or regulation relating solely to service rendered by a municipality to consumers whose premises are located within its limits as they existed on March 29, 1973.

(b) Notwithstanding any other provision of law, every electric supplier is prohibited from, directly or indirectly, by ordinance, law, policy, contract, rate, regulation, or otherwise:

(1) Requiring that a consumer receive retail electric service from such electric supplier as a condition for such consumer to receive from such electric supplier or any other person any goods or other services that are not reasonably related to the furnishing of retail electric service to such consumer's premises;

(2) Offering a consumer lesser charges or more favorable terms or conditions for retail electric service because of such consumer's receiving or agreeing to receive from such electric supplier any goods or other services that are not reasonably related to the furnishing of retail electric service to such consumer's premises;

(3) Imposing higher charges for any goods or other services that are not reasonably related to the furnishing of retail electric service to a

consumer's premises because of such consumer's failure or refusal to receive retail electric service from that supplier; or

(4) Furnishing retail electric service to any premises which such electric supplier is not entitled to serve under this part. (Ga. L. 1973, p. 200, § 10.)

JUDICIAL DECISIONS

This section not unlawful attempt to regulate or fix charges of municipal utilities. — Ga. L. 1973, p. 200, § 10 (see O.C.G.A. § 46-3-11) does not attempt to interfere with either the municipality or the electric membership corporation in the establishment of their rate levels. Therefore, it is clear that the section does not constitute an unlawful attempt to regulate or fix the charges of municipal utilities prohibited by Ga. Const. 1976, Art. III, Sec. VIII, Para. I (Ga. Const. 1983, Art. III, Sec. VI, Para. I), subject to the exception in Ga. Const. 1976, Art. IX, Sec. VIII, Para. I (Ga. Const. 1983, Art. IX, Sec. VI, Para. I, II; Art. XI, Sec. I, Para. IV). *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

Electric supplier may recover underbilled services. — Public policy prohibits suppliers of electricity from charging consumers in the same class at different rates; thus, an electric membership corporation was entitled to recover from a farmer for underbilled services. *Habersham Elec. Membership Corp. v. Mize*, 211 Ga. App. 329, 439 S.E.2d 26 (1993).

Defenses allowed against recovery of underbilled services. — When an electric supplier's act results in the underbilling of

its customer, and the supplier seeks to recover the correct billing amount, the customer can assert accord and satisfaction, equitable estoppel, or statute of limitation defenses. *Brown v. Walton Elec. Membership Corp.*, 272 Ga. 453, 531 S.E.2d 712 (2000), reversing *Brown v. Walton Elec. Membership Corp.*, 238 Ga. App. 347, 518 S.E.2d 727 (1999).

Electric supplier may condition sale by it of satellite dish to retail electric service clients. — An electrical supplier may require a consumer to receive retail electric service from "such electric supplier" as a condition for the consumer to purchase a satellite dish from the supplier, but under O.C.G.A. §§ 46-3-200 and 46-3-201, an electric membership corporation must require a consumer to be a member of that EMC before the EMC can sell a satellite dish to the consumer. *Washington Elec. Membership Corp. v. Avant*, 256 Ga. 340, 348 S.E.2d 647 (1986).

Cited in *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345 (N.D. Ga. 1986); *Albany Oil Mill, Inc. v. Sumter Elec. Membership Corp.*, 212 Ga. App. 242, 441 S.E.2d 524 (1994).

RESEARCH REFERENCES

ALR. — Right of public utility corporation to refuse its service because of collateral matter not related to that service, 55 ALR 771.

Variations of electric utility rates based on quantity used, 67 ALR 821.

Right of electrical company to discriminate against a concern which desires service for resale, 112 ALR 773.

Variations of utility rates based on flat and meter rates, 40 ALR2d 1331.

46-3-12. Jurisdiction of commission over electric membership corporations.

All electric membership corporations which furnish service in the State of Georgia and all municipalities, whether incorporated by this state or not,

which furnish service inside the state shall, in addition to the manner and extent otherwise provided for in this part, be subject to the authority and jurisdiction of the commission in the same manner as electric light and power companies are subject under other laws of the State of Georgia and regulations of the commission pursuant thereto, provided that the rates, charges, and service rules and regulations of electric membership corporations and municipalities shall be filed with the commission and shall be subject to Code Section 46-3-11 but shall not otherwise be fixed by the commission; provided, further, that securities issued by a municipality relating solely to service rendered inside its limits as they existed on March 29, 1973, shall not be subject to regulation by the commission; provided, further, that service rendered by any electric supplier shall be made pursuant to and consistent with its rates, charges, and service rules and regulations then in effect. (Ga. L. 1973, p. 200, § 11.)

JUDICIAL DECISIONS

This section not unlawful attempt to regulate or fix charges of municipal utilities. — Ga. L. 1973, p. 200, § 11 (see O.C.G.A. § 46-3-12) does not attempt to interfere with either the municipality or the electric membership corporation in the establishment of their rate levels. Therefore, it is clear that the section does not constitute an unlawful attempt to regulate or fix the charges of municipal utilities prohibited by Ga. Const. 1976, Art. III, Sec. VIII, Para. I (Ga. Const.

1983, Art. III, Sec. VI, Para I), subject to the exception in Ga. Const. 1976, Art. IX, Sec. VIII, Para. I (Ga. Const. 1983, Art. IX, Sec. VI, Para I, II; Art. XI, Sec. I, Para. IV). *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

Cited in *Habersham Elec. Membership Corp. v. Mize*, 211 Ga. App. 329, 439 S.E.2d 26 (1993); *Albany Oil Mill, Inc. v. Sumter Elec. Membership Corp.*, 212 Ga. App. 242, 441 S.E.2d 524 (1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 27A Am. Jur. 2d, Energy and Power Sources, § 35.

C.J.S. — 29 C.J.S., Electricity, § 3.

ALR. — Grant of perpetual franchise to public service corporation, 2 ALR 1105.

46-3-13. Enforcement of part by commission.

At any time, upon its own complaint or the complaint of any other electric supplier or any other interested party, the commission shall have the authority and jurisdiction, after notice to all affected electric suppliers and other interested parties, and after a hearing, to enforce the provisions of this part by appropriate orders. (Ga. L. 1973, p. 200, § 12.)

JUDICIAL DECISIONS

Cited in *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345 (N.D. Ga. 1986).

46-3-14. Effect of part on municipal police powers over erection and maintenance of electric wires, poles, and other facilities of electric suppliers in streets, alleys, and public ways.

(a) No provision of this part shall restrict the reasonable exercise of the police power of a municipality over the erection and maintenance of poles, wires, and other facilities of electric suppliers in streets, alleys, and public ways.

(b) No municipality may, by unreasonably withholding or conditioning right of way easements or franchises, defeat, impair, or interfere with the rights and restrictions applying to electric suppliers therein as provided for in this part. Rather, any secondary supplier within a municipality existing on March 29, 1973, and any electric supplier other than the primary supplier within any geographic area thereafter annexed to such municipality, shall pay the municipality for street franchise rights a sum of money calculated and payable in the same manner and on the same basis as is utilized with respect to the payment, if any, by the primary supplier (other than the municipality itself) for the same or substantially identical rights. In addition, any electric supplier within a wholly new municipality at the time such municipality comes into existence or thereafter which does not serve a majority or plurality of the retail electric meters inside the limits of such municipality shall pay such municipality for street franchise rights a sum of money calculated and payable in the same manner and on the same basis as is utilized with respect to the payment, if any, by the electric supplier (other than the municipality itself) which serves a majority or plurality, whichever is the case, of the retail electric meters inside the limits of such municipality for the same or substantially identical rights.

(c) No provision of this part shall abolish the power of any incorporated municipality pursuant to paragraph (7) of Code Section 36-34-2 or any other provision of law to grant street franchises; nor shall any provision of this part abolish the requirement, to the extent existing on March 29, 1973, that any electric supplier must obtain such a franchise in order to use and occupy streets of an incorporated municipality for the purpose of rendering utility services. (Ga. L. 1973, p. 200, § 15.)

JUDICIAL DECISIONS

Authority of city to charge franchise fee. — Nothing in the first sentence of O.C.G.A. § 46-3-14(b) purports to prohibit a city from conditioning its grant of a street franchise to an electric company upon the payment of a reasonable franchise fee, and the second sentence is a statutory preservation of the right of a “municipality” under O.C.G.A. § 36-34-2(7) to charge “any secondary supplier” a franchise fee, even where the mu-

nicipality itself is also the primary supplier. *City of Calhoun v. North Ga. Elec. Membership Corp.*, 264 Ga. 205, 443 S.E.2d 469 (1994).

A municipality may grant a franchise to an electric membership corporation. It is also authorized to assess franchise fees against the corporation. *Athens-Clarke County v. Walton Elec. Membership Corp.*, 265 Ga. 229, 454 S.E.2d 510 (1995).

Cited in *City of LaGrange v. Troup County Elec. Membership Corp.*, 200 Ga. App. 418, 408 S.E.2d 708 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 27A Am. Jur. 2d, Energy and Power Sources, § 20.

C.J.S. — 29 C.J.S., Electricity, § 15.

ALR. — Grant of perpetual franchise to public service corporation, 2 ALR 1105.

46-3-15. Effect of part on charges of public utilities owned or operated by counties or municipalities.

No provision of this part, and no application thereof, shall be construed in any way to regulate or fix charges of county owned or operated or municipality owned or operated public utilities, as prohibited by Article III, Section VI, Paragraph V(d) of the Constitution of Georgia. (Ga. L. 1973, p. 200, § 15A; Ga. L. 1983, p. 3, § 62; Ga. L. 1984, p. 22, § 46.)

JUDICIAL DECISIONS

Legislature only prohibited from regulating or fixing charges. — The proviso to Ga. Const. 1976, Art. III, Sec. VIII, Para. IX (Ga. Const. 1983, Art. III, Sec. VI, Para. V), was intended only to prohibit the General Assembly from regulating or fixing the charges of municipally owned or operated electric

systems and does not deal with every aspect of the General Assembly's broad, inherent powers over both public utilities and municipal corporations. *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

PART 2

HIGH-VOLTAGE SAFETY

JUDICIAL DECISIONS

Constitutionality. — The High-Voltage Safety Act, O.C.G.A. § 46-3-30 et seq., does not deprive injured persons of due process by abolishing a common law claim, since the legislature has the authority to abolish such claims prior to their accrual; nor is the Act unconstitutionally vague. *Santana v. Georgia Power Co.*, 269 Ga. 127, 498 S.E.2d 521 (1998).

This part directed towards businesses. — The persons and activities toward which this part is directed are not those of the private individual who encounters the lines, but those of businesses, whether giant corporations or one man concerns, whose usual activities would foreseeably bring their employees within close proximity to high volt-

age lines. The duty is placed on them to notify a power company of the proposed activity and on the power company to take any necessary technical measures for assuring the safety of the workmen. *Savannah Elec. & Power Co. v. Holton*, 127 Ga. App. 447, 193 S.E.2d 866 (1972).

Intent of this part is to protect workmen by regulating the conduct of employers and owners of power lines. *Savannah Elec. & Power Co. v. Holton*, 127 Ga. App. 447, 193 S.E.2d 866 (1972).

Persons intended to be covered. — Where plaintiff was installing cable television wire on defendant's property and made contact with a live electrical wire, the defendant was not a "person responsible for the work to be

done" and was not, therefore, liable pursuant to O.C.G.A. Pt. 2, Ch. 3, T. 46. *Johnson v. Richardson*, 202 Ga. App. 470, 414 S.E.2d 698 (1992).

Activities intended to be covered. — Kinds of activities intended to be covered are not random or casual exposures to lines. *Savannah Elec. & Power Co. v. Holton*, 127 Ga. App. 447, 193 S.E.2d 866 (1972).

Workers' compensation exclusive remedy provision. — O.C.G.A. Pt. 2, Ch. 3, T. 46 is

not an exception to the exclusive remedy provision of Workers' Compensation Act. *Pappas v. Hill-Staton Eng'rs, Inc.*, 183 Ga. App. 258, 358 S.E.2d 625, cert. denied, 183 Ga. App. 906, 358 S.E.2d 625 (1987); *City of Dalton v. Gene Rogers Constr. Co.*, 223 Ga. App. 819, 479 S.E.2d 171 (1996); *Flint Elec. Membership Corp. v. Ed Smith Constr. Co.*, 229 Ga. App. 838, 495 S.E.2d 136 (1998).

RESEARCH REFERENCES

ALR. — Liability of electric light or power company for injuries to employee of patron, 9 ALR 174.

Duty to guard against danger to children by electric wires, 17 ALR 833; 41 ALR 1337; 49 ALR 1053; 100 ALR 621.

Liability of one maintaining electric wire over or near highway for injury due to breaking of wire by fall of tree or limb, 19 ALR 801.

Induction, conduction, and electrolysis, 23 ALR 1257; 33 ALR 380; 56 ALR 421.

Duty and liability in respect of sagging of electric wire maintained over highway, 84 ALR 690.

Liability of electric light or power company for injury or damage due to condition of service lines or electrical appliance maintained by one to whom it furnishes electric current, 134 ALR 507.

Correlative rights of dominant and servient owners in right of way for electric line, 6 ALR2d 205.

Liability for injury of child on electric transmission tower or pole, 6 ALR2d 754.

Liability for injury or death of adult from

electric wires passing through or near trees, 40 ALR2d 1299.

Liability of electric power, telephone, or telegraph company for personal injury or death from fall of pole, 97 ALR2d 664.

Status of injured adult as trespasser on land not owned by electricity supplier, as affecting its liability for injuries inflicted upon him by electric wires it maintains thereon, 30 ALR3d 777.

Liability of power company for injury or death resulting from contact of radio or television antenna with electrical line, 82 ALR3d 113.

Applicability of rule of strict liability to injury from electrical current escaping from powerline, 82 ALR3d 218.

Liability for injury to or death of child from electric wire encountered while climbing tree, 91 ALR3d 616.

Products liability: electricity, 60 ALR4th 732.

Liability of electric company to one other than employee for injury or death arising from commencement or resumption of service, 46 ALR5th 423.

46-3-30. Short title.

This part shall be known and may be cited as the "High-voltage Safety Act." (Code 1981, § 46-3-30, enacted by Ga. L. 1992, p. 2141, § 1.)

Editor's notes. — Ga. L. 1992, p. 2141, § 1, redesignated former Code Section 46-3-30 as present Code Section 46-3-32.

Law reviews. — For annual survey article discussing workers' compensation law, see 51 Mercer L. Rev. 549 (1999).

JUDICIAL DECISIONS

Constitutionality. — The High-Voltage Safety Act, O.C.G.A. § 46-3-30, does not

deprive injured persons of due process by abolishing a common law claim, since the

legislature has the authority to abolish such claims prior to their accrual; nor is the Act unconstitutionally vague. *Santana v. Georgia Power Co.*, 269 Ga. 127, 498 S.E.2d 521 (1998).

Requirement of notice is clear. — The language of the Georgia High-voltage Safety Act, O.C.G.A. § 46-3-30 et seq., is clear and unambiguous in its requirement that notice

be given before work is commenced in proximity to high-voltage lines, and in its provision that lack of such notice insulates an owner of the lines from liability. *Jackson Elec. Mbrshp. Corp. v. Smith*, 276 Ga. 208, 576 S.E.2d 878 (2003).

Cited in *Brown v. Southern Bell Tel. & Tel. Co.*, 209 Ga. App. 99, 432 S.E.2d 675 (1993).

46-3-31. Purpose of part.

The purpose of this part is to prevent injury to persons and property and interruptions of utility service resulting from accidental or inadvertent contact with high-voltage electric lines by providing that no work shall be done in the vicinity of such lines unless and until the owner or operator thereof has been notified of such work and has taken one of the safety measures prescribed in this part. (Code 1981, § 46-3-31, enacted by Ga. L. 1992, p. 2141, § 1.)

Editor's notes. — Ga. L. 1992, p. 2141, § 1, effective July 1, 1992, repealed former Code Section 46-3-31, which related to the protection of employees from accidental

contact with high voltage lines. The former Code section was based on Ga. L. 1960, p. 181, § 2; and Ga. L. 1981, Ex. Sess., p. 8, Code Enactment Act.

JUDICIAL DECISIONS

Power company not liable if notice not given. — The 1992 “High-voltage Safety Act”, O.C.G.A. § 46-3-30 et seq., immunizes a power company’s negligence of omission and commission in placement and maintenance of such lines when there has been no notice given; thus, liability was barred because there had been no notice. *Williams v. Mitchell County Elec. Mbrshp. Corp.*, 255 Ga. App. 668, 566 S.E.2d 356 (2002), *aff’d*, 276 Ga. 759, 582 S.E.2d 107 (2003).

Georgia High-voltage Safety Act, O.C.G.A. § 46-3-30 et seq., barred recovery in a wrongful death action as the decedent failed to give the statutory notice that decedent would be working within 10 feet of a sagging power line with which decedent came into contact and which electrocuted the decedent. *Williams v. Mitchell County Elec. Mbrshp. Corp.*, 276 Ga. 759, 582 S.E.2d 107 (2003).

46-3-32. Definitions.

As used in this part, the term:

(1) “High-voltage lines” means an electric line or lines installed above ground level having a voltage in excess of 750 volts between conductors or from any conductor to ground.

(2) “Notice” means actual notification given to the center.

(3) “Person responsible for the work” means the person actually doing the work as well as any person, firm, or corporation who employs and carries on his payroll any person actually doing the work or who

employs a subcontractor who actually does the work; provided, however, that this term does not mean one who is exempted under Code Sections 46-3-37 and 46-3-38.

(4) “Utilities protection center” or “center” means the corporation or other organization formed by utilities which receives advance notifications regarding work and distributes such notifications to its utility members.

(5) “Utility” means any person operating or maintaining high-voltage lines within the state.

(6) “Work” means the physical act of performing or preparing to perform any activity under, over, by, or near high-voltage lines, including, but not limited to, the operation, erection, handling, storage, or transportation of any tools, machinery, ladders, antennas, equipment, supplies, materials, or apparatus or the moving of any house or other structure whenever such activity is done by a person or entity in pursuit of his trade or business. (Ga. L. 1960, p. 181, § 1; Ga. L. 1974, p. 153, § 1; Code 1981, § 46-3-30; Code 1981, § 46-3-32, as redesignated by Ga. L. 1992, p. 2141, § 1.)

Editor’s notes. — Ga. L. 1992, p. 2141, § 1, effective July 1, 1992, repealed former Code Section 46-3-32, which concerned clearance requirements for the operation, handling, etc., of tools, machinery, etc., and the moving of houses, buildings, or other structures over, under, by, or near

high-voltage lines and the safeguarding against accidental contact. The former Code section was based on Ga. L. 1960, p. 181, § 3; Ga. L. 1981, Ex. Sess., p. 8, Code Enactment Act; and Ga. L. 1984, p. 22, § 46; and Ga. L. 1992, p. 6, § 46.

JUDICIAL DECISIONS

“Person responsible”. — An employee as well as the employer may in some circumstances be a “person responsible” for notifying the line owner or operator under O.C.G.A. §§ 46-3-32 and 46-3-33. *Malvarez v. Georgia Power Co.*, 250 Ga. 568, 300 S.E.2d 145 (1983), superceded by statute as stated in *Williams v. Mitchell County Elec. Mbrshp. Corp.*, 279 Ga. 759, 582 S.E.2d 107 (2003). But see *Preston v. Georgia Power Co.*, 227 Ga. App. 449, 489 S.E.2d 573 (1997), cert. denied, 525 U.S. 869, 119 S. Ct. 163, 142 L. Ed. 2d 134 (1998); *Santana v. Georgia Power Co.*, 269 Ga. 127, 498 S.E.2d 521 (1998).

The phrase “person responsible for the work to be done” is defined in paragraph (2) (now paragraph (3)) of O.C.G.A. § 46-3-32 and, when read in conjunction with O.C.G.A. § 46-3-33(a), requires the person or persons immediately responsible for the operation of machinery within eight feet

of a high-voltage line to give notice. *Green v. Moreland*, 200 Ga. App. 167, 407 S.E.2d 119 (1991).

“Work”. — Farmer who was electrocuted by a sagging high-voltage power line was engaged in work within the meaning of O.C.G.A. § 46-3-32(6) as the individual was a farmer, using the farmer’s own equipment to harvest a neighbor’s field of cotton, and thus was obviously engaged in the farmer’s customary trade; accordingly, the farmer was required under provisions of the Georgia High-voltage Safety Act, O.C.G.A. § 46-3-30 et seq., to give notice to the owner of high-voltage power lines before coming within 10 feet of the power lines. *Williams v. Mitchell County Elec. Mbrshp. Corp.*, 276 Ga. 759, 582 S.E.2d 107 (2003).

Cited in *Parsons, Brinckerhoff, Quade & Douglas, Inc. v. Johnson*, 161 Ga. App. 634, 288 S.E.2d 320 (1982); *Colquitt Elec. Mem-*

bership Corp. v. Cvengros, 165 Ga. App. 649, 302 S.E.2d 407 (1983); Allen v. King Plow Co., 227 Ga. App. 795, 490 S.E.2d 457 (1997).

RESEARCH REFERENCES

C.J.S. — 29 C.J.S., Electricity, § 1.

46-3-33. Required conditions for commencing work within ten feet of high-voltage line.

No person, firm, or corporation shall commence any work as defined in paragraph (6) of Code Section 46-3-32 if at any time any person or any item specified in paragraph (6) of Code Section 46-3-32 may be brought within ten feet of any high-voltage line unless and until:

(1) The person responsible for the work has given the notice required by Code Section 46-3-34; and

(2) The owner or operator of such high-voltage line has effectively guarded against danger from accidental contact by either deenergizing and grounding the line, relocating it, or installing protective covering or mechanical barriers, whichever safeguard is deemed by the owner or operator to be feasible under the circumstances. (Code 1981, § 46-3-33, enacted by Ga. L. 1992, p. 2141, § 1.)

Editor's notes. — Ga. L. 1992, p. 2141, § 1, redesignated former Code Section 46-3-33 as present Code Section 46-3-34.

In light of the similarity of the provisions,

decisions under former Code Section 46-3-32 are included in the annotations for this Code section.

JUDICIAL DECISIONS

Recovery for injuries suffered during prohibited act. — Violation of former § 46-3-32 does not necessarily bar recovery for injuries suffered while engaged in a prohibited act, in view of the provision of former § 46-3-39 that “nothing in this Act shall be construed or applied as limiting or reducing the duty or degree of care now applicable to owners or operators of such high-voltage lines with respect to damage or loss to person or property.” *Reighard v. Georgia Power Co.*, 119 Ga. App. 640, 168 S.E.2d 639 (1969), disapproved on other grounds, *Carden v. Georgia Power Co.*, 231 Ga. 456, 202 S.E.2d 55 (1973).

Electric membership corporation could not be absolved of liability even in the absence of statutory notice, where it had not been shown as a matter of law that its lines were properly located and maintained at the time of a fatal accident. *Three Notch Elec.*

Membership Corp. v. Bush, 190 Ga. App. 858, 380 S.E.2d 720, cert. denied, 190 Ga. App. 897, 380 S.E.2d 720 (1989).

Businesses and activities covered by Act. — The High-voltage Safety Act, O.C.G.A. § 46-3-30 et seq., is directed only toward businesses whose usual activities would foreseeably bring their employees within close proximity to voltage lines, and the kinds of activities intended to be covered are not random or casual exposures to lines. *Southern Orchard Supply v. Boyer*, 221 Ga. App. 626, 472 S.E.2d 157 (1996).

A farm laborer injured while replacing irrigation pipe when the laborer attempted to raise a pipe near a voltage line, without looking up at the line, rather than move to a different, safer location, could not hold the employer liable under the High-voltage Safety Act, O.C.G.A. § 46-3-30 et seq. *South-*

ern Orchard Supply v. Boyer, 221 Ga. App. 626, 472 S.E.2d 157 (1996).

An employer was not strictly liable under the High-voltage Safety Act, O.C.G.A. § 46-3-30, for injuries to employees incurred while they were working within the danger area of high voltage wires. Callaway v. Crown Crafts, Inc., 223 Ga. App. 297, 477 S.E.2d 435 (1996).

Lack of notice of risk to power company insignificant where lines negligently installed or maintained. — One whose injury is caused by negligent installation or maintenance of high-voltage lines, even where such injury occurs while engaged in acts enumerated in former Code section 46-3-32 within eight (now ten) feet of the lines, is not barred by failure to give notice. Malvarez v. Georgia Power Co., 250 Ga. 568, 300 S.E.2d 145 (1983), superceded by statute as stated in Williams v. Mitchell County Elec. Mbrshp. Corp., 279 Ga. 759, 582 S.E.2d 107 (2003); Habersham Elec. Membership Corp. v. Dalton, 170 Ga. App. 483, 317 S.E.2d 312 (1984).

Although an employee as well as his employer may in some circumstances be a "person responsible" for notifying the line owner or operator under §§ 46-3-32, 46-3-34 and former Code section 46-3-32, lack of such notification is a bar to recovery only where the lines are "otherwise properly located

and maintained." Malvarez v. Georgia Power Co., 250 Ga. 568, 300 S.E.2d 145 (1983), superceded by statute as stated in Williams v. Mitchell County Elec. Mbrshp. Corp., 279 Ga. 759, 582 S.E.2d 107 (2003).

Notice requirement. — Georgia High-voltage Safety Act, O.C.G.A. § 46-3-30 et seq., barred recovery in a wrongful death action as the decedent failed to give the statutory notice that decedent would be working within 10 feet of a sagging power line with which decedent came into contact and which electrocuted the decedent. Williams v. Mitchell County Elec. Mbrshp. Corp., 276 Ga. 759, 582 S.E.2d 107 (2003).

Cited in King v. King, 124 Ga. App. 814, 186 S.E.2d 432 (1971); Savannah Elec. & Power Co. v. Holton, 127 Ga. App. 447, 193 S.E.2d 866 (1972); Georgia Power Co. v. Carden, 128 Ga. App. 347, 196 S.E.2d 477 (1973); Carden v. Georgia Power Co., 231 Ga. 456, 202 S.E.2d 55 (1973); Parsons, Brinckerhoff, Quade & Douglas, Inc. v. Johnson, 161 Ga. App. 634, 288 S.E.2d 320 (1982); Brown v. City of Fitzgerald, 177 Ga. App. 859, 341 S.E.2d 476 (1986); Santana v. First Guaranty Mgt. Corp., 223 Ga. App. 472, 477 S.E.2d 857 (1996); Preston v. Georgia Power Co., 227 Ga. App. 449, 489 S.E.2d 573 (1997), cert. denied, 525 U.S. 869, 119 S. Ct. 163, 142 L. Ed. 2d 134 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 27A Am. Jur. 2d, Energy and Power Sources, § 167.

C.J.S. — 29 C.J.S., Electricity, § 41.

ALR. — Duty to guard against danger to children by electric wires, 41 ALR 1337; 49 ALR 1053; 100 ALR 621.

Liability of one maintaining high-tension electric wires over private property of another for injuries thereby inflicted, 46 ALR 1021.

Induction, conduction and electrolysis, 56 ALR 421.

Restoring electric current after automatic breaking of current as negligence, 57 ALR 1065.

Liability of electric power or telephone company for injury or damage by lightning transmitted on wires, 25 ALR2d 722.

46-3-34. Utilities protection center; funding of activities; notice of work; delay; responsibility for completing safety requirements.

(a) All utilities shall organize, participate as members in, and cooperate with the utilities protection center. In lieu of organizing a new center, if the organization defined as the utilities protection center in paragraph (21) of Code Section 25-9-2 undertakes to serve as the utilities protection center referred to in this part, it may do so and no duplicative center shall

thereafter be established. The activities of the center relating to high-voltage lines shall be funded by all utilities.

(b) Where work is to be done, the person responsible for such work shall give notice to the utilities protection center during its regular business hours at least 72 hours, excluding weekends and holidays, prior to commencing such work and such notice shall:

(1) Describe the tract or parcel of land upon which the work to be done is to take place with sufficient particularity to enable the owner or operator of the high-voltage lines to ascertain the precise tract or parcel of land involved;

(2) State the name, address, and telephone number of the person who will be in charge of the work;

(3) Describe the type of work to be engaged in by the person; and

(4) Designate the date upon which the work will commence and will be completed.

(c) After receipt of the notice required by subsection (b) of this Code section, the owner or operator of the high-voltage line shall contact the person whose name is given as required by paragraph (2) of subsection (b) of this Code section within a reasonable time, so that appropriate satisfactory arrangements can be made for the completion of the safety precautions required by Code Section 46-3-33, including coordination of work schedules and payment of costs required to effect such safety precautions. Upon completion of such arrangements, the owner or operator of such high-voltage line shall effect such safety precautions within a reasonable time.

(d) If, after such arrangements are made, a delay in commencing the work is encountered, then the person responsible for the work shall be required to give a new notice as specified in subsection (b) of this Code section.

(e) The person responsible for the work shall be responsible to assure that the safety requirements of Code Section 46-3-33 are completed prior to the commencement of any such work. (Ga. L. 1960, p. 181, § 5; Code 1981, § 46-3-33; Code 1981, § 46-3-34, as redesignated by Ga. L. 1992, p. 2141, § 1; Ga. L. 2001, p. 4, § 46.)

Editor's notes. — Ga. L. 1992, p. 2141, § 1, redesignated former Code Section 46-3-34 as present Code Section 46-3-35.

JUDICIAL DECISIONS

Meaning of section. — Ga. L. 1960, p. 181, § 5 (see O.C.G.A. § 46-3-34) means that for a construction work risk to be brought within the duty owed by the owner and

maintainer of the high-voltage lines, then the notice required by that section must have been given by the responsible party. *Carden v. Georgia Power Co.*, 231 Ga. 406, 202 S.E.2d 55 (1973).

Construction. — There is no doubt engendered by O.C.G.A. § 46-3-34 about the necessity of giving notice prior to working in proximity to high-voltage power lines or about the effect of failing to give notice. Thus, persons of common intelligence need not guess at the meaning of that section, and, once in the possession of the necessary facts, should not differ as to its application. *Santana v. Georgia Power Co.*, 269 Ga. 127, 498 S.E.2d 521 (1998).

Duty where notice of work risk given. — Ga. L. 1960, p. 181, § 5 (see O.C.G.A. § 46-3-34) places duty upon owner and maintainer of high-voltage lines where notice is given of a construction work risk although such owner would otherwise not be liable. *Carden v. Georgia Power Co.*, 231 Ga. 406, 202 S.E.2d 55 (1973).

The phrase “person responsible for the work to be done” is defined in O.C.G.A. § 46-3-30(2) and, when read in conjunction with subsection (a) of O.C.G.A. § 46-3-34, requires the person or persons immediately responsible for the operation of machinery within eight feet of a high-voltage line to give notice. *Green v. Moreland*, 200 Ga. App. 167, 407 S.E.2d 119 (1991).

Electric membership corporation could not be absolved of liability even in the absence of statutory notice, where it had not been shown as a matter of law that its lines were properly located and maintained at the time of a fatal accident. *Three Notch Elec. Membership Corp. v. Bush*, 190 Ga. App. 858, 380 S.E.2d 720, cert. denied, 190 Ga. App. 897, 380 S.E.2d 720 (1989).

Activities of employee not constituting contributory negligence. — A mere employee of a construction company, not having notification responsibility under Ga. L. 1960, p. 181, § 5 (see O.C.G.A. § 46-3-34), cannot be contributorily negligent as a matter of law just because the employee performed activities within the prohibited eight feet from high-voltage lines. *Carden v. Georgia Power Co.*, 231 Ga. 406, 202 S.E.2d 55 (1973).

Duty to give notice. — City could not be held liable under the High-voltage Safety

Act, O.C.G.A. § 46-3-30 et seq., for injuries to workers where the notice required by O.C.G.A. § 46-3-34 was not given. *Callaway v. Crown Crafts, Inc.*, 223 Ga. App. 297, 477 S.E.2d 435 (1996).

Power company not liable if notice not given. — Defendant power company could not be held responsible for injuries that occurred during painting of apartment building, where neither the power company nor the utilities protection center was notified of the work as required by statute. *Santana v. Georgia Power Co.*, 269 Ga. 127, 498 S.E.2d 521 (1998).

Assumption of the risk did not apply as a defense to a farm worker's death by electrocution since there was no evidence to show that the farm worker appreciated the danger of the sagging power lines; despite the fact that the power company failed to maintain or inspect its power lines, it was immune from liability since it had no notice that the deceased was working within 10 feet of its lines. *Williams v. Mitchell County Elec. Mbrshp. Corp.*, 255 Ga. App. 668, 566 S.E.2d 356 (2002), aff'd, 276 Ga. 759, 582 S.E.2d 107 (2003).

Lack of notice of risk to power company insignificant where lines are not properly located or maintained. — Although an employee as well as his employer may in some circumstances be a “person responsible” for notifying the line owner or operator under §§ 46-3-30, 46-3-32 and this section, lack of such notification is a bar to recovery only where the lines are “otherwise properly located and maintained.” *Malvarez v. Georgia Power Co.*, 250 Ga. 568, 300 S.E.2d 145 (1983), superceded by statute as stated in *Williams v. Mitchell County Elec. Mbrshp. Corp.*, 279 Ga. 759, 582 S.E.2d 107 (2003).

One whose injury is caused by negligent installation or maintenance of high-voltage lines, even where such injury occurs while engaged in acts enumerated in § 46-3-32 within eight feet of the lines, is not barred by failure to give notice. *Malvarez v. Georgia Power Co.*, 250 Ga. 568, 300 S.E.2d 145 (1983), superceded by statute as stated in *Williams v. Mitchell County Elec. Mbrshp. Corp.*, 279 Ga. 759, 582 S.E.2d 107 (2003); *Habersham Elec. Membership Corp. v. Dalton*, 170 Ga. App. 483, 317 S.E.2d 312 (1984).

Where a victim was electrocuted from

overhead power lines, and notwithstanding the existence of evidence that the utility companies may not have forwarded calls for protection, because of the general contractor's cancellation of overhead protection, it was incumbent upon the general contractor to provide the utility companies with the 72-hours notice as required by O.C.G.A. § 46-3-34(d); thus, the utility companies were not liable. *Jackson Elec. Mbrshp. Corp. v. Smith*, 276 Ga. 208, 576 S.E.2d 878 (2003).

Georgia High-voltage Safety Act, O.C.G.A. § 46-3-30 et seq., barred recovery in a wrongful death action as the decedent failed to give the statutory notice that decedent would be working within 10 feet of a sagging power line with which decedent came into contact and which electrocuted the decedent. *Williams v. Mitchell County Elec. Mbrshp. Corp.*, 276 Ga. 759, 582 S.E.2d 107 (2003).

New notice required if project delayed. — Under the plain language of O.C.G.A.

§ 46-3-34(d), which controls notice to the Utilities Protection Center, Inc. (UPC), if there is a delay in the work, new notice to the UPC is required prior to initiating a project. *Jackson Elec. Mbrshp. Corp. v. Smith*, 276 Ga. 208, 576 S.E.2d 878 (2003).

Cited in *Georgia Power Co. v. Carden*, 128 Ga. App. 347, 196 S.E.2d 477 (1973); *Parsons, Brinckerhoff, Quade & Douglas, Inc. v. Johnson*, 161 Ga. App. 634, 288 S.E.2d 320 (1982); *Brown v. City of Fitzgerald*, 177 Ga. App. 859, 341 S.E.2d 476 (1986); *Butler v. Georgia Power Co.*, 183 Ga. App. 144, 358 S.E.2d 266 (1987); *Lynch v. Georgia Power Co.*, 185 Ga. App. 256, 363 S.E.2d 777 (1987); *Santana v. First Guaranty Mgt. Corp.*, 223 Ga. App. 472, 477 S.E.2d 857 (1996); *Preston v. Georgia Power Co.*, 227 Ga. App. 449, 489 S.E.2d 573 (1997), cert. denied, 525 U.S. 869, 119 S. Ct. 163, 142 L. Ed. 2d 134 (1998).

RESEARCH REFERENCES

ALR. — Duty to guard against danger to children by electric wires, 41 ALR 1337; 49 ALR 1053; 100 ALR 621.

Duty of public utility to notify patron in advance of temporary suspension of service, 52 ALR 1078.

Liability of electric light or power com-

pany for injury or damage due to condition of service lines or electrical appliance maintained by one to whom it furnishes electric current, 134 ALR 507.

Liability of electric power or telephone company for injury or damage by lightning transmitted on wires, 25 ALR2d 722.

46-3-35. Allocation of expense of precautionary measures taken pursuant to public highway construction.

Where, during any public highway construction, any temporary precautionary measure is required by this part to guard against accidental contact with high-voltage lines that are located upon public highways or roads which are owned by this state or a county thereof and which are located outside the corporate limits of any municipality, the expense of such temporary precautionary measure shall be borne by the owner or operator of such lines, provided that such construction is undertaken pursuant to a permit issued by the state or county, for which permit neither the state nor the county received consideration. The person responsible for the work nevertheless shall not commence any work until he has given notice as required by Code Section 46-3-34 and the safety precautions required by Code Section 46-3-33 have been effected. (Ga. L. 1960, p. 181, § 5A; Code 1981, § 46-3-34; Code 1981, § 46-3-35, as redesignated by Ga. L. 1992, p. 2141, § 1.)

Editor's notes. — Ga. L. 1992, p. 2141, § 1, redesignated former Code Section 46-3-35 as present Code Section 46-3-36 [repealed].

46-3-36. Administration and enforcement of part by Commissioner of Labor.

Reserved. Repealed by Ga. L. 1994, p. 1673, § 1, effective April 19, 1994.

Editor's notes. — This Code section was based on Ga. L. 1960, p. 181, § 6; Code 1981, § 46-3-35; Code 1981, § 46-3-36, as redesignated by Ga. L. 1992, p. 2141, § 1.

46-3-37. Applicability of part to railway systems, electrical engineering system or other entities.

(a) This part shall not be construed as applying to the construction, reconstruction, operation, and maintenance of overhead electrical conductors and their supporting structures and associated equipment by authorized and qualified electrical workers. Specifically, this part shall not be construed as applying to the construction, reconstruction, operation, and maintenance of overhead electrical circuits or conductors and their supporting structures and associated equipment for rail transportation systems or for electrical generating, transmission, and distribution systems or for communication systems, when such work is performed by authorized and qualified employees of any person engaged in such work.

(b) When applied to railway systems, the exception provided in this Code section shall be construed as permitting operation of standard rail equipment which is normally used in the transportation of freight or passengers, or both, or in the operation of relief trains or other equipment in emergencies, or in the maintenance of way service, at a distance of less than ten feet from any high-voltage conductor of such railway system; provided, however, that normal repair or construction operations at a distance of less than ten feet from any high-voltage conductor by other than properly qualified and authorized persons or employees under the direct supervision of an authorized person who is familiar with the hazards involved is prohibited, unless there has been compliance with the safety provisions of Code Section 46-3-33.

(c) Any telephone company or other entity which has a joint use contract with an electric company is specifically exempted from this part. (Ga. L. 1960, p. 181, § 8; Code 1981, § 46-3-36; Code 1981, § 46-3-37, as redesignated by Ga. L. 1992, p. 2141, § 1.)

Editor's notes. — Ga. L. 1992, p. 2141, § 1, redesignated former Code Section 46-3-37 as present Code Section 46-3-38.

RESEARCH REFERENCES

ALR. — Liability of electric power or lightning transmitted on wires, 25 ALR2d telephone company for injury or damage by 722.

46-3-38. Applicability of part to moving or transportation of houses or buildings.

In addition to the exceptions set forth in Code Section 46-3-37, this part shall not be construed as applying to and shall not apply to the moving or transportation of houses or buildings or parts thereof when such moving is under the jurisdiction of, and is undertaken pursuant to authority granted by, the Georgia Public Service Commission. (Ga. L. 1960, p. 181, § 4; Code 1981, § 46-3-37; Code 1981, § 46-3-38, as redesignated by Ga. L. 1992, p. 2141, § 1.)

Editor's notes. — Ga. L. 1992, p. 2141, § 1, redesignated former Code Section 46-3-38 as present Code Section 46-3-39.

46-3-39. Restriction on liability of owners and operators of high-voltage lines; effect of part on duty or degree of care.

(a) The owner or operator of high-voltage lines shall not be liable for damage or loss to person or property resulting from work within ten feet of high-voltage lines unless notice has been given as required by Code Section 46-3-34 and the owner or operator of the high-voltage line has failed to comply with the provisions of Code Section 46-3-33.

(b) Except as provided in subsection (a) of this Code section, nothing in this part shall be construed or applied so as to limit or reduce the duty or degree of care applicable to owners or operators of high-voltage lines with respect to damage or loss to person or property. (Ga. L. 1960, p. 181, § 10; Code 1981, § 46-3-38; Code 1981, § 46-3-39, as redesignated by Ga. L. 1992, p. 2141, § 1.)

Editor's notes. — Ga. L. 1992, p. 2141, § 1, redesignated former Code Section 46-3-39 as present Code Section 46-3-40.

JUDICIAL DECISIONS

This chapter added another theory of liability. — Ga. L. 1960, p. 181, § 10 (see O.C.G.A. § 46-3-39) means that the chapter has not subtracted a theory of liability but added another, i.e., regardless of any concurring factual negligence on the part of a power company, an employer would be negligent per se vis-a-vis an employer if it vio-

lated a provision of this chapter. *Savannah Elec. & Power Co. v. Holton*, 127 Ga. App. 447, 193 S.E.2d 866 (1972).

Maintenance of wires at minimum height not actionable negligence. — The mere maintenance, without more, of high tension wires at a minimum height of 24 feet four inches above a traveled roadway is not ac-

tionable negligence. *Carden v. Georgia Power Co.*, 231 Ga. 406, 202 S.E.2d 55 (1973).

Companies protected by principle of nonliability for utility pole placement. — Power companies as well as telephone companies are protected by the principle of nonliability for utility pole placement in O.C.G.A. § 46-5-1, where such pole is located with approval of local authorities and does not interfere with normal highway use. *Georgia Power Co. v. Collum*, 176 Ga. App. 61, 334 S.E.2d 922 (1985).

Power company not liable. — Power company was protected from an action arising from injuries to an employee who came in contact with a power line, where the employer was aware of the high voltage carried in the line and neither the employer nor employee gave appropriate notice to the company. *Preston v. Georgia Power Co.*, 227 Ga. App. 449, 489 S.E.2d 573 (1997), cert. denied, 525 U.S. 869, 119 S. Ct. 163, 142 L. Ed. 2d 134 (1998).

Power company not liable if notice not given. — Defendant power company could not be held responsible for injuries that occurred during painting of an apartment building, where neither the power company nor the utilities protection center was notified of the work as required by statute. *Santana v. Georgia Power Co.*, 269 Ga. 127, 498 S.E.2d 521 (1998).

Assumption of risk did not apply as a defense to a farm worker's death by electrocution since there was no evidence to show that the farm worker appreciated the danger of the sagging power lines; despite the fact that the power company failed to maintain or inspect its power lines, it was immune from liability since it had no notice that the deceased was working within 10 feet of its lines. *Williams v. Mitchell County Elec. Mbrshp. Corp.*, 255 Ga. App. 668, 566 S.E.2d 356 (2002), aff'd, 276 Ga. 759, 582 S.E.2d 107 (2003).

Georgia High-voltage Safety Act, O.C.G.A. § 46-3-30 et seq., barred recovery in a wrongful death action as the decedent failed to give the statutory notice that decedent would be working within 10 feet of a sagging power line with which decedent came into contact and which electrocuted the decedent. *Williams v. Mitchell County Elec. Mbrshp. Corp.*, 276 Ga. 759, 582 S.E.2d 107 (2003).

Cited in *Reighard v. Georgia Power Co.*, 119 Ga. App. 640, 168 S.E.2d 639 (1969); *Malvarez v. Georgia Power Co.*, 250 Ga. 568, 300 S.E.2d 145 (1983), superceded by statute as stated in *Williams v. Mitchell County Elec. Mbrshp. Corp.*, 279 Ga. 759, 582 S.E.2d 107 (2003).

RESEARCH REFERENCES

ALR. — Duty to guard against danger to children by electric wires, 41 ALR 1337; 49 ALR 1053; 100 ALR 621.

Duty of public utility to notify patron in advance of temporary suspension of service, 52 ALR 1078.

Liability of electric light or power company for injury or damage due to condition of service lines or electrical appliance maintained by one to whom it furnishes electric current, 134 ALR 507.

Liability of electric power or telephone

company for injury or damage by lightning transmitted on wires, 25 ALR2d 722.

Liability for injury to or death of child from electric wire encountered while climbing tree, 91 ALR3d 616.

Liability for injury or death resulting when object is manually brought into contact with, or close proximity to, electric line, 33 ALR4th 809.

Liability for injury or death from collision with guy wire, 8 ALR5th 177.

46-3-40. Criminal penalty; strict liability for injury or damage; indemnification; liability for cost of delay.

(a) Any person responsible for the work who violates any of the provisions of this part shall be guilty of a misdemeanor and, upon

conviction thereof, shall be liable for a fine of \$1,000.00 for a first offense and \$3,000.00 for a second or subsequent offense.

(b) Any person responsible for the work who violates the requirements of Code Section 46-3-33 and whose subsequent activities within the vicinity of high-voltage lines result in damage to utility facilities or result in injury or damage to person or property shall be strictly liable for said injury or damage. Any such person shall also indemnify the owner or operator of such high-voltage lines against all claims, if any, for personal injury, including death, property damage, or service interruptions, including costs incurred in defending any such claims resulting from work in violation of Code Section 46-3-33.

(c) In the event the owner or operator of the high-voltage line fails to effect the safeguards required by Code Section 46-3-33 within a reasonable time after notice is given and appropriate arrangements are made pursuant to Code Section 46-3-34, such owner or operator shall be liable for the reasonable costs incurred by any such delay. (Ga. L. 1960, p. 181, § 7; Code 1981, § 46-3-39; Code 1981, § 46-3-40, as redesignated by Ga. L. 1992, p. 2141, § 1.)

JUDICIAL DECISIONS

Workers' compensation exclusive remedy provisions. — The workers' compensation exclusive remedy provisions of O.C.G.A. § 34-9-11(a) bar the express indemnity provisions of the High-voltage Safety Act, O.C.G.A. § 46-3-40(b). *Georgia Power Co. v. Franco Remodeling Co.*, 233 Ga. App. 640, 505 S.E.2d 488 (1998).

The indemnity provision of the High-voltage Safety Act (O.C.G.A. § 46-3-30 et seq.) can be enforced without offending the exclusive remedy provision of the Workers' Compensation Act. *Georgia Power Co. v. Franco Remodeling Co.*, 240 Ga. App. 771, 525 S.E.2d 152 (1999), vacating *Georgia Power Co. v. Franco Remodeling Co.*, 233 Ga. App. 640, 505 S.E.2d 488 (1998).

Indemnity actions pursuant to HVSA. — The indemnity provision of the High Voltage safety Act (HVSA) may be enforced without offending the exclusive remedy provision of the Workers' Compensation Act by according indemnity actions pursuant to the HVSA

the same dignity case law has given contractual indemnity provisions executed by private parties. The HVSA authorizes a power line owner or operator to obtain indemnification from an employer on account of the employer's failure to abide by the safety provisions in the HVSA. *Flint Elec. Membership Corp. v. Ed Smith Constr. Co.*, 270 Ga. 464, 511 S.E.2d 160 (1999).

Where a power line owner established that a subcontractor was a "person responsible for the work" that failed to give notice to the owner or a utilities protection center that work was being performed within 10 feet of the high-voltage line, the subcontractor was liable to the owner on its claim for defense costs. *Georgia Power Co. v. Franco Remodeling Co.*, 240 Ga. App. 771, 525 S.E.2d 152 (1999).

Cited in *Savannah Elec. & Power Co. v. Holton*, 127 Ga. App. 447, 193 S.E.2d 866 (1972).

PART 3

SALE OF ELECTRICITY BY FACILITY GENERATING ELECTRICITY, STEAM, OR
OTHER FORMS OF ENERGY FOR ITS OWN CONSUMPTION

Law reviews. — For article surveying recent legislative and judicial developments in zoning, planning and environmental law, see 31 Mercer L. Rev. 89 (1979).

46-3-50. Short title.

This part shall be known and may be cited as “The Georgia Cogeneration and Distributed Generation Act of 2001.” (Ga. L. 1979, p. 389, § 1; Ga. L. 2001, p. 1149, § 1.)

46-3-51. Legislative determinations and declarations.

(a) The legislature finds that it is in the public interest to:

- (1) Encourage private investment in renewable energy resources;
- (2) Stimulate the economic growth of Georgia; and

(3) Enhance the continued diversification of the energy resources used in Georgia.

(b) The General Assembly further finds and declares that a program to provide distributed generation for eligible cogenerators is a way to encourage private investment in renewable energy resources, stimulate in-state economic growth, enhance the continued diversification of this state’s energy resource mix, and reduce interconnection and administrative costs. (Code 1981, § 46-3-51, enacted by Ga. L. 2001, p. 1149, § 1.)

Editor’s notes. — Ga. L. 2001, p. 1149, § 1, redesignated former Code Section 46-3-51 as present Code Section 46-3-52.

OPINIONS OF THE ATTORNEY GENERAL

Retail sales by cogenerators. — Under current Georgia laws, cogenerators may not make retail sales of electricity in Georgia except to electric suppliers. 1985 Op. Att’y Gen. No. 85-42.

Operator need not own cogeneration facility. — Since O.C.G.A. § 46-3-52 (now § 46-3-53) uses the term “person,” which is defined as “a natural person, corporation, trust, partnership, incorporated or unincorporated association, or any other legal entity,” and does not use the term “cogenerator,” which is defined as the

owner of a cogeneration facility, it does not appear that the act requires the operator of a cogeneration facility to own the facility. 1988 Op. Att’y Gen. No. 88-1.

Third-party ownership and/or financing is permissible for cogeneration facilities so long as the operator of the facility uses all of the electrical energy, steam, or other form of useful energy produced at the facility or sells the excess electric energy produced in accordance with O.C.G.A. § 46-3-53 (see subsection (b)). 1988 Op. Att’y Gen. 88-1.

46-3-52. Jurisdiction of commission over cogeneration facility the energy from which is used solely by operator.

As used in this part, the term:

(1) "Bidirectional metering" means measuring the amount of electricity supplied by an electric service provider and the amount fed back to the electric service provider by the customer's distributed generation facility using the same meter.

(2) "Cogeneration facility" means a facility, other than a distributed generation facility, which produces electric energy, steam, or other forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes.

(3) "Commission" means the Georgia Public Service Commission.

(4) "Customer generator" means the owner and operator of a distributed generation facility.

(5) "Distributed generation facility" means a facility owned and operated by a customer of the electric service provider for the production of electrical energy that:

(A) Uses a solar Photovoltaic system, fuel cell, or wind turbine;

(B) Has a peak generating capacity of not more than 10kw for a residential application and 100kw for a commercial application;

(C) Is located on the customer's premises;

(D) Operates in parallel with the electric service provider's distribution facilities;

(E) Connected to the electric service provider's distribution system on either side of the electric service provider's meter; and

(F) Is intended primarily to offset part or all of the customer generator's requirements for electricity.

(6) "Electric membership corporation" means a corporation organized under Article 2 of this chapter.

(7) "Electric service provider" means any electric utility, electric membership corporation, or municipal electric utility that is engaged in the business of distributing electricity to retail electric customers in the state.

(8) "Electric supplier" means any electric utility, electric membership corporation furnishing wholesale service, any municipal electric utility or any other person which furnishes wholesale service to any municipality, and the Tennessee Valley Authority.

(9) "Electric utility" means any retail supplier of electricity whose rates are fixed by the commission.

(10) "Municipal electric utility" means a city or town that owns or operates an electric utility.

(11) "Person" means a natural person, corporation, trust, partnership, incorporated or unincorporated association, or any other legal entity.

(12) "Renewable energy sources" means energy supplied from technologies as approved in the Georgia Green Pricing Accreditation Program. (Ga. L. 1979, p. 389, § 3; Code 1981, § 46-3-51; Code 1981, § 46-3-52, as redesignated by Ga. L. 2001, p. 1149, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2001, punctuation was modified in paragraph (4); and "10kw" was substituted for "10kW" and "100kw" was substituted for "100kW" in subparagraph (5)(B).

Editor's notes. — Ga. L. 2001, p. 1149, § 1, redesignated former Code Section 46-3-52 as present Code Section 46-3-53.

OPINIONS OF THE ATTORNEY GENERAL

"Operate." — The term "operate" as used in O.C.G.A. § 46-3-52 means to run and to maintain a cogeneration facility. 1988 Op. Att'y Gen. No. 88-1.

Retail sales by cogenerators. — Under current Georgia laws, cogenerators may not make retail sales of electricity in Georgia except to electric suppliers. 1985 Op. Att'y Gen. No. 85-42.

Operator need not own facility. — Since O.C.G.A. § 46-3-52 uses the term "person," which is defined as "a natural person, corporation, trust, partnership, incorporated or unincorporated association, or any other legal entity," and does not use the term "cogenerator," which is defined as the owner of a cogeneration facility, it does not appear that the act requires the operator of a cogeneration facility to own the facility. 1988 Op. Att'y Gen. No. 88-1.

Third-party ownership and/or financing is permissible for cogeneration facilities so long as the operator of the facility uses all of

the electric energy, steam, or other form of useful energy produced at the facility or sells the excess electric energy produced in accordance with O.C.G.A. § 46-3-53 (see subsection (b)). 1988 Op. Att'y Gen. 88-1.

Where energy used is irrelevant. — Since the intent of the General Assembly is to authorize operators of cogeneration facilities to manufacture energy as necessary to meet their needs and to authorize the operators to sell any excess electrical energy to other electric utilities, it appears clear that the phrase "at such cogeneration facility" modifies the word "produced" and not the term "uses." Therefore, so long as the operator of the cogeneration facility uses all of the useful energy produced at the cogeneration facility with the exception of any excess electrical energy which is sold in accordance with the act, it is irrelevant where the energy is used. 1988 Op. Att'y Gen. No. 88-1.

46-3-53. Jurisdiction of commission over cogeneration facilities.

(a) Any person may operate a cogeneration facility without being subject to the jurisdiction or regulation of the commission if such person uses all of the electric energy, steam, or other form of useful energy produced at such cogeneration facility. The electric energy shall not be sold to any other person except as provided in subsection (b) of this Code section.

(b) Any person may operate a cogeneration facility and sell any excess electric energy to an electric supplier without being subject to the jurisdiction or regulation of the commission; provided, however, that nothing in

this article shall except a person from compliance with federal law. (Ga. L. 1979, p. 389, § 4; Code 1981, § 46-3-52; Ga. L. 1981, p. 808, § 1; Code 1981, § 46-3-53, as redesignated by Ga. L. 2001, p. 1149, § 1; Ga. L. 2002, p. 415, § 46.)

The 2002 amendment, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, substituted “except” for “affect” in subsection (b).

OPINIONS OF THE ATTORNEY GENERAL

Retail sales by cogenerators. — Under current Georgia laws, cogenerators may not make retail sales of electricity in Georgia except to electric suppliers. 1985 Op. Att’y Gen. No. 85-42.

46-3-54. Electric service providers; rates and fees.

An electric service provider:

- (1) Shall make either bidirectional metering or single directional metering available to customer generators depending on how the distributed generation facility is connected to the distribution system of the electric service provider;
- (2) Shall enter into a written agreement with the customer generator to charge the customer generator the rate established by the commission, or the appropriate governing body, in the case of any other electric service provider or electric supplier, for metering services;
- (3) In setting the fees for metering service, the commission, or the appropriate governing body, in the case of any other electric service provider or electric supplier, will include the direct costs associated with interconnecting or administering metering services or distributed generation facilities and will not allocate these costs among the utility’s entire customer base; and
- (4) In establishing such a fee for metering services, the electric service provider shall not charge the customer generator any standby, capacity, interconnection, or other fee or charge, other than a monthly service charge, unless agreed to by the customer generator or approved by the commission, in the case of an electric utility, or the appropriate governing body, in the case of any other electric service provider or electric supplier. (Code 1981, § 46-3-54, enacted by Ga. L. 2001, p. 1149, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2001, “; and” was substituted for a period at the end of paragraph (3).

46-3-55. Measurement and payment of energy flow.

Consistent with the other provisions of this chapter, the energy flow shall be measured and paid for in the following manner:

(1) If the distributed generation facilities are connected to the electric service provider's distribution system on the customer generator's side of the customer's meter, the electric service provider shall:

(A) Measure the electricity produced or consumed during the billing period, in accordance with normal metering practices using bidirectional metering;

(B) When the electricity supplied by the electric service provider exceeds the electricity generated by the customer's distributed generation, the electricity shall be billed by the electric service provider, in accordance with tariffs filed with the commission; or

(C) When electricity generated by the customer's distributed generation system exceeds the electricity supplied by the electric service provider, the customer generator:

(i) Shall be billed for the appropriate customer charges for that billing period; and

(ii) Shall be credited for the excess kilowatt-hours generated during the billing period at an agreed to rate as filed with the commission, with this kilowatt-hour credit appearing on the bill for the billing period; or

(2) If the distributed generation facilities are connected to the electric service provider's distribution system on the electric service provider's side of the customer's meter, the electric service provider shall:

(A) Measure the electricity produced or consumed during the billing period, in accordance with normal metering practices using single directional metering;

(B) Charge the customer generator a minimum monthly fee as established in Code Section 46-3-54; and

(C) If there is electricity generated by the customer generator for the billing period, the customer generator shall be compensated at an agreed to rate as filed with the commission. (Code 1981, § 46-3-55, enacted by Ga. L. 2001, p. 1149, § 1.)

Code Commission notes. — Pursuant to substituted for a period at the end of division Code Section 28-9-5, in 2001, “; or” was (1)(C)(ii).

46-3-56. Requirement to purchase energy from customer generator; safety standards and regulations.

(a) An electric service provider will only be required to purchase energy as specified in Code Section 46-3-55 from an eligible customer generator on a first-come, first-served basis until the cumulative generating capacity of all renewable energy sources equals 0.2 percent of the utility's annual peak

demand in the previous year; provided, however, that no electric service provider will be required to purchase such energy at a price above avoided energy cost unless that amount of energy has been subscribed under any renewable energy program.

(b) Once the capacity is subscribed, an electric service provider may purchase energy from an eligible customer generator at a cost of energy as defined for a utility by the commission, in the case of an electric utility, or by the appropriate governing body, in the case of any other electric service provider or electric supplier.

(c) A distributed generation facility used by a customer generator shall include, at the customer's own expense, all equipment necessary to meet applicable safety, power quality, and interconnection requirements established by the National Electrical Code, National Electrical Safety Code, the Institute of Electrical and Electronics Engineers, and Underwriters Laboratories.

(d) The commission, in the case of an electric utility, or the appropriate governing body, in the case of other electric service providers or electric suppliers, after appropriate notice and opportunity for comment, may adopt by regulation additional safety, power quality, and interconnection requirements for customer generator that the commission or governing body determines are necessary to protect public safety and system reliability.

(e) An electric service provider may not require a customer generator whose distributed generation facility meets the standards in subsections (a) and (b) of this Code section, to comply with additional safety or performance standards, perform or pay for additional tests, or purchase additional liability insurance.

(f) No electric service provider or electric supplier shall be liable to any person, directly or indirectly, for loss of property, injury, or death resulting from the interconnection of a cogenerator or distributed generation facility to its electrical system. (Code 1981, § 46-3-56, enacted by Ga. L. 2001, p. 1149, § 1; Ga. L. 2002, p. 415, § 46.)

The 2002 amendment, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, in subsection (a), deleted "to" preceding "0.2 percent" and "that" preceding "has been subscribed" and modified punctuation.

ARTICLE 2

NONPROFIT RURAL ELECTRIFICATION MEMBERSHIP CORPORATIONS

46-3-70 through 46-3-97.

Repealed by Ga. L. 1981, p. 1587, § 6, effective July 1, 1981.

ARTICLE 3

MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA

JUDICIAL DECISIONS

Power of authority to function and contract as state instrumentality. — The Municipal Electric Authority has authority to function and contract as instrumentality of the state in providing electric power to the political subdivisions of the state which own and operate electric distribution systems, and to contract with power companies, electric membership corporations, and political subdivisions for the purchase, ownership, operation, and maintenance of the facilities which constitute the subject matter of the contracts. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Immunity from antitrust laws. — The Municipal Electric Authority of Georgia (MEAG) is an “instrumentality of the state” as are its participants, political subdivisions who entered long-term power supply agreements, and is therefore immune from the antitrust laws under the state action immunity doctrine broadened by the Supreme

Court in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985) and *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985). *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345 (N.D. Ga. 1986), *aff’d*, 844 F.2d 1538 (11th Cir. 1988).

Act not preempted by federal law. — The Federal Telecommunications Act (47 USC § 151 et seq.) did not preempt the Public Service Commission from applying the Municipal Electric Authority of Georgia (MEAG) Act to forestall MEAG from applying for a certificate to sell excess telecommunications capacity to the public for hire. *Municipal Elec. Auth. v. Georgia Pub. Serv. Comm’n*, 241 Ga. App. 237, 525 S.E.2d 399 (1999).

Cited in *Appling County v. Municipal Elec. Auth.*, 621 F.2d 1301 (5th Cir. 1980).

46-3-110. Declaration of necessity.

Whereas certain political subdivisions of this state now own and operate electric distribution systems to serve their citizens, inhabitants, and customers by providing them electricity for all purposes; and whereas, if such political subdivisions are to furnish, and if the members of the public in the areas they serve are to receive, adequate service, such political subdivisions must have adequate, dependable, and economical sources and supplies of bulk electric power; it is declared that there exists in this state a need for an authority to function without profit in developing and promoting for the public good in this state adequate, dependable, and economical sources and supplies of bulk electric power and energy for the purposes expressed in this Code section. (Ga. L. 1975, p. 107, § 1.)

46-3-111. Definitions.

As used in this article, the term:

(1) “Authority” means the Municipal Electric Authority of Georgia and any successor thereto. Any change in name or composition of the authority shall in no way affect the vested rights of any person under this article or impair the obligations of any contracts existing under this article.

(2) “Bond anticipation notes” or “notes” means short-term obligations issued after validation of bonds and in anticipation of the issuance of the bonds as validated.

(3) “Bonds” or “revenue bonds” means any bonds issued by the authority under this article, including refunding bonds.

(4) “Cost of project” or “cost of construction” means all costs of construction; all costs of real and personal property required for the purposes of such project and facilities related thereto, including land and any rights or undivided interests therein, easements, franchises, water rights, fees, permits, approvals, licenses, and certificates, and the securing of such permits, approvals, licenses, and certificates and the preparation of applications therefor, and including all machinery and equipment, including equipment for use in connection with such construction, and the initial fuel supply acquired for such project; financing charges; interest prior to and during construction and during such additional period as the authority may reasonably determine to be necessary for the placing of such project in operation; costs of engineering, architectural, and legal services; costs of plans and specifications and all expenses necessary or incidental to determining the feasibility or practicability of the project; administrative expenses; and such other expenses as may be necessary or incidental to the financing authorized by this article. All funds paid or advanced for any of the purposes mentioned in this paragraph by political subdivisions contracting with the authority prior to the issuance of any of the authority’s bonds or notes may be refunded to such political subdivisions out of the proceeds of any bonds or notes so issued. The costs of any project may also include a fund or funds for the creation of a debt service reserve, a renewal and replacement reserve, a fuel reserve, and such other reserves as may be reasonably required by the authority for the operation of its projects and as may be authorized by any bond resolution or trust agreement or indenture pursuant to the provisions of which the issuance of any such bonds may be authorized. Any obligation or expense incurred for any of the purposes mentioned in this paragraph shall be regarded as a part of the cost of the project and may be paid or reimbursed as such out of the proceeds of revenue bonds or notes issued under this article for such project.

(5) “Election committee” means the Municipal Electric Authority of Georgia Membership Election Committee, as created in Code Section 46-3-113.

(6) “Project,” “undertaking,” or “facility” means electric generation and transmission lines and works and all property, whether real or personal, of every kind and nature material or pertinent thereto or necessary therefor which may be used or useful in the development of electric power and energy and in the supplying of such electric power and energy to all those entities contracting with the authority therefor. These

terms may include a divided or undivided interest in any electric generation or transmission facility in which the authority participates as an owner in common with others. These terms may be used interchangeably. (Ga. L. 1975, p. 107, § 5.)

46-3-112. Creation of authority; status of authority as instrumentality of state; location of principal office and legal situs or residence of authority.

There is created a public body corporate and politic to be known as the Municipal Electric Authority of Georgia, which shall be a public corporation of the State of Georgia and shall have a perpetual existence. This authority, however, shall not be a state institution nor a department or agency of the state but shall be an instrumentality of the state, a mere creature of the state, having distinct corporate entity and being exempt from Article 2 of Chapter 17 of Title 50. The authority shall have its principal office in Fulton County, and its legal situs or residence for the purpose of this article shall be Fulton County. (Ga. L. 1975, p. 107, § 2; Ga. L. 1975, p. 1200, § 1.)

JUDICIAL DECISIONS

Creation of authority and grant of powers to it not unconstitutional. — As the Municipal Electric Authority is a public corporation of the state, the creation of the authority and the granting of powers to it do not constitute a grant of corporate powers and privileges to a private company in violation of Ga. Const. 1976, Art. III, Sec. VIII, Para. V (Ga. Const. 1983, Art. III, Sec. VI, Para. V). *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Immunity from antitrust laws. — The Municipal Electric Authority of Georgia (MEAG) is an “instrumentality of the state”

as are its participants, political subdivisions who entered long-term power supply agreements, and is therefore immune from the antitrust laws under the state action immunity doctrine broadened by the Supreme Court in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985) and *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985). *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345 (N.D. Ga. 1986), *aff'd*, 844 F.2d 1538 (11th Cir. 1988).

RESEARCH REFERENCES

C.J.S. — 29 C.J.S., Electricity, § 25.

46-3-113. Number of members of authority; creation of Municipal Electric Committee of Georgia Membership Election Committee; designation of members; selection of officers; receiving of nominations, election and terms of first members of authority.

(a) The authority shall consist of nine members. The first nine members shall be elected as provided in this Code section.

(b) On or before June 16, 1975, each of those political subdivisions which have, prior to such date, by proper resolution of their respective governing bodies, declared their intention to contract with the authority for the purchase of electric power and energy (other than for short-term purchases) shall designate one person, who shall be a resident of such political subdivision, as its representative on a body to be known as the Municipal Electric Authority of Georgia Membership Election Committee, provided that at least five political subdivisions have declared their intention to contract with the authority. All such resolutions of declaration of intention to contract with the authority shall be presented to the election committee at its first meeting, which shall be held in the office of the Georgia Municipal Association at 11:00 A.M. on Monday, June 22, 1975.

(c) At its first meeting, the election committee shall organize and shall elect a chairman and such other officers as may be desirable in the determination of the election committee. The election committee shall then determine the sufficiency of the resolutions presented to it and shall determine the number of votes (including fractions thereof) which each representative to the election committee shall be entitled to cast in accordance with Code Section 46-3-117. Nominations for membership on the authority shall then be received by the election committee prior to adjournment of its first meeting.

(d) The election committee shall then meet for the second time on Monday, June 29, 1975, at the same time and place to receive any other nominations to the authority that may be made. A vote shall then be taken; and the nine nominees receiving the largest number of votes cast by a quorum of the election committee, as such quorum is determined by subsection (c) of Code Section 46-3-117, shall be declared the first nine members of the authority. Insofar as may be consistent with the remaining provisions of this Code section, in the election of the first nine members, the three nominees receiving the highest number of votes shall be elected to terms of three years; the three nominees receiving the next highest number of votes shall be elected to terms of two years; and the three nominees receiving the next highest number of votes shall be elected to terms of one year. Any tie votes shall be resolved by lot in such manner as shall be prescribed by the election committee.

(e) Notwithstanding any other provision of this Code section to the contrary, in the event it should be mathematically necessary in the election of the members of the authority for two members to be residents of the same political subdivision, then one of the two members who are residents of the same political subdivision shall be elected for an initial term of one year. In the event there are four political subdivisions from which two residents must be elected, one of the residents of one of such political subdivisions shall be elected for an initial term of two years. (Ga. L. 1975, p. 107, § 4.)

46-3-114. Residency requirements for authority members; ineligibility of election committee representatives for membership; eligibility of members to succeed themselves.

Each member of the authority shall be a resident of one of the political subdivisions represented on the election committee, but, insofar as is mathematically possible, no two members shall reside in the same political subdivision. Representatives to the election committee shall not be eligible for membership on the authority. Members shall be eligible to succeed themselves. (Ga. L. 1975, p. 107, § 4.)

46-3-115. Terms of authority members generally; time of meeting of election committee prior to annual meeting of authority.

Upon the expiration of the terms of the first members of the authority, members shall be elected for three-year terms, provided that in the year in which a member's term is to expire, the term shall not expire until the adjournment of the annual meeting for that year and until a successor is elected. The election committee shall meet at a date not more than 30 days prior to each annual meeting of the authority and shall elect members to fill the terms which will expire at the conclusion of such annual meeting. (Ga. L. 1975, p. 107, § 4.)

Cross references. — Annual meeting of authority, § 46-3-121.

46-3-116. Selection of additional representatives to election committee by political subdivisions subsequently contracting with authority.

(a) Each political subdivision contracting with the authority (other than for short-term purchases) following the election of the first nine members of the authority shall designate a representative to the election committee no more than 30 days following the execution of such contract by and between the authority and such political subdivision. The term of such additional representative shall begin with the next meeting of the election committee.

(b) Representatives to the election committee shall serve at the pleasure of the governing body of the political subdivision which appointed them. (Ga. L. 1975, p. 107, § 4.)

46-3-117. Manner of distribution of votes among representatives to election committee; quorum of election committee.

(a) In elections held by the election committee to elect members to the authority, each political subdivision entitled to representation on the election committee shall have and shall be entitled to have its representative

on the election committee cast one whole vote plus an additional vote or votes (including fractions thereof) to be determined as provided in this subsection. The percentage which is arrived at by dividing the number of kilowatt hours taken from Georgia Power Company by each such political subdivision during the immediately preceding calendar year by the total number of kilowatt hours taken from Georgia Power Company by all such political subdivisions during the immediately preceding calendar year shall be determined; and each such percentage shall then be applied to a total number of votes equal to the total number of political subdivisions entitled to representation on the election committee. The resulting figure, calculated to the nearest one-thousandth, shall be the additional vote or votes (including fractions thereof) to which each respective political subdivision is entitled.

(b) At such time as facilities of the authority are placed in commercial operation as determined by the authority and energy is being supplied by the authority to political subdivisions contracting with the authority, then and thereafter each such political subdivision entitled to representation on the election committee shall have and shall be entitled to have its representative on the election committee cast one whole vote plus an additional vote or votes (including fractions thereof) to be determined as provided in this subsection. The percentage which is arrived at by dividing the number of kilowatt hours taken from the authority by each such political subdivision during the immediately preceding calendar year by the total number of kilowatt hours taken from the authority by all such political subdivisions during the immediately preceding calendar year shall be determined; and each such percentage shall then be applied to a total number of votes equal to the total number of political subdivisions entitled to representation on the election committee. The resulting figure, calculated to the nearest one-thousandth, shall be the additional vote or votes (including fractions thereof) to which each respective political subdivision is entitled by reason of energy taken. Notwithstanding any other provision of this subsection, at the meeting of the election committee in the calendar year immediately following the calendar year in which such facilities are first placed in commercial operation, as determined by the authority, and energy is being supplied by the authority to such political subdivisions, the period of time upon which the determination shall be made of the additional vote or votes (including fractions thereof) to which the representatives of the election committee shall be entitled at such meeting shall be the remainder of the calendar year in which energy was first supplied to such political subdivisions, provided that such facilities have been in commercial operation, as determined by the authority, and energy has been supplied for a minimum of six months in the immediately preceding calendar year. If such facilities of the authority have not been in commercial operation, as determined by the authority, and if energy has not been supplied for a minimum of six months in the immediately preceding

calendar year, such additional vote or votes (including fractions thereof) shall be determined by the number of kilowatt hours taken from Georgia Power Company in accordance with subsection (a) of this Code section.

(c) The presence at any meeting of the election committee of representatives entitled to cast two-thirds of the total votes to which the election committee shall be entitled shall constitute a quorum of the election committee. (Ga. L. 1975, p. 107, § 4; Ga. L. 1982, p. 3, § 46.)

46-3-118. Vacancies on authority.

Any vacancy in the membership of the authority shall be filled by a new member who shall be elected by the remaining members of the authority and who shall serve until the next meeting of the election committee. At the first meeting of the election committee following the filling of such vacancy, the election committee shall elect a member to fill the remainder, if any, of the unexpired term for which such vacancy was filled. Upon such election by the election committee, the membership on the authority of the member previously elected by the remaining members of the authority to fill such vacancy shall terminate. (Ga. L. 1975, p. 107, § 4.)

46-3-119. Officers of authority.

The authority shall elect from its membership a chairman, a vice-chairman, a secretary-treasurer, and an assistant secretary-treasurer. Such officers shall serve for such terms as shall be prescribed by resolution of the authority or until their successors are elected and qualified. (Ga. L. 1975, p. 107, § 4.)

46-3-120. Quorum of authority; action by majority vote; adjournment of meetings at which less than a majority is present.

At all meetings of the authority, the presence in person of a majority of the members in office shall be necessary for the transaction of business, and the affirmative vote of a majority of the members then in office shall be necessary for any action of the authority. No vacancy in the membership of the authority shall impair the right of such majority to exercise all the rights and perform all the duties of the authority. If at any meeting there is less than a majority present, a majority of those present may adjourn the meeting to a fixed time and place, and notice of such time and place shall be given in accordance with subsection (c) of Code Section 46-3-121, provided that if the time element of subsection (c) of Code Section 46-3-121 cannot reasonably be complied with, such notice, if any, of such adjourned meeting shall be given as is reasonably practical. (Ga. L. 1975, p. 107, § 4.)

46-3-121. Annual meeting of authority; special meetings; notice of meetings; waiver of notice; regular meetings other than annual meeting.

(a) The annual meeting of the authority shall be held on the anniversary date of the first meeting of the authority unless the date, time, and place of such annual meeting shall otherwise be fixed by resolution of the authority, provided that any such date so fixed shall be in reasonable proximity to the anniversary date of such first meeting.

(b) Special meetings of the authority may be called by resolution of the authority, by the chairman or vice-chairman, or upon the written request of at least three members of the authority.

(c) Written notice of all meetings shall be delivered to each political subdivision contracting with the authority other than for short-term purchases, and to each member of the authority not less than ten days prior to the date of such meeting in the case of regular meetings and not less than three days in the case of special meetings.

(d) Notice of a meeting of the authority need not be given to any member who signs a waiver of notice either before or after the meeting. Attendance of a member at a meeting shall constitute a waiver of notice of such meeting and a waiver of any and all objections to the place or time of the meeting or to the manner in which it has been called or convened, except when a member states at the beginning of the meeting any such objection or objections to the transaction of business. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the authority need be specified in the notice or waiver of notice of such meetings.

(e) In addition to the annual meeting of the authority, regular meetings of the authority may be established by resolution of the authority; and no notice, other than notice of the adoption of such resolution to any member of the authority who was absent when it was adopted, shall be required for such meeting, except for the notice required by subsection (c) of this Code section. (Ga. L. 1975, p. 107, § 4; Ga. L. 1982, p. 3, § 46.)

Editor's notes. — The first meeting of the authority, as referred to in subsection (a) of this Code section, was held on July 7, 1975.

46-3-122. Reimbursement of members for expenses; making of rules and regulations by authority; employment of staff and personnel; designation of assistant secretary-treasurer.

The members of the authority shall not be entitled to compensation for their services but may be reimbursed by the authority for their actual expenses properly incurred in the performance of their duties. The

authority shall make rules and regulations for its own government and may retain, employ, and engage all necessary staff and personnel, including professional and technical supervisors, assistants, and experts and other agents and employees, whether temporary or permanent, as it may require. Any one or more of such persons so engaged may be designated as an additional assistant secretary-treasurer of the authority and may be given the duties of keeping the books, records, and minutes of the authority, of giving all notices required by Code Sections 46-3-120, 46-3-121, and 46-3-123, and, in the absence of or in lieu of the secretary-treasurer, performing all other functions of the secretary-treasurer. Officers designated by the authority pursuant to this Code section shall serve at the pleasure of the authority. (Ga. L. 1975, p. 107, § 4.)

JUDICIAL DECISIONS

Cited in *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345 (N.D. Ga. 1986).

46-3-123. Removal of authority members from office.

The election committee shall have the power to remove from office any member of the authority for cause after written notice and public hearing. (Ga. L. 1975, p. 107, § 4.)

46-3-124. Books and records generally.

The authority shall keep suitable books and records of all its obligations, contracts, transactions, and undertakings; of all income and receipts of every nature; and of all expenditures of every kind. (Ga. L. 1975, p. 107, § 4.)

46-3-125. Purpose of authority.

The purpose of the authority shall be to acquire or construct, or to acquire and construct, and to operate and maintain, or to cause to be constructed, operated, and maintained, electric generation and transmission facilities. In addition, it shall be the purpose of the authority to take all other necessary or desirable action in order to provide or make available an adequate, dependable, and economical supply of electric power and energy and related services to those political subdivisions of this state identified in Code Section 46-3-130 which may desire the same and, incidentally and so as to take advantage of economies of scale in the generation and transmission of electric power and energy, to other persons and entities. (Ga. L. 1975, p. 107, § 3.)

JUDICIAL DECISIONS

Limitations on authority. — The Municipal Electric Authority of Georgia (MEAG) Act did not authorize MEAG to apply to the Public Service Commission for a certificate to offer its excess telecommunications capacity to the public for hire. *Municipal Elec.*

Auth. v. Georgia Pub. Serv. Comm'n, 241 Ga. App. 237, 525 S.E.2d 399 (1999).

Cited in *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976); *Appling County v. Municipal Elec. Auth.*, 621 F.2d 1301 (5th Cir. 1980).

RESEARCH REFERENCES

C.J.S. — 29 C.J.S., Electricity, § 25.

46-3-126. Powers of authority generally.

The authority shall have all powers necessary or convenient to carry out and effectuate the purpose and provisions of this article including, but without limiting the generality of the foregoing, the power:

(1) To sue and be sued in contract and in tort and to complain and defend in all courts;

(2) To adopt and alter a corporate seal;

(3) To acquire in its own name real property or rights and easements therein and franchises and personal property necessary or convenient for its corporate purposes, by purchase, on such terms and conditions and in such manner as it may deem proper, or by the exercise of the power of eminent domain in accordance with any and all existing laws of the State of Georgia applicable to the condemnation of property for public use, including the power to proceed as a condemning body under Article 2 of Chapter 2 of Title 22 or by gift, grant, lease, or otherwise; to insure the same against any and all risks as such insurance may, from time to time, be available; and to use such property, rent or lease the same to or from others, make contracts with respect to the use thereof, or sell, lease, or otherwise dispose of any such property in any manner it deems to the best advantage of the authority and the purposes thereof. The power to acquire, use, and dispose of property provided in this paragraph shall include the power to acquire, use, and dispose of any interest in such property, whether divided or undivided, which acquisition may result in the ownership of such property or any part thereof in common with any other party, whether public or private. Title to any such property of the authority, however, shall be held by the authority exclusively for the benefit of the public. The authority shall be under no obligation to accept and pay for any property condemned under this article except from the funds provided under the authority of this article and, in any proceedings to condemn, such orders may be made by the court having jurisdiction of the action as may be just to the authority and to the owners of the property to be condemned. If the authority shall deem it expedient

to construct any project on lands which are subject to the control of the state or of any political subdivision or public corporation of the state, the Governor, in the case of lands controlled by the state, or the governing authorities of such political subdivisions or such public corporations are authorized to convey such lands to the authority for such consideration, not exceeding reasonable value, as may be agreed upon by the authority, as grantee, and by the Governor or by the governing body of such political subdivision or by such public corporation, as grantor, taking into consideration the public benefit to be derived from such conveyance;

(4) To appoint and select officers, agents, and employees, including engineering, architectural, and construction experts, fiscal agents, and attorneys, and to fix their compensation;

(5) To acquire, by purchase or otherwise, in whole or in part, as provided in paragraph (3) of this Code section, and to place into operation and operate or cause to be placed into operation and operated, either as owner of all or of any part in common with others or as agent, electric generation and transmission lines, works, facilities, and projects; to provide, by sale or otherwise, an adequate, dependable, and economical electric power supply to political subdivisions of this state contracting with the authority pursuant to authority of Code Section 46-3-130; and, through such political subdivisions, to supply such electric power to the members of the public in the areas served by them; and, as agent for such political subdivisions, to secure power supply contracts and arrangements with other persons. The authority shall also have the power, which may be exercised either as principal or as agent, to manufacture, generate, store, and transmit electric current for light, heat, power, and energy; to manufacture, buy, sell, import, export, lease, or otherwise acquire and generally deal in electrical apparatuses of all kinds and machinery and devices and nuclear or fossil fuels for the manufacture, generation, storage, and transmission of electric current for light, heat, power, and energy; to purchase power at retail or wholesale from any other person; to purchase or construct part of the capacity of generation or transmission projects sponsored and owned by or in common with others, making any such purchase at wholesale or retail within or without this state; to contract for the purchase of power and energy from, or the sale of power and energy to, the United States government and electric utility systems either privately or publicly owned, within or without this state; to execute long- or short-term power purchase or sale contracts on terms which may include agreements with respect to resale rates and the disposition of revenues; to interchange, exchange, and purchase power and energy from any person; to erect, buy, lease, or otherwise acquire, operate, and maintain electric lighting, heating, and power projects; to transmit power both for itself and on behalf of others; to erect, buy, sell, lease, or otherwise acquire, maintain, and operate or cause to be maintained and operated plants, under-

ground subways, conduits, poles, and wires above, upon, and under the streets, alleys, lands, and territories of political subdivisions, public or private corporations, or individuals; and to continue to sell electric power to political subdivisions of this state which are authorized to contract with the authority pursuant to Code Section 46-3-130 and to other persons and entities and, as agent for any or all of the same, to make power and energy otherwise available to them through arrangements with other persons, all in the exercise of the powers of the authority and to effectuate the purposes of this article;

(6) To contract with the state and its agencies, instrumentalities, and departments, with those political subdivisions of the state which are authorized to contract with the authority pursuant to Code Section 46-3-130 and with private persons and corporations. This power includes the making of contracts for the construction of projects, which contracts for construction may be made either as sole owner of the project or as owner, in common with other public or private persons, of any divided or undivided interest therein;

(7) To exercise any one or more of the powers, rights, and privileges conferred by this Code section either alone or jointly or in common with one or more other parties or utilities, whether public or private. In any such exercise of such powers, rights, and privileges jointly or in common with others with respect to the construction, operation, and maintenance of electric generation or transmission facilities, the authority may own an undivided interest in such facilities with any other parties, whether public or private. The authority may enter into agreements with respect to any such electric generation or transmission facility with the other parties participating therein, and any such agreement may contain such terms, conditions, and provisions consistent with this article as the parties thereto shall deem to be in their best interests. Any such agreement may include, but need not be limited to, provisions for the construction, operation, and maintenance of such electric generation or transmission facility by any one or more of the parties to such agreement, which party or parties shall be designated in or pursuant to such agreement as agent or agents on behalf of itself and one or more of the other parties thereto, or by such other means as may be determined by the parties thereto. Such an agreement may also include provisions for methods of determining and allocating among or between the parties the costs of construction, operation, maintenance, renewals, replacements, improvements, and disposals with respect to such facility. In carrying out its functions and activities as such agent with respect to the construction, operation, and maintenance of such a facility, such agent shall be governed by the laws and regulations applicable to such agent as a separate legal entity and not by any laws or regulations which may be applicable to any of the other participating parties. Notwithstanding any other law to the contrary, pursuant to the terms of any such agreement the authority may delegate

its powers and duties with respect to the construction, operation, and maintenance of such facility to the party acting as agent; and all actions taken by such agent in accordance with the provisions of such agreement may be made binding upon the authority without further action or approval by the authority;

(8) To accept, receive, and administer gifts, grants, appropriations, and donations of money, materials, and property of any kind, including loans and grants from the United States government or the State of Georgia or any agency, department, authority, or instrumentality of either, upon such terms and conditions as the United States government, the State of Georgia, or such agency, department, authority, or instrumentality shall impose; to administer trusts; and to sell, lease, transfer, convey, appropriate, and pledge any and all of its property and assets;

(9) To invest any accumulation of its funds and any sinking fund or reserves in any manner that public funds of this state or its political subdivisions may be invested, and to purchase its own bonds and notes;

(10) To do any and all things necessary or proper for the accomplishment of the objectives of this article and to exercise any power usually possessed by private corporations performing similar functions which is not in conflict with the Constitution and laws of this state, including:

(A) Employment of professional and administrative staff and personnel and retaining of legal, engineering, and other professional services;

(B) The purchasing of all kinds of insurance, including, without limitation, insurance against tort liability and against risks of damage to property;

(C) The borrowing of money for any of the corporate purposes of the authority, provided that obligations of the authority other than revenue bonds for which provision is made in this article shall be payable from the general funds of the authority and shall not be a charge against any special fund allocated to the payment of revenue bonds;

(D) The power to indemnify and hold harmless any parties contracting with the authority or its agents from damage to persons or property; and

(E) The power to act as self-insurer with respect to any loss or liability;

(11) To issue its revenue bonds as provided in this article in evidence of its indebtedness incurred with respect to the powers described in this Code section, such bonds to be payable from the revenues, receipts, and earnings of the projects of the authority and other available funds

thereof; to execute trust agreements or indentures; to sell, convey, pledge, and assign any and all of its funds, assets, property, and income as security for the payment of such revenue bonds; and to provide for the payment of the same and for the rights of the owners thereof. (Ga. L. 1975, p. 107, § 7.)

JUDICIAL DECISIONS

Constitutionality. — Ga. L. 1975, p. 107 (see O.C.G.A. Art. 3, Ch. 3, T. 46) is not in violation of Ga. Const. 1976, Art. IX, Sec. IV, Para. III (Ga. Const. 1983, Art. IX, Sec. II, Para. VIII) since the authority is not a county, municipal corporation, or political subdivision of this state. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

No constitutional prohibition against authority acquiring property. — There is no constitutional prohibition against the Municipal Electric Authority acquiring property, or an undivided interest therein, from private persons, or contracting with private persons for the construction, operation, or maintenance of its project. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Limitations on authority. — The Municipal Electric Authority of Georgia (MEAG) Act did not authorize MEAG to apply to the

Public Service Commission for a certificate to offer its excess telecommunications capacity to the public for hire. *Municipal Elec. Auth. v. Georgia Pub. Serv. Comm'n*, 241 Ga. App. 237, 525 S.E.2d 399 (1999).

Immunity from antitrust laws. — Any anticompetitive effect which the participation of the Municipal Electric Authority of Georgia (MEAG) in the integrated transmission system (ITS) and joint ownership agreements might have caused were a foreseeable result of the specific authorizations contained in Georgia law, so that such participation is immune from antitrust attack. *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345 (N.D. Ga. 1986), aff'd, 844 F.2d 1538 (11th Cir. 1988).

Cited in *Appling County v. Municipal Elec. Auth.*, 621 F.2d 1301 (5th Cir. 1980); *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345 (N.D. Ga. 1986).

RESEARCH REFERENCES

ALR. — Furnishing electricity to public as public use or purpose for which power of eminent domain may be exercised, 44 ALR 735; 58 ALR 787.

Elements and measure of compensation for power lines or other wire lines over private property, 49 ALR 697; 124 ALR 407.

Power of municipal corporation to extend its service beyond corporate limits, 49 ALR 1239; 98 ALR 1001.

Duty to extend electrical service or supply individual applicant as affected by cost involved, 58 ALR 537.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves, 35 ALR3d 1293.

Right of public utility to deny service at one address because of failure to pay for past service rendered at another, 73 ALR3d 1292.

46-3-127. Policy as to nonprofit operation of projects by authority; fixing of rates, fees, and charges by authority.

The authority shall not operate or construct any project for profit except insofar as any such profit will inure to the benefit of the public. The authority shall fix the rates, fees, and charges consistent with this declaration of policy such as will produce revenues only in amounts sufficient, together with all other funds of the authority, to pay principal and interest

on bonds and obligations of the authority, to provide for maintenance and operation of the authority and of its projects, and to maintain such reserves as shall have been created in amounts sufficient in the judgment of the authority for the security of the bonds and for the improvement, replacement, or expansion of the facilities or services of the authority or to provide fuel for its generating projects. (Ga. L. 1975, p. 107, § 12.)

RESEARCH REFERENCES

Am. Jur. 2d. — 64 Am. Jur. 2d, Public Utilities, § 73 et seq.

C.J.S. — 29 C.J.S., Electricity, § 34.

ALR. — Variations of electric utility rates based on quantity used, 67 ALR 821.

Disposition of revenues from operation of revenue-producing enterprise owned by municipal corporation, 103 ALR 579; 165 ALR 854.

Right to cut off supply of electricity or gas

because of nonpayment of service bill or charges, 112 ALR 237.

Validity of “fuel adjustment” or similar clauses authorizing electric utility to pass on increased cost of fuel to its customers, 83 ALR3d 933.

Advertising or promotional expenditures of public utility as part of operating expenses for rate-making purposes, 83 ALR3d 963.

46-3-128. Declaration of authority property as public property; payments by authority in lieu of taxes; tax exemption for authority property, income, obligations, and debt interest.

(a) It is found, determined, and declared that the creation of the authority and the carrying out of its corporate purposes are in all respects for the benefit of the people of this state and that the authority is an institution of purely public charity performing an essential governmental function.

(b)(1) The property of the authority is declared, and shall in all respects be considered, to be public property. Title to the authority’s property shall be held by the authority only for the benefit of the public; and the use of such property pursuant to this article shall be and is declared to be for essential public and governmental purposes, that is, for the promotion of public general welfare in the matter of providing an adequate, dependable, and economical electric power supply in an effort to better the general condition of society in this state, which promotion is declared to be a public beneficence for the good of humanity and for the general improvement and happiness of society.

(b)(2)(A) It is recognized, however, that removal from local tax digests of the value of all property owned by the authority might impose an unfair burden on many taxpayers whose property is taxable. In the interest of weighing these benefits and concerns and arriving at an equitable policy regarding treatment of authority property, the General Assembly finds and declares that equity requires that the exemption presently applicable to the authority’s property should remain in effect. However, the General Assembly also finds and declares that in the

future the authority should rightfully make payments in lieu of taxes so that the authority may fulfill its good and public purposes without incidental harm to the state's local governments.

(B) With respect to tangible property owned by the authority and included in its project one and project two, as those projects are constituted as of March 25, 1980, or thereafter under the authority's power revenue bond resolution and general power revenue bond resolution, and supplemental resolutions thereto, the authority shall begin making payments in lieu of taxes in such manner and amounts as provided in this Code section in the earlier of (i) the first year after all of the bonds issued by the authority to finance each such respective project have been fully redeemed or (ii) the year 2020.

(C) With respect to tangible property acquired or constructed by the authority after March 25, 1980, and not included in its project one or project two, the authority shall begin making payments in lieu of taxes, in such manner and amounts as provided in this Code section, in the year 1981 or such later year as the authority first acquires or constructs such property.

(D) In each year in which the authority is required by this Code section to make payments in lieu of taxes, it shall file a return within the same time and in the same form and manner as public utilities. The taxing authorities shall assess the tangible property of the authority which is made subject by this Code section to payments in lieu of taxes in accordance with the law and procedures applicable to public utilities and shall apply to such assessments in each year in which any such payments are due the appropriate millage levies of the state and of the political subdivisions in which such property is located in order to arrive at the amounts of the respective payments in lieu of taxes. The authority shall be notified of the amounts of the payments in lieu of taxes due and shall pay such amounts to the state and respective political subdivisions within the time in which payments of taxes by public utilities are allowed or required.

(c) Except as specifically provided in this Code section for payments in lieu of taxes, all property of the authority, all income, obligations, and interest on the bonds and notes of the authority and all transfers of such property, bonds, or notes shall be and are declared to be exempt from taxation by the state or any of its political subdivisions. (Ga. L. 1975, p. 107, § 6; Ga. L. 1980, p. 1128, § 1.)

JUDICIAL DECISIONS

Property of authority is public property and exempt from taxation. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Authority exempt from property transfer tax. — The Municipal Electric Authority is exempt from the property transfer tax imposed by Ga. L. 1967, p. 788, as amended

(see O.C.G.A. § 48-6-1). *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Elec. Auth., 621 F.2d 1301 (5th Cir. 1980); *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345 (N.D. Ga. 1986).

Cited in *Appling County v. Municipal*

RESEARCH REFERENCES

ALR. — Right of municipality to refuse services provided by it to resident for failure of resident to pay for other unrelated services, 60 ALR3d 714.

46-3-129. Contracts between authority and political subdivisions for use of projects and facilities of authority.

(a) The authority may contract with any political subdivision of this state which is authorized by Code Section 46-3-130 to make such contracts for the payment of such rates, tolls, fees, and charges as may be prescribed by the authority for the use by such subdivisions or the residents thereof of the services and facilities of the projects and facilities of the authority. Any such political subdivision shall have the right and power, by resolution of its governing body, to make such a contract; and the amounts contracted to be paid by such political subdivision to the authority under such a contract shall constitute general obligations of such political subdivision for the payment of which the full faith and credit of such political subdivision may be pledged to provide the funds required to fulfill all obligations arising under any such contract.

(b) Any such political subdivision which enters into such a contract pursuant to this article shall, annually in each and every fiscal year during the term of such contract, include in a general revenue or appropriation measure, whether or not any other items are included, sums sufficient to satisfy the payments required to be made in each year by such contract until all payments required under such contract have been paid in full.

(c) If for any reason a provision or appropriation pursuant to subsection (b) of this Code section is not made, then the fiscal officers of such political subdivision are authorized and directed to set up as an appropriation on their accounts in each fiscal year the amounts required to pay the obligations called for under any such contract. The amount of an appropriation made under this subsection in each fiscal year shall be due and payable and shall be expended for the purpose of paying and meeting the obligations provided under the terms and conditions of such contract; and such appropriation shall have the same legal status as if the contracting political subdivision had included the amount of the appropriation in its general revenue or appropriation measure. Such fiscal officers shall make such payment to the authority if for any reason such appropriation is not otherwise made.

(d) Any political subdivision which contracts with the authority under this article may obligate itself and its successors to use only those projects for which it has contracted and none other. (Ga. L. 1975, p. 107, § 17.)

JUDICIAL DECISIONS

No unconstitutional delegation of legislative powers. — The provisions of Ga. L. 1975, p. 107 and particularly Ga. L. 1975, p. 107, § 17 (see O.C.G.A. § 46-3-129), conferring power on the fiscal authorities to appropriate funds to pay the obligations under the contracts and to make payments of such funds, do not constitute an unconstitutional delegation of legislative powers. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Right granted by this section to promote public welfare not unconstitutional. — The right granted by Ga. L. 1975, p. 107, § 17 (see O.C.G.A. § 46-3-129) to political subdivisions to give an exclusive privilege or monopoly to the authority to promote the pub-

lic welfare does not violate Ga. Const. 1976, Art. III, Sec. VIII, Para. VIII (Ga. Const. 1983, Art. III, Sec. VI, Para. V). *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Pledging full faith and credit and taxing power does not constitute unlawful taking of property. — Under Ga. L. 1975, p. 107, the pledging of the full faith and credit and taxing power of the political subdivisions does not constitute a taking of property without due process of law. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Cited in *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345 (N.D. Ga. 1986).

46-3-130. Eligibility of political subdivisions to contract with authority.

The political subdivisions with which the authority shall be authorized to contract to provide an electric power supply pursuant to this article shall be those political subdivisions of this state which, on March 18, 1975, owned and operated an electric distribution system. (Ga. L. 1975, p. 107, § 27.)

JUDICIAL DECISIONS

No special privileges provided to particular group of citizens. — Ga. L. 1975, p. 107, § 27 (see O.C.G.A. § 46-3-130), limiting the operation of this part to those political subdivisions of the state which owned and operated an electric distribution system on the date this part became law, does not provide special privileges to a particular group of citizens to the exclusion of others in violation of Ga. Const. 1976, Art. I, Sec. II, Para. III (Ga. Const. 1983, Art. I, Sec. I, Para. II). *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

This section does not offend constitutional provisions requiring laws of general

nature have uniform operation. — Ga. L. 1975, p. 107, § 27 (see O.C.G.A. § 46-3-130), limiting the operation of this part to those political subdivisions of the state which owned and operated an electric distribution system on the date this part became law, does not offend Ga. Const. 1976, Art. I, Sec. II, Para. VII (Ga. Const. 1983, Art. III, Sec. VI, Para. IV), requiring that laws of a general nature shall have uniform operation throughout the state. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Cited in *Appling County v. Municipal Elec. Auth.*, 621 F.2d 1301 (5th Cir. 1980).

46-3-131. Issuance of revenue bonds and bond anticipation notes in general.

(a) When the authority desires to issue revenue bonds as permitted by this article, the authority shall, prior to the adoption of a resolution authorizing the issuance of such bonds, enter into one or more contracts with no less than five political subdivisions which are authorized to contract

with the authority in accordance with Code Section 46-3-130. All such contracts shall be in accordance with Code Section 46-3-129.

(b) The acquisition, construction, reconstruction, improvement, equipment, alteration, repair, or extension of any project, and the issuance, in anticipation of the collection of the revenues from such project, of bonds to provide funds to pay the cost thereof, may be authorized under this article by resolution of the authority. Unless otherwise provided therein, such resolution shall take effect immediately and need not be laid over or published or posted. The authority, in determining such cost, may include all costs and estimated costs of the issuance of the bonds; all engineering, inspection, fiscal, and legal expenses; the interest which it is estimated will accrue during the construction period and during such additional period as the authority may reasonably determine to be necessary for the placing of such project in operation on money borrowed, or which it is estimated will be borrowed pursuant to this article; and all costs included in the definition of "cost of project" as defined in Code Section 46-3-111. Such bonds may also be issued to pay off, refund, or refinance any outstanding bonds or other obligation of any nature owed by the authority, whether or not such bonds or other obligations shall then be subject to redemption; and the authority may provide for such arrangements as it may determine for the payment and security of the bonds being issued or for the payment and security of the bonds or other obligations to be paid off, refunded, or refinanced.

(c) Revenue bonds may be issued under this article in one or more series; may bear such date or dates; may mature at such time or times, not exceeding 50 years from their respective dates; may bear interest at such rate or rates, payable at such time or times; may be payable in such medium of payment at such place or places; may be in such denomination or denominations; may be in such form, either coupon or fully registered without coupons; may be issued in any specific amounts; may carry such registration, conversion, and exchangeability privileges; may be declared or become due before the maturity date thereof; may provide such call or redemption privileges; may have such rank or priority; and may contain such other terms, covenants, assignments, and conditions as the bond resolution authorizing the issuance of such bonds or any indenture or trust agreement may provide. The authority may sell such bonds in such manner, at such price or prices, and upon such terms and conditions as shall be determined by the authority.

(d) The bonds shall be signed by the chairman of the authority; the corporate seal of the authority shall be impressed, imprinted, or otherwise reproduced on the bonds; and the bonds shall be attested by the signature of the secretary-treasurer of the authority. The coupons shall be signed in such manner as may be directed by the authority. The signatures of the officers of the authority and the seal of the authority upon any bond, note,

or other debt security issued by the authority may be by facsimile if the instrument is authenticated or countersigned by a trustee other than the authority itself or an officer or employee of the authority. All bonds or notes issued under authority of this article bearing signatures or facsimiles of the signatures of officers of the authority in office on the date of the signing thereof shall be valid and binding, notwithstanding that before the delivery thereof and payment therefor such officers whose signatures appear thereon shall have ceased to be officers of the authority. Pending the preparation of the definitive bonds, interim receipts, in such form and with such provisions as the authority may determine, may be issued to the purchasers of bonds to be issued under this article.

(e) Any bond resolution authorizing the issuance of bonds and any indenture or trust agreement entered into under this article to finance in whole or in part the acquisition, construction, reconstruction, improvement, equipment, alteration, repair, or extension of any project may contain covenants as to:

(1) The rates, fees, tolls, or charges to be charged for the services, facilities, and commodities of the project;

(2) The use and disposition of the revenue to be derived from the project;

(3) The creation and maintenance of reserves or sinking funds and the regulation, use, and disposition thereof, including debt service reserve; renewal and replacement or other capital improvement reserve, including reserves for the provision of fuel; and such other reserves as may be reasonably required by the authority for the operation of its projects and as may be authorized by the bond resolution or trust agreement or indenture pursuant to which the issuance of such bonds may be authorized;

(4) The purposes to which the proceeds of the sale of said bonds may be applied, and the use and disposition of such proceeds;

(5) Events of default and the rights and liabilities arising thereupon, the terms and conditions upon which bonds issued under this article shall become or may be declared due before maturity, and the terms and conditions upon which such declaration and its consequences may be waived;

(6) The issuance of other additional bonds or instruments payable from or a charge against the revenue of such project;

(7) The insurance to be carried thereon and the use and disposition of insurance proceeds;

(8) Books of account and the inspection and audit thereof;

(9) Limitations or restrictions on the power to lease or otherwise dispose of the project while any of the bonds or interest thereon remains outstanding and unpaid; and

(10) The operation and maintenance of the project and of the authority.

(f) The provisions of this article and of any bond resolution, indenture, or trust agreement entered into pursuant to this article shall be a contract with every holder of the bonds; and the duties of the authority under this article and under any such bond resolution, indenture, or trust agreement shall be enforceable by any bondholder by mandamus or other appropriate action or proceeding at law or in equity.

(g) The authority shall give notice to the district attorney of the Atlanta Judicial Circuit of its intention to issue its revenue bonds, setting forth the fact of service of such notice, the principal amount of bonds to be issued, the purpose for which the same are to be issued, whether the bonds are to be issued in separate series or installments from time to time, the interest rate or rates which such bonds are to bear, the amount of principal to be paid in each year during the life of the bonds or the method or formula by which such amounts shall be determined, the date by which all bonds are to be paid in full, and the security to be pledged to the payment of the bonds; provided, however, that such notice, in the discretion of the authority, in lieu of specifying the rate or rates of interest which the bonds are to bear, may state that the bonds when issued will bear interest at a rate not exceeding a maximum per annum rate of interest specified in the notice, or, in the event the bonds, or any series or installment thereof, are to bear different rates of interest for different maturity dates, may state that none of such rates will exceed the maximum rate specified in the notice; provided, further, that nothing in this subsection shall be construed as prohibiting or restricting the right of the authority to sell the bonds at a discount, even if in so doing the effective interest cost resulting therefrom would exceed the maximum per annum interest rate specified in the notice to the district attorney. Such notice shall be signed by the chairman, vice-chairman, or secretary-treasurer.

(h) Within 20 days after the date of service of the required notice, the district attorney shall prepare and file in the office of the clerk of the Superior Court of Fulton County a complaint directed to the Superior Court of Fulton County in the name of the state and against the authority, setting forth the fact of service of such notice, the amount of the bonds to be issued, for what purpose they are to be issued, whether the bonds are to be issued in separate series or installments from time to time, the interest rate or rates they are to bear or the maximum rate or rates of interest, the amount of principal and interest to be paid annually or the method or formula by which the amount of such payments shall be determined, and the date by which all bonds are to be paid in full. In addition, the district

attorney shall obtain from the judge of the court an order requiring the authority by its proper officers to appear at such time and place as the judge may direct, either during a session of court or in chambers, within 20 days after the filing of the complaint, and show cause, if any, why the bonds should not be confirmed and validated. Such complaint and order shall be served upon the authority in the manner provided by law; and to such complaint the authority shall make sworn answer at or before the date set in the order for the hearing.

(i) Prior to the hearing of the cause, the clerk of the Superior Court of Fulton County shall publish in the official organ of Fulton County once during each of the two weeks immediately preceding the week in which the hearing is to be held a notice to the public that, on the day specified in the order providing for the hearing of the cause, the same will be heard.

(j) Within the time prescribed in the order or at such other time as he may fix, the judge of the superior court shall proceed to hear and determine all questions of law and of fact in the cause, including the question of whether the contractual obligations which are made a condition precedent to the issuance of such bonds by subsection (a) of this Code section have been properly incurred; and the judge shall render judgment on the cause. Any citizen of this state may become a party to the proceedings at or before the time set for the hearing. Any party who is dissatisfied with the judgment of the court confirming and validating the issuance of the bonds and the security therefor or refusing to confirm and validate the issuance of the bonds and the security therefor may appeal from the judgment under the procedure provided by Article 2 of Chapter 6 of Title 5. No appeal may be taken by any person who was not a party at the time the judgment appealed from was rendered.

(k) In the event no appeal is filed within 30 days after the date of the judgment of validation, or, if an appeal is filed, in the event the judgment is affirmed on appeal, the judgment of the superior court so confirming and validating the issuance of the bonds and the security therefor shall be forever conclusive upon the validity of the bonds and the security therefor.

(l) Bonds issued under this article shall bear a certificate of validation signed with the facsimile or manually executed signature of the clerk of the Superior Court of Fulton County stating the date on which the bonds were validated as provided in this Code section; and such entry shall be original evidence of the fact of judgment and shall be received as original evidence in any court in this state.

(m) The authority shall reimburse the district attorney for his actual costs of the case, if any. For every \$5,000.00 in principal amount of bonds or portion thereof, there shall be payable to the clerk of the Superior Court of Fulton County the following fees for validation and confirmation:

First \$500,000.00 \$1.00

\$501,000.00 — \$2,500,000.0025
All over \$2,500,000.0010

(n) Any other law to the contrary notwithstanding, this article shall govern all civil claims, proceedings, and actions respecting debt of the authority evidenced by revenue bonds. (Ga. L. 1975, p. 107, § 8; Ga. L. 1985, p. 149, § 46.)

Cross references. — Revenue bonds generally, § 36-82-60 et seq. Repeal of interest rate limitations, § 36-82-123.

Code Commission notes. — Pursuant to § 28-9-5, in 1985, “bondholder” was substituted for “bond holder” in subsection (f).

Pursuant to § 28-9-5, in 1987, “Atlanta Judicial Circuit” was substituted for “Atlanta judicial circuit” in the first sentence of subsection (g).

JUDICIAL DECISIONS

Provisions of the Municipal Electric Authority of Georgia Act are not unlawful as being contrary to provisions of the Revenue Bond Law (see O.C.G.A. Art. 3, Ch. 82, T. 36). *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Purpose of notice is to give information to the citizens of the political subdivisions con-

tracting with the authority of the proceeding to validate the bonds so that they might resist the validation of the proposed bond issue. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Cited in *Appling County v. Municipal Elec. Auth.*, 621 F.2d 1301 (5th Cir. 1980).

46-3-132. Validation of contracts for payments pledged as security for bonds.

- (a) When payments which are made by political subdivisions pursuant to contracts entered into under subsection (a) of Code Section 46-3-131 are pledged as security for the payment of bonds sought to be validated, the petition for validation shall make party defendant the authority and shall also make parties defendant to such action every political subdivision which has contracted with the authority for the use of the facilities, commodities, and services of the project for which bonds shall be sought to be validated and issued. In addition, every other party, whether public or private, contracting with the authority in any manner with relation to the operation of such project, and particularly with relation to any common ownership of such project or to the supplying of electric energy to the authority or the taking or purchasing of electric energy from the project, shall be made parties defendant.
- (b) All such parties defendant shall be served and shall be required to show cause, if any exists, why such contracts and the terms and conditions thereof should not be inquired into by the court and the validity of the terms thereof determined and the matters and conditions imposed on the parties to such contracts and all such undertakings thereof adjudicated to be valid and binding on the parties thereto.

(c) Notice of such proceedings shall be included in the notice of validation hearing required by Code Section 46-3-131 to be issued and published by the clerk of the Superior Court of Fulton County. In addition to such notice required to be published in Fulton County, such notice shall also be published in the newspaper in which sheriff's advertisements are published, once a week during each of the two weeks immediately preceding the week of the hearing, in each county in which any portion of any of the defendant political subdivisions lie.

(d) Any citizen resident of this state may, at or before the time set for the validation hearing, intervene in the validation proceedings conducted in the Superior Court of Fulton County pursuant to Code Section 46-3-131 and may assert any ground or objection to the validity and binding effect of such contract on his own behalf and on behalf of any political subdivision and of all citizens, residents, and property owners of the state.

(e) No appeal may be taken by any person who was not a party at the time the judgment appealed from was rendered.

(f) An adjudication as to the validity of any such contract which adjudication is unexcepted to within 30 days after the date of the judgment of validation or, if an appeal is filed, which adjudication is confirmed on appeal shall be forever conclusive and binding upon such political subdivisions and the resident citizens and property owners of this state. (Ga. L. 1975, p. 107, § 9.)

Cross references. — Class actions, § 9-11-23. Intervention, § 9-11-24.

JUDICIAL DECISIONS

Purpose of notice is to give information to the citizens of the political subdivisions contracting with the authority of the proceeding to validate the bonds so that they might resist

the validation of the proposed bond issue. Thompson v. Municipal Elec. Auth., 238 Ga. 19, 231 S.E.2d 720 (1976).

46-3-133. Failure of district attorney to pursue judicial validation of bonds.

In all cases where the authority has adopted a resolution for the issuance of revenue bonds, and where notice has been duly served upon the district attorney for the purpose of securing a judicial validation of such bonds and the security therefor, and where, in such case, there has been a failure on the part of such district attorney or other officer to proceed within the time prescribed by this article, it shall be competent for the authority to represent such facts in writing to the court and to represent further that such failure has been without fault on the part of the authority. In such case, the Superior Court of Fulton County shall have power and authority to inquire into the facts; and, upon being satisfied that such failure has not arisen from any fault or neglect on the part of the authority, it shall be the

duty of the court to pass an order directing such district attorney to proceed within ten days to file a complaint as authorized by this article. Thereafter, the proceedings shall be held in the same manner as would have been followed had such petition been duly and promptly filed in the first instance. (Ga. L. 1975, p. 107, § 10.)

46-3-134. Bonds as legal investments; depositing bonds with public officers and bodies of state.

The bonds authorized by this article shall be securities in which:

- (1) All public officers and bodies of this state;
- (2) All political subdivisions of this state;
- (3) All insurance companies and associations, and other persons carrying on an insurance business;
- (4) All banks, bankers, trust companies, saving banks, and savings associations, including savings and loan associations, building and loan associations, investment companies, and other persons carrying on a banking business;
- (5) All administrators, guardians, executors, trustees, and other fiduciaries; and
- (6) All other persons whatsoever who are authorized to invest in bonds or other obligations of the state

may properly and legally invest funds, including capital in their control or belonging to them. Such bonds shall also be securities which may be deposited with and shall be received by all public officers and bodies of this state and its political subdivisions for any purpose for which deposit of the bonds or other obligations of this state is authorized. (Ga. L. 1975, p. 107, § 16.)

46-3-135. Pledge of authority's revenues and earnings to payment of principal of and interest on bonds; setting aside of pledged revenues and earnings into sinking funds.

(a) All or any part of the gross or net revenues and earnings derived from any particular project and any and all revenues and earnings received by the authority, regardless of whether such revenues and earnings were produced by a particular project for which bonds have been issued, may be pledged by the authority to the payment of the principal of and interest on revenue bonds of the authority as may be provided in any resolution authorizing the issuance of such bonds or in any trust instrument pertaining to such bonds.

(b) Such funds so pledged, from whatever source received, may include funds received from one or more or all sources and may be set aside at

regular intervals into sinking funds for which provision may be made in any such resolution or trust instrument, which sinking funds may be pledged to and charged with the payment of:

(1) The interest upon such revenue bonds as such interest shall become due;

(2) The principal of the bonds as the same shall mature;

(3) The necessary charges of any trustee, paying agent, or registrar for such bonds; and

(4) Any premium upon bonds retired upon call or purchase.

(c) The use and disposition of any sinking fund may be subject to regulations for which provision may be made in the resolution authorizing the issuance of the bonds or in the trust instrument or indenture securing the payment of the same. (Ga. L. 1975, p. 107, § 19.)

JUDICIAL DECISIONS

Cited in *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345 (N.D. Ga. 1986), *aff'd*, 844 F.2d 1538 (11th Cir. 1988).

RESEARCH REFERENCES

ALR. — Disposition of revenues from operation of revenue-producing enterprise owned by municipal corporation, 103 ALR 579; 165 ALR 854.

46-3-136. Securing of bonds by trust agreement or indenture.

(a) In the discretion of the authority, any issue of revenue bonds may be secured by a trust agreement or indenture made by the authority with a corporate trustee, which may be any trust company or bank having the powers of a trust company within or without this state. Such trust agreement or indenture may pledge or assign all revenue, receipts, and earnings to be received by the authority and any proceeds which may be derived from the disposition of any real or personal property of the authority or proceeds of insurance carried thereon.

(b) The resolution providing for the issuance of revenue bonds and such trust agreement or indenture may contain provisions for protecting and enforcing the rights and remedies of the bond owners, including the right of appointment of a receiver upon default in the payment of any principal or interest obligation and the right of any receiver or trustee to enforce collection of any rates, fees, tolls, charges, or revenues for the use of the services or facilities of the project necessary to pay all costs of operation and all reserves provided for, the principal of and interest on all bonds in the issue, all costs of collection, and all other costs reasonably necessary to

accomplish the collection of such sums in the event of any default of the authority.

(c) Such resolution, trust agreement, or indenture may include covenants setting forth the duties of the authority regarding the acquisition of property for and the construction of the project and regarding the custody, safeguarding, and application of all funds of the authority, including any proceeds derived from the disposition of any real or personal property of the authority or proceeds of insurance carried thereon. In addition, such resolution, trust agreement, or indenture may include covenants providing for the operation, maintenance, repair, and insurance of the project and may contain provisions concerning the conditions, if any, upon which additional bonds may be issued.

(d) Such resolution, trust agreement, or indenture may set forth the rights and remedies of the bond owners and of the trustee; may restrict the individual right of action of any bond owner in such manner as is customary in securing bonds and debentures of corporations; and may contain such other provisions as the authority may deem reasonable and proper for the security of the bond owners.

(e) All expenses incurred in carrying out any trust agreement or indenture under this Code section may be treated as a part of the cost of maintenance, operation, and repair of the project affected by such trust agreement or indenture. (Ga. L. 1975, p. 107, § 20; Ga. L. 1992, p. 6, § 46.)

46-3-137. Application of bond proceeds to cost of projects; issuance of additional bonds to remedy deficit in proceeds from bond issue; application of surplus proceeds.

(a) Proceeds of the bonds issued under authority of this article shall be used solely for the payment of the cost of projects and shall be disbursed upon requisition or order of such person and under such restrictions as the resolution authorizing the issuance of such bonds or the trust agreement or indenture may provide.

(b) If the proceeds of such bonds, including all series or installments of such issue, by error of calculation or otherwise, are less than the cost of projects, then, unless otherwise provided in the resolution authorizing the issuance of the bonds or in the trust agreement or indenture, additional bonds may in like manner be issued, subject to the requirements of subsection (a) of Code Section 46-3-131 to provide the amount of such deficit. Unless otherwise provided in the resolution authorizing the issuance of the bonds or in the trust agreement or indenture, such additional bonds shall be deemed to be of the same issue and shall be entitled to payment from the same fund, without preference or priority, as the bonds first issued for the same purpose.

(c) If the proceeds of the bonds of any issue exceed the amount required for the purpose for which such bonds are issued, the surplus shall be paid

into the fund provided for the payment of principal and interest of such bonds.

(d) In the discretion of the authority, revenue bonds of a single issue or series or installment of such issue may be issued for the purpose of paying the cost of any one or more projects. (Ga. L. 1975, p. 107, § 21.)

46-3-138. Mutilated, lost, stolen, or destroyed bonds and coupons.

(a) If any bond becomes mutilated or is lost, stolen, or destroyed, the authority may execute and deliver a new bond of like date of issue, maturity date, principal amount, and interest rate per annum as the bond so mutilated, lost, stolen, or destroyed, which new bond shall have attached thereto coupons corresponding in all respects to those, if any, on the bond mutilated, lost, stolen, or destroyed, provided that:

(1) In the case of any mutilated bond, such bond together with all unmatured coupons appertaining thereto is first surrendered to the authority;

(2) In the case of any lost, stolen, or destroyed bond, there is first furnished evidence of such loss, theft, or destruction satisfactory to the authority, together with indemnity satisfactory to the authority;

(3) All other reasonable requirements of the authority are complied with; and

(4) Expenses in connection with such transaction are paid.

(b) In the event any coupon is mutilated, lost, stolen, or destroyed, the authority may issue a duplicate coupon upon the same terms and conditions as those provided for the replacement of mutilated, lost, stolen, or destroyed bonds.

(c) Any bonds or coupon surrendered for exchange shall be canceled.

(d) The authority shall be authorized to print the new bond with the validation certificate bearing the facsimile signature of the clerk of the superior court then in office, and such certificate shall have the same force and effect as in the first instance. All responsibility with respect to the issuance of any such new bonds shall be with the authority and not with such clerk; and such clerk shall have no liability in the event an overissuance occurs. (Ga. L. 1975, p. 107, § 11.)

46-3-139. Interest on bonds.

Interest shall cease to accrue on any bond on the date that such bond becomes due for payment if said payment is made or duly provided for, but liability for such bond and for the accrued interest thereon shall continue until such bond is 20 years overdue for payment. At that time, unless

demand for payment has been made, such obligation shall be extinguished and shall be deemed no longer outstanding. (Ga. L. 1975, p. 107, § 11.)

46-3-140. Cancellation of evidences of indebtedness and interest coupons.

Unless otherwise directed by the authority, every evidence of indebtedness and interest coupon paid or otherwise retired shall forthwith be marked "canceled" and shall be delivered by the paying agent making payment thereof to the authority, whereupon the evidence of indebtedness or interest coupon shall be destroyed and a certificate of destruction shall be filed in the records of the authority. (Ga. L. 1975, p. 107, § 11.)

46-3-141. Records of evidences of indebtedness issued.

The fiscal officer of the authority or his agent shall maintain records containing a full and correct description of each evidence of indebtedness issued, identifying it and showing its date, issue, amount, interest rate, payment dates, payments made, registration, cancellation, destruction, and every other relevant transaction. (Ga. L. 1975, p. 107, § 11.)

46-3-142. Paying agents for bonds.

The authority may appoint one or more paying agents for each issue or series or installment of bonds. Every such paying agent shall be an incorporated bank or trust company authorized by the laws of the United States or of the state in which it is located to do a banking or trust business. The authority may make such provisions respecting paying agents as it deems necessary or useful and may enter into a contract with any paying agents containing such terms, including its compensation, and such conditions in regard to the paying agents as the authority deems necessary or useful. (Ga. L. 1975, p. 107, § 11.)

46-3-143. Bond anticipation notes.

(a) The authority shall have the power and is authorized, whenever revenue bonds of the authority have been validated as provided in Code Section 46-3-131, to issue from time to time its negotiable notes in anticipation of the issuance of such bonds as validated and to renew from time to time any such notes by the issuance of new notes, regardless of whether the notes to be renewed have matured. The authority may issue notes only to provide funds which would otherwise be provided by the issuance of the bonds as validated. The notes may be authorized, sold, executed, and delivered in the same manner as bonds.

(b) Any resolution authorizing notes of the authority or any issue thereof may contain any provisions which the authority is authorized to include in

any resolution authorizing bonds of the authority or any issue thereof; and the authority may include in any notes any terms, covenants, or conditions which it is authorized to include in any bonds.

(c) All notes shall be general obligations of the authority, payable out of any of its funds or revenues, subject only to any contractual rights of the holders of any of its notes or other obligations then outstanding, provided that there may be specially pledged to the payment of such notes the proceeds to be derived from the issuance of the validated bonds in anticipation of the issuance of which the notes have been issued.

(d) Validation of such bonds shall be a condition precedent to the issuance of such notes but it shall not be required that such notes be judicially validated.

(e) Bond anticipation notes shall not be issued in an amount exceeding the par value of the bonds in anticipation of which they are to be issued. (Ga. L. 1975, p. 107, § 22; Ga. L. 1982, p. 3, § 46.)

JUDICIAL DECISIONS

Provisions of the Municipal Electric Authority Act not unlawful as being contrary to provisions of the Revenue Bond Law (see

O.C.G.A. Art. 3, Ch. 82, T. 36). *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

46-3-144. Negotiability of bonds, notes, and other evidences of debt.

Notwithstanding any other law to the contrary, every evidence of indebtedness issued under this article shall have all the rights and incidences of negotiable instruments, subject to provisions for registration. (Ga. L. 1975, p. 107, § 15.)

46-3-145. Liability of members of authority on bonds and notes; obligations of state and political subdivisions in regard to issued bonds or notes; requirement as to recital on face of bonds and notes.

(a) Neither the members of the authority nor any person executing bonds or notes on behalf of the authority shall be personally liable thereon by reason of the issuance thereof.

(b) Neither the revenue bonds or notes issued under this chapter nor the instruments evidencing the obligations which constitute the security therefor shall constitute a debt of, a loan by, or a pledge of the faith and credit of the State of Georgia or of any political subdivision thereof. Rather, such bonds and notes shall be payable from the revenues of the authority as provided in the resolutions, trust agreements, or indentures authorizing or securing the issuance and payment of such bonds or notes. The issuance of such bonds or notes shall not obligate the state or any political subdivision thereof to levy or pledge any form of taxation whatever for the payment

thereof. No owner of any such bond or note, and no receiver or trustee in connection therewith, shall have the right to enforce the payment of the bond or note against any property of the state or of any political subdivision thereof; nor shall any such bond or note constitute a charge, lien, or encumbrance, whether legal or equitable, upon any such property.

(c) All such bonds and notes shall contain on their face a recital setting forth the complete immunity of the state and any such political subdivisions from liability thereon, which recital shall contain substantially the foregoing provisions of this Code section. (Ga. L. 1975, p. 107, § 13; Ga. L. 1982, p. 3, § 46.)

JUDICIAL DECISIONS

State authorities exempt from certain restrictions. — State authorities, lawfully created, are not subject to the restrictions of Ga. Const. 1976, Art. IX, Sec. VII, Para. I and Art. IX, Sec. VIII, Para. I (Ga. Const. 1983, Art.

IX, Sec. V, Para. I, IV, V; Art. IX, Sec. VI, Para. I, II; Art. XI, Sec. I, Para. IV). *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

RESEARCH REFERENCES

ALR. — Suit against railroad owned by or in which interest is held by United States or state, 8 ALR 995.

Remedy available against invalid judgment in favor of United States, state, or other governmental unit immune to suit, 163 ALR 244.

Validity and construction of legislation conferring personal immunity on public officers or employees for acts in course of duty, 163 ALR 1435.

46-3-146. Preservation of interests and rights of owners of bonds and notes.

While any of the bonds or notes issued by the authority remain outstanding, the powers, duties, or existence of the authority or of its officers, employees, or agents shall not be diminished, impaired, or affected in any manner which will affect adversely the interest and rights of the owners of such bonds or notes; and no other authority, instrumentality, or body will be created or empowered to compete with the authority so as to affect adversely the interests and rights of the owners of such bonds or notes; nor will the state itself so compete with the authority. This article shall be for the benefit of the state, the authority, and every owner of the authority's bonds and notes and, upon and after the issuance of bonds or notes under this article, shall constitute an irrevocable contract by the state with the owners of such bonds and notes. (Ga. L. 1975, p. 107, § 30.)

JUDICIAL DECISIONS

No unconstitutional delegation of legislative powers in this section. — Ga. L. 1975, p. 107, § 30 (see O.C.G.A. § 46-3-146), limit-

ing the power of the state to adversely affect the interests of the owners of the authority's bonds and notes, does not constitute uncon-

stitutional delegation of legislative powers in violation of Ga. Const. 1976, Art. III, Sec. I, Para. I (Ga. Const. 1983, Art. I, Sec. I, Para. I), because it does not limit the right of the General Assembly to legislate except to prevent legislation which will impair the contracts with the bond owners, and this is consistent with the Constitution. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Constitutional limits on power of state to adversely affect interests of owners of bonds

and notes. — Ga. L. 1975, p. 107, § 30 (see O.C.G.A. § 46-3-146), limiting the power of the state to adversely affect the interests of the owners of the authority's bonds and notes, is not in violation of Ga. Const. 1976, Art. III, Sec. VII, Para. IV (Ga. Const. 1983, Art. III, Sec. V, Para. III), which prohibits an act from containing matter different from what is expressed in the title. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

46-3-147. Appointment of receiver for authority for default on bonds; duties of receiver; termination of receivership; jurisdiction of court over receiver.

(a) If the authority defaults on the payment of the principal or interest on any of the revenue bonds after the same become due, whether at maturity or upon call for redemption, and such default continues for a period of 30 days, or if the authority or its officers, agents, or employees fail or refuse to comply with the essential provisions of this article or default in any material respect on any agreement made with the holders of the revenue bonds, any holders of revenue bonds or a trustee therefor shall have the right to apply in an appropriate judicial proceeding to the Superior Court of Fulton County for the appointment of a receiver of the undertaking, regardless of whether all revenue bonds have been declared due and payable, and regardless of whether such holder or trustee therefor is seeking or has sought to enforce any other right or exercise any remedy in connection with such revenue bonds. Upon such application, the court, if it deems such action necessary for the protection of the bondholders, may appoint a receiver for the undertaking, provided that such appointment shall be mandatory if the application is made by the holders of 25 percent in principal amount of such revenue bonds then outstanding, or by any trustee for holders of such revenue bonds in such principal amount.

(b) A receiver appointed pursuant to subsection (a) of this Code section shall forthwith, directly or by his agents and attorneys, enter into and upon and take possession of the project or of such portion thereof or interest therein as is owned by the authority. If the court so directs, the receiver may wholly exclude from the project the authority, its officers, agents, and employees, and all persons claiming under them. Upon taking possession of the project, the receiver shall have, hold, use, operate, manage, and control the same and each and every part thereof and, in the name of the authority or otherwise, as the receiver may deem best, shall exercise all the rights and powers of the authority with respect to the undertaking as the authority itself might do. The receiver shall maintain, restore, insure, and keep insured the project or such portion or interest therein as is owned by the authority; from time to time shall make all such necessary or proper repairs

as the receiver may deem expedient; shall establish and maintain rates and collect such fees, tolls, and other charges in connection with the project as the receiver may deem necessary or proper and reasonable; and shall collect and receive all revenues, shall deposit the same in a separate account, and shall apply such revenues so collected and received in such manner as the court shall direct, provided that the duties of the receiver as described in this subsection shall be performed in a manner consistent with any and all existing contractual arrangements to which the authority may be a party; and the powers of the receiver shall be no greater than the powers of the authority.

(c) Whenever all amounts due upon the revenue bonds and interest thereon have been cured and made good; and whenever a similar cure and making good has been effected in regard to any other notes, bonds, or other obligations, and interest thereon, which constitute a charge, lien, or encumbrance on the revenues of the project under any of the terms of any covenants or agreements with holders of revenue bonds; then, if it appears to the court that no default is imminent, the court shall direct the receiver to surrender possession of the project to the authority, provided that the same right of the holders of the revenue bonds to secure the appointment of a receiver as is provided in subsection (a) of this Code section shall exist upon any subsequent default.

(d) A receiver shall, in the performance of the powers conferred upon him by this Code section, act under the direction and supervision of the court making such appointment, shall at all times be subject to the orders and decrees of such court, and may be removed thereby. Nothing contained in this Code section shall limit or restrict the jurisdiction of such court to enter such other and further orders and decrees as the court may deem necessary or appropriate for the exercise by the receiver of any functions specifically set forth in this Code section. (Ga. L. 1975, p. 107, § 14; Ga. L. 1982, p. 3, § 46.)

46-3-148. Fixing, revising, and collecting fees, tolls, and charges for use of projects; application of revenues; time of payment; indemnity by political subdivisions; enforcement; assignment of payments; issuing resolutions governing disposition of revenues.

(a) For the purpose of earning sufficient revenue to make possible the financing of the construction of the projects of the authority with revenue bonds, the authority is authorized and empowered to fix and revise rates and collect fees, tolls, and charges on each project which it causes to be acquired or constructed. Such rates, fees, tolls, and charges to be paid for the use of the facilities or services of such projects shall be so fixed and adjusted from time to time as to provide a fund which, together with other revenue, if any, of such projects or of the authority, will be sufficient:

(1) To pay:

(A) The costs of operating, maintaining, and repairing the projects,

including reserves for insurance and extraordinary repairs, reserves for fuel, and other reserves required by the resolution, trust agreement, or indenture pertaining to such bonds and the issuance thereof, unless such costs shall be otherwise provided for;

(B) The costs of operating and conducting the business of the authority, including salaries; fees for professional services, including legal, engineering, and others; and all expenses properly relating to the conduct of the affairs of the authority;

(C) The costs of power, whether generated by the authority or acquired from others; and

(D) All other costs associated with the operation of the authority and its projects and facilities;

(2) To pay the principal of and interest on such revenue bonds as the same become due, including all premiums, if any, the proceeds of which shall have been or will be used to pay the cost of such projects, which cost shall include all elements of cost authorized by this article, including acquisition of property, whether real or personal, and any interest in property; clearing and preparing land for the purposes of this article; architectural, engineering, financial, and legal services; construction of projects authorized by this article; administrative expenses; funds for initiating the operation of the project; and interest prior to and during construction and during such period of time thereafter as may be reasonably determined by the authority to be necessary to put the project into operation;

(3) To comply with any sinking fund requirements contained in the resolution, trust agreement, or indenture pertaining to the issuance of and security for such bonds;

(4) To perform fully all provisions of such resolution, trust agreement, or indenture relating to the issuance of or security for such bonds to the payment of which such revenue is pledged;

(5) To accumulate any excess income which may be required by the purchasers of such bonds or may be dictated by the requirements of such resolution, trust agreement, or indenture or by the requirements of achieving ready marketability of and low interest rates on such bonds; and

(6) To pay expenses in connection with such bond issue or such projects, including, but not limited to, trustees' and fiscal fees.

(b) The rates, fees, tolls, and charges authorized by subsection (a) of this Code section shall be payable at such intervals as may be agreed upon and set forth in the contract providing therefor. Any such contract may provide for the commencement of payments, not necessarily based directly on rates,

to the authority prior to the completion of the undertaking by the authority of any such project; may provide for the making of payments during such times as such projects may be partially or wholly not in use, whether or not any such project has been completed, is then operable, or is operating; and may provide that such payments shall not be subject to any reduction, by offset or otherwise, and shall not be conditioned upon the performance or nonperformance by any party of any agreement.

(c) Such contract may obligate the political subdivision to indemnify and save harmless the authority from any and all damage to persons and property occurring on or by reason of the project, and may also obligate the political subdivision to undertake, at the expense of the political subdivision, the defense of any action brought against the authority by reason of injury or damages to persons or property occurring on or by reason of the project.

(d) In the event of any failure or refusal on the part of the political subdivision to perform punctually any covenant or obligation contained in any such contract, the authority may enforce performance by any legal or equitable process, including specific performance.

(e) Any payments due or to become due to the authority pursuant to any such contract may be assigned by the authority to a trustee or paying agent as may be required by the terms of the resolution, trust agreement, or indenture relating to the issuance of and security for such bonds.

(f) The use and disposition of the authority's revenue shall be subject to the provisions of the resolution authorizing the issuance of such bonds or of the trust agreement or indenture, if any, securing the same. (Ga. L. 1975, p. 107, § 18; Ga. L. 1982, p. 3, § 46.)

RESEARCH REFERENCES

<p>ALR. — Disposition of revenues from operation of revenue-producing enterprise owned by municipal corporation, 103 ALR 579; 165 ALR 854.</p>	<p>Public utility's right to recover cost of nuclear power plants abandoned before completion, 83 ALR4th 183.</p>
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46-3-149. Status of authority's funds received from revenue bonds, fees, tolls, charges, gifts, grants, or other contributions as trust funds; lien of bond owners on funds.

All funds received pursuant to authority of this article, whether as proceeds from the sale of revenue bonds or as revenues, fees, tolls, charges, or other earnings or as gifts, grants, or other contributions, shall be deemed to be trust funds to be held and applied solely as provided in this article. The bond owners entitled to receive the benefits of such funds shall have a lien on all such funds until applied as provided in any such resolution, trust agreement, or indenture of the authority. (Ga. L. 1975, p. 107, § 23.)

46-3-150. Audits of authority and of funds established in connection with its debt.

The authority, together with all funds established in connection with its debt, shall be audited no less frequently than annually by an independent certified public accountant to be selected by the authority. Copies of such audit shall be available upon request to interested parties, including, but without limitation, the holders of the authority's bonds and all parties contracting with the authority. (Ga. L. 1975, p. 107, § 11.)

46-3-151. Venue of actions.

Any action to protect or enforce any rights under this article brought in the courts of this state shall be brought in the Superior Court of Fulton County. Any action pertaining to validation of the bonds issued under this article and pertaining to validation of the contracts constituting security for bonds shall also be brought in the Superior Court of Fulton County. That court shall have exclusive original jurisdiction of any action referred to in this Code section, provided that any action on any contractual obligation brought against the authority by any political subdivision contracting with the authority may be brought either in the county containing all or the largest part of the area of the political subdivision involved or in Fulton County, at the option of the party bringing the action. (Ga. L. 1975, p. 107, § 24.)

46-3-152. Jurisdiction of commission over rates, services, and practices of authority.

The rates, services, and practices relating to the generation, transmission, and sale by the authority of power to be generated from the projects authorized by this article shall not be subject to the provisions of the Georgia Public Service Commission law nor to regulation by nor jurisdiction of the commission. (Ga. L. 1975, p. 107, § 26.)

JUDICIAL DECISIONS

The Public Service Commission's interpretations of the Municipal Electric Authority of Georgia (MEAG) Act are not entitled to great deference and are reviewed de novo. *Municipal Elec. Auth. v. Georgia Pub. Serv.*

Comm'n, 241 Ga. App. 237, 525 S.E.2d 399 (1999).

Cited in *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345 (N.D. Ga. 1986), *aff'd*, 844 F.2d 1538 (11th Cir. 1988).

RESEARCH REFERENCES

ALR. — Applicability of public utility acts to municipal corporations owning or operating a public utility, 10 ALR 1432; 18 ALR 946.

Public utility's right to recover cost of nuclear power plants abandoned before completion, 83 ALR4th 183.

46-3-153. Applicability of other laws to meetings and records of authority.

Meetings of the authority shall be subject to Chapter 14 of Title 50. All records of the authority shall be subject to Article 4 of Chapter 18 of Title 50. (Ga. L. 1975, p. 107, § 25.)

46-3-154. Supplemental nature of powers conferred by article.

The provisions of this article shall be regarded as supplementary and additional to and cumulative of powers conferred by other laws and shall not be regarded as being in derogation of any powers conferred by any other law. (Ga. L. 1975, p. 107, § 29.)

46-3-155. Construction of article.

This article, being for the welfare of the state and its inhabitants, shall be liberally construed to effect the purposes hereof. (Ga. L. 1975, p. 107, § 28.)

JUDICIAL DECISIONS

Cited in Municipal Elec. Auth. v. Georgia Pub. Serv. Comm'n, 241 Ga. App. 237, 525 S.E.2d 399 (1999).

ARTICLE 4**ELECTRIC MEMBERSHIP CORPORATIONS AND FOREIGN ELECTRIC COOPERATIVES****JUDICIAL DECISIONS**

Construction of article to promote competition. — The supreme court will construe the economic aspects of the Georgia Electric Membership Corporation Act, O.C.G.A. § 46-3-170 et seq., in a manner that will broaden competition. Washington Elec. Membership Corp. v. Avant, 256 Ga. 340, 348 S.E.2d 647 (1986).

Members disqualified from serving as jurors in prosecution involving corporation. —

Members of an electric membership corporation were disqualified from serving as jurors in a prosecution for criminal damage to property owned by the corporation, even though the corporation was not listed as the actual prosecutor. Lowman v. State, 197 Ga. App. 556, 398 S.E.2d 832 (1990).

Cited in Georgia Power Co. v. Altamaha Elec. Membership Corp., 221 Ga. 521, 145 S.E.2d 691 (1965).

PART 1

GENERAL PROVISIONS

46-3-170. Short title.

This article may be cited as the “Georgia Electric Membership Corporation Act.” (Ga. L. 1937, p. 644, § 1; Code 1933, § 34C-101, enacted by Ga. L. 1981, p. 1587, § 1.)

Cross references. — Nonprofit corporations generally, Ch. 3, T. 14. Extension of jurisdiction of commission over electric

membership corporations to same extent as commission has jurisdiction over electric light and power companies, § 46-3-12.

JUDICIAL DECISIONS

Nonprofit electric corporations not excluded from class of electric companies generally. — The word “profit” as employed both in Ga. Const. 1976, Art. VII, Sec. I, Para. IV (Ga. Const. 1983, Art. VII, Sec. II, Para. I-IV) and the Rural Electrification Act (7 U.S.C. § 901 et seq.) did not, when construed in pari materia with former Code 1933, § 94-1101 (see O.C.G.A. § 46-1-2) and Ga. L. 1937, p. 644 (see O.C.G.A. Art. 4, Ch. 3, T. 46), exclude the electric corporations created under that Act from the class of electric companies engaged in the business of generating and transmitting electricity. *Lamar Elec. Membership Corp. v. Carroll*, 89 Ga. App. 440, 79 S.E.2d 832 (1953).

Liability for punitive damages. — Power corporation failed to show that it was a

public service corporation and, accordingly, shielded from liability for punitive damages as a matter of law; an electrical membership, under the Georgia Electric Membership Corporation Act, is vested with the power to sue and be sued and is provided with no express statutory immunity from liability for punitive damages. *Oglethorpe Power Corp. v. Sheriff*, 210 Ga. App. 299, 436 S.E.2d 14 (1993).

Cited in *Troup County Elec. Membership Corp. v. Georgia Power Co.*, 229 Ga. 348, 191 S.E.2d 33 (1972); *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345 (N.D. Ga. 1986), *aff’d*, 844 F.2d 1538 (11th Cir. 1988).

46-3-171. Definitions.

As used in this article, the term:

(1) “Address” means a complete mailing address, including, when-ever practicable, street and number or building and floor.

(2) “Articles of incorporation” means the original or restated articles of incorporation or articles of consolidation and all the amendments thereto, including articles of merger, and also includes what have been designated by the laws of this state prior to July 1, 1981, as charters.

(3) “Electric membership corporation” or “EMC” means an electric membership corporation organized under this article or any prior electric membership corporation law of this state, or a corporation which elected, in accordance with the provisions thereof, to be governed by Ga. L. 1937, p. 644, the “Electric Membership Corporation Act.”

(4) "Federal agency" includes the United States of America and any department, administration, commission, board, bureau, office, establishment, agency, authority, or instrumentality thereof.

(5) "Foreign electric cooperative" means a cooperative, nonprofit membership corporation organized under laws other than the laws of this state for the same or similar purposes for which an electric membership corporation may be organized under this article.

(6) "Insolvent" means that an electric membership corporation is unable to pay its debts as they become due in the usual course of its business or that it has liabilities in excess of assets.

(7) "Member" means a person who has met the requirements and conditions of membership in an electric membership corporation which are set forth in this article and in the articles of incorporation and bylaws of an electric membership corporation.

(8) "Person" includes any natural person; firm; association; electric membership corporation; foreign electric cooperative; corporation, either domestic or foreign; business or other trust; partnership; federal agency; state or political subdivision thereof; or body politic.

(9) "Service" means any service or commodity which an electric membership corporation may provide under this article for which value is paid. (Ga. L. 1937, p. 644, § 2; Ga. L. 1939, p. 312, § 1; Ga. L. 1960, p. 5, § 1; Code 1933, § 34C-102, enacted by Ga. L. 1981, p. 1587, § 1.)

JUDICIAL DECISIONS

Word "member" designates both shareholder and customer. — One word contained in Ga. L. 1937, p. 644 (see O.C.G.A. Art. 4, Ch. 3, T. 46) designates both the shareholder and the customer; that word is "member." By whatever word the customer may be designated, the customer is still a customer, and by whatever name a shareholder may be referred to a shareholder is still a shareholder. *Lamar Elec. Membership Corp. v. Carroll*, 89 Ga. App. 440, 79 S.E.2d 832 (1953).

Cited in *Georgia Power Co. v. Okefenokee Rural Elec. Membership Corp.*, 217 Ga. 219, 121 S.E.2d 777 (1961); *Georgia Power Co. v. Altamaha Rural Elec. Membership Corp.*, 217 Ga. 376, 122 S.E.2d 250 (1961); *Georgia Power Co. v. Oconee Elec. Membership Corp.*, 219 Ga. 690, 135 S.E.2d 328 (1964); *Troup County Elec. Membership Corp. v. Georgia Power Co.*, 229 Ga. 348, 191 S.E.2d 33 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, *Cooperative Associations*, §§ 1-4. 18 Am. Jur. 2d, *Corporations*, §§ 199, 202, 203, 205, 206. 27A Am. Jur. 2d, *Energy and Power Sources*, §§ 42, 43, 45.

C.J.S. — 18 C.J.S., *Corporations*, §§ 33-40. 29 C.J.S., *Electricity*, § 10.

46-3-172. Applicability of article.

(a) This article shall apply to electric membership corporations but shall not apply to other persons except when expressly so provided in this article.

(b) This article shall apply to commerce with foreign nations and among the several states only insofar as the same may be permitted under the Constitution and laws of the United States.

(c) This article shall not impair the existence of any electric membership corporation existing on July 1, 1981. Any such existing electric membership corporation and its members, directors, and officers shall have the same rights and be subject to the same limitations, restrictions, liabilities, and penalties as an electric membership corporation formed under this article and its members, directors, and officers.

(d) If the articles of incorporation or the bylaws of an electric membership corporation in existence on July 1, 1981, contain any provisions which were not authorized or permitted by the prior electric membership corporation law of this state but which are authorized or permitted by this article, such articles of incorporation or bylaw provisions shall be valid on and from July 1, 1981; and action may be taken on and from that date in reliance on such provisions. (Code 1933, § 34C-103, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-173. Effect of affixing corporate seal; signing of documents; affixing of seal as optional; signing of deeds after dissolution of an electric membership corporation.

(a) With respect to any contract, conveyance, or other such document executed by and on behalf of an electric membership corporation or a foreign electric cooperative, the presence of the corporate seal or facsimile thereof, attested by the secretary or an assistant secretary of the corporation, shall attest:

(1) That the corporate seal or facsimile thereof affixed to the document is in fact the seal of the corporation or a true facsimile thereof, as the case may be;

(2) That any officer of the corporation executing the document does in fact occupy the official position indicated; that one in such position is duly authorized to execute such document on behalf of the corporation; and that the signature of such officer subscribed thereto is genuine; and

(3) That the execution of the document on behalf of the corporation has been duly authorized.

(b) When the seal of an electric membership corporation or facsimile thereof is affixed to any document and is attested by the secretary or an

assistant secretary of an electric membership corporation, a third party without knowledge or reason to know to the contrary may rely on such document as being what it purports to be.

(c) When other provisions of this article require a document to be executed as provided in this Code section, the document shall be signed by the president or other chief executive officer, or a vice-president; and his signature shall be attested by the secretary or an assistant secretary. If the corporate seal is affixed, the signature of the secretary or assistant secretary shall also attest the seal.

(d) The seal of the electric membership corporation may, but need not, be affixed to any document executed in accordance with this article; and its absence therefrom shall not impair the validity of the document or of any action taken in pursuance thereof or in reliance thereon.

(e) Deeds or other transfer instruments requiring execution after the dissolution of an electric membership corporation may be signed by any two of the last officers or directors of the electric membership corporation and shall operate to convey the interest of the electric membership corporation in the real estate or other property described. (Code 1933, § 34C-104, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 300-304.

C.J.S. — 18 C.J.S., Corporations, § 106.

46-3-174. Filing of documents with Secretary of State; filing of articles of correction.

(a) Whenever this article requires any document to be delivered for filing as provided in this article, unless otherwise specifically stated in this article and subject to any additional provisions of this article, such requirement shall mean that:

(1) The original executed document, together with a conformed copy thereof, shall be delivered to the office of the Secretary of State;

(2) All fees required for filing the document shall be tendered to the Secretary of State;

(3) Upon delivery of the documents, and upon tender of the required fees, the Secretary of State shall certify that the original has been filed in his office by endorsing upon the original the word "filed" and the hour, day, month, and year thereof. Such endorsement shall be known as the filing date of the document and shall be conclusive of the date of filing in the absence of actual fraud. The Secretary of State shall thereafter file and index the original;

(4) The Secretary of State shall immediately compare the conformed copy with the original; and, if he finds that they are identical, he shall certify the conformed copy by making upon it the same endorsement which is required to appear upon the original, together with a further endorsement that the conformed copy is a true copy of the original document;

(5) The conformed copy, so certified, shall be returned to the person or persons delivering the documents to the Secretary of State or to the designee of such person or persons; and it shall be retained as part of the permanent records of the electric membership corporation or foreign electric cooperative.

(b) Whenever any document authorized to be filed with the Secretary of State under this article has been so filed and contains errors in, inaccuracies in, or omissions of information required by this article, is an inaccurate record of the action therein referred to, or was defectively or erroneously executed or sealed, such document may be corrected by filing articles of correction with the Secretary of State. The articles of correction shall specify the error, inaccuracy, omission, or defect to be corrected and shall set forth the portion of the document in corrected form. Except as set forth in subsection (c) of this Code section, the procedure for filing articles of correction shall be the same as would be required under this article for filing the document being corrected. The corrected document shall be effective as of the effective date of the original document, except as to those persons who are substantially and adversely affected by the correction; and, as to those persons, the corrected document shall be effective from the filing date of the articles of correction.

(c) No fee shall be payable to the Secretary of State for filing the articles of correction. The filing of the articles of correction as authorized in subsection (b) of this Code section shall not require the republication of any notice previously published in connection with the filing of the original document unless the error, inaccuracy, omission, or defect in the original document relates to information which was disclosed in the notice. In the event the error, inaccuracy, omission, or defect in the original document relates to information disclosed in the notice, a new notice shall be published in the same manner as the original publication. The publisher's fee for republication shall be the same as the fee for the original publication. (Code 1933, § 34C-105, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 88, 95, 208, 209, 211, 213, 244-246. 19 Am. Jur. 2d, Corporations, §§ 1002, 1142,

1376, 1859-1862, 2614, 2615.

C.J.S. — 18 C.J.S., Corporations, § 39.

46-3-175. Receipt of certificates and certified copies in evidence; certification of documents by Secretary of State.

(a) All certificates issued by the Secretary of State in accordance with this article and all copies of documents filed in his office in accordance with this article, when certified by him, shall be taken and received in all courts, public offices, and official bodies as prima-facie evidence of the facts stated therein. A certificate by the Secretary of State under the seal of his office as to the existence or nonexistence of facts relating to electric membership corporations or foreign electric cooperatives shall be taken and received in all courts, public offices, and official bodies as prima-facie evidence of the existence or nonexistence of the facts stated therein.

(b) The Secretary of State, at any time, upon the request of any person, shall make and certify additional copies of any document filed with his office and of the certificate, if any, issued by the Secretary of State in connection with the filing of the document, under this article, upon payment to him of the fee provided for in Code Section 46-3-502. (Code 1933, § 34C-106, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-176. Obligations issued to secure payment of federal loans as constituting securities; exemption of obligations and membership certificates from Georgia securities laws.

Whenever any electric membership corporation shall have borrowed money from any federal agency, the obligations issued to secure the payment of such money shall be and are classified as securities, the inherent qualities of which assure their sale and disposition without the perpetuation of fraud and which, together with membership certificates issued by any such electric membership corporation, shall not be subject to the Georgia securities laws. (Ga. L. 1937, p. 644, § 20; Code 1933, § 34C-1801, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-177. Jurisdiction of commission.

Except as otherwise provided in Part 1 of Article 1 of this chapter, the "Georgia Territorial Electric Service Act," electric membership corporations shall not be subject to the jurisdiction of the commission. (Code 1933, § 34C-1802, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-178. Intent of article as regards authority of electric membership corporations to own or operate cable television systems.

It is the intention of the General Assembly that nothing in this article shall be construed so as to authorize any electric membership corporation to own or operate a cable television system. (Ga. L. 1981, p. 1587, § 2.)

46-3-179. Validity of transactions entered into before July 1, 1981; preservation of rights, duties, and interests arising from such transactions.

Transactions validly entered into before July 1, 1981, and the rights, duties, and interests flowing from them shall remain valid thereafter and may be terminated, completed, consummated, or enforced as required or permitted by any statute repealed by this article as though such repeal had not occurred. (Ga. L. 1981, p. 1587, § 3.)

46-3-180. Effect of article on cause of action, liability, penalty, or special proceeding accrued, existing, incurred, or pending as of July 1, 1981.

The repeal of a prior Act by this article shall not affect any cause of action, liability, penalty, or action or special proceeding which is accrued, existing, incurred, or pending on July 1, 1981; but the same may be asserted, enforced, prosecuted, or defended as if the prior Act had not been repealed. (Ga. L. 1981, p. 1587, § 4.)

46-3-181. Reservation of power by General Assembly.

The General Assembly shall at all times have power to prescribe such regulations, provisions, and limitations as it may deem advisable, which regulations, provisions, and limitations shall be binding upon any and all persons which are subject to this article; and the General Assembly shall have power to amend, repeal, or modify this article at pleasure. (Code 1933, § 34C-107, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-182. Construction of article as against Part 1 of Article 1 of this chapter, the “Georgia Territorial Electric Service Act.”

Nothing in this article repeals, or is intended to repeal, either expressly or by implication, any provision of Part 1 of Article 1 of this chapter, the “Georgia Territorial Electric Service Act.” (Code 1933, § 34C-108, enacted by Ga. L. 1981, p. 1587, § 1.)

PART 2

CORPORATE PURPOSES AND POWERS

46-3-200. Purposes of electric membership corporations.

An electric membership corporation may serve any one or more of the following purposes:

- (1) To furnish electrical energy and service;

- (2) To assist its members in the efficient and economical use of energy;
- (3) To engage in research and to promote and develop energy conservation and sources and methods of conserving, producing, converting, and delivering energy; and
- (4) To engage in any lawful act or activity necessary or convenient to effect the foregoing purposes. (Ga. L. 1937, p. 644, § 3; Code 1933, § 34C-201, enacted by Ga. L. 1981, p. 1587, § 1.)

JUDICIAL DECISIONS

Qualifications of nonprofit electric membership corporation. — If the entire benefit of the sole enterprise upon which the electric membership corporation was empowered by its charter to enter inures to the general public and no profit or improvement of the economic condition or desires of its stockholders or members was contemplated, the corporation could not be said to be in business within the contemplation of former Code 1933, § 94-1101 (see O.C.G.A. § 46-1-2), but a corporation whose stockholders, by whatever name they may be designated, derive from the transaction of the business a profit in money or improvement in their economic conditions and desires was engaged in business within the contemplation of the above mentioned section, and was subject to the jurisdiction of the courts, under the same rules of practice that other electric corporations were. *Lamar Elec. Membership Corp. v. Carroll*, 89 Ga. App. 440, 79 S.E.2d 832 (1953).

It is not required that a transmission line serve more than one member. *Hagans v. Excelsior Elec. Membership Corp.*, 207 Ga. 53, 60 S.E.2d 162 (1950).

Fact that property used as resort does not prevent owner from becoming member. — The fact that an applicant's property is used for a fishing camp or pleasure resort, and not as a farm home, permanent dwelling, or place of business, does not prevent the applicant becoming a member of the corpora-

tion and receiving electric service, or the corporation from furnishing electric energy to the applicant. *Hagans v. Excelsior Elec. Membership Corp.*, 207 Ga. 53, 60 S.E.2d 162 (1950).

Sale of satellite dishes. — An electric membership corporation must require a consumer to be a member of that EMC before the EMC can sell a satellite dish to the consumer. *Washington Elec. Membership Corp. v. Avant*, 256 Ga. 340, 348 S.E.2d 647 (1986).

Sale of propane gas. — An electric membership corporation was not authorized to sell propane gas to its customers. *Flint Elec. Membership Corp. v. Barrow*, 271 Ga. 636, 523 S.E.2d 10 (1999).

Liability for punitive damages. — An electric membership corporation has power under O.C.G.A. § 46-3-200 to sue and be sued, and there is no statutory exemption from liability for punitive damages. *Walton Elec. Membership Corp. v. Snyder*, 270 Ga. 62, 508 S.E.2d 167 (1998).

Cited in *Flint Elec. Membership Corp. v. Posey*, 78 Ga. App. 597, 51 S.E.2d 869 (1949); *Georgia Power Co. v. Okefenokee Rural Elec. Membership Corp.*, 217 Ga. 219, 121 S.E.2d 777 (1961); *Georgia Power Co. v. Altamaha Rural Elec. Membership Corp.*, 217 Ga. 376, 122 S.E.2d 250 (1961); *Georgia Power Co. v. Oconee Elec. Membership Corp.*, 219 Ga. 690, 135 S.E.2d 328 (1964).

RESEARCH REFERENCES

Am. Jur. 2d. — 27A Am. Jur. 2d, Energy and Power Sources, §§ 14, 15, 34, 43.

C.J.S. — 29 C.J.S., Electricity, §§ 10-15.

46-3-201. Existence of electric membership corporations under articles of incorporation; duration of corporations; powers of corporations generally.

(a) Subject to any limitations provided in this article, or in any other law, and consistent with the purposes set forth in this article, each electric membership corporation:

(1) Shall exist under articles of incorporation;

(2) Shall have perpetual duration unless a limited period of duration is stated in its articles of incorporation; provided, however, that each electric membership corporation existing or continuing to operate as an electric membership corporation after the expiration of the period of duration stated in its articles of incorporation or any renewal thereof, on July 1, 1981, shall have perpetual duration unless its articles of incorporation are amended under this article to provide for a limited period of duration. The existence of any such electric membership corporation whose articles of incorporation were expired on July 1, 1981, shall be deemed to have continued without interruption from the date of such expiration;

(3) Shall have power:

(A) To cease its corporate activities and surrender its corporate franchise;

(B) To renew or revive its corporate existence in case a limited period of duration is fixed in its articles of incorporation; and

(C) To sue and be sued and to complain and defend in all courts and to participate in any judicial, administrative, arbitative, or other action or proceeding.

(b) Subject to any limitations provided in this article or in any other law, and consistent with the purposes set forth in this article, each electric membership corporation shall have power:

(1) To conduct its business, carry on its operations, have offices, and exercise its powers granted by this article at any location within or outside of this state;

(2) To make and alter bylaws, not inconsistent with its articles of incorporation or with the laws of this state, for the administration and regulation of the affairs of the electric membership corporation;

(3) To elect, appoint, or hire officers, employees, and other agents of the electric membership corporation; to define their duties; and to fix their compensation and the compensation of directors;

(4) To have a corporate seal which may be altered at pleasure and to use the seal by causing it or a facsimile thereof to be impressed or affixed or in any other manner reproduced;

(5) To purchase; take; receive by gift, will, or otherwise; lease; or otherwise acquire, own, hold, improve, use, and otherwise deal in and with real or personal property or any interest therein, wherever situated;

(6) To sell, convey, lease, exchange, transfer, and otherwise dispose of all or any part of its property and assets or any interest therein, wherever situated;

(7) To generate, manufacture, purchase, acquire, and accumulate electricity, and to transmit, distribute, sell, furnish, and dispose of such electricity;

(8) To assist its members in any manner in the efficient and economical use of energy, including, but not limited to, the installation of wiring, insulation, electrical machinery, supplies, apparatus, and equipment of any and all kinds or character;

(9) To acquire, own, hold, use, exercise, and, to the extent permitted by law, sell, mortgage, pledge, hypothecate, and in any manner dispose of franchises, rights, privileges, licenses, rights of way, and easements necessary, useful, or appropriate. Any such electric membership corporation shall have the right to acquire rights of way, easements, and all interests in realty necessary and appropriate to effectuate the purposes of such electric membership corporation by condemnation under the same procedure and terms as provided by Title 22 and any other law of this state which provides a method or procedure for the condemnation of property for public purposes by all persons or corporations having the privilege of exercising the right of eminent domain;

(10) In connection with the acquisition, construction, improvement, operation, or maintenance of its lines, to use any highway or any right of way, easement, or other similar property right owned or held by the state or any political subdivision thereof, subject to reasonable rules and regulations as to safety as may be promulgated by the State Transportation Board or subject to such reasonable terms and conditions as the governing body of such political subdivision shall determine;

(11) To make any and all contracts necessary or convenient for the exercise of the powers granted in this article, including, but not limited to, contracts with any person, federal agency, or municipality for the purchase or sale of energy; and, in connection with any such contract, to stipulate and agree to such covenants, terms, and conditions as the board of directors may deem appropriate, including, but not limited to, covenants, terms, and conditions with respect to resale rates, financial and accounting methods, services, operation and maintenance practices, and the manner of disposing of the revenues of the system operated and maintained by the electric membership corporation;

(12) To make and enter into contracts of guaranty, whether or not the electric membership corporation has a direct interest in the subject matter of the contract with respect to which it acts as guarantor or surety;

(13) To incur obligations and liabilities, borrow money, issue its notes, bonds, and other obligations, and to execute and deliver any one or more mortgages, deeds of trust, or deeds to secure debt covering, or to create by other means a security interest in, any or all of the real or personal property, assets, rights, privileges, licenses, franchises, and permits of the electric membership corporation or any interest therein, as well as the revenues therefrom, whether acquired or to be acquired, and wherever situated, for the purpose of securing the payment or performance of any one or more contracts, notes, bonds, or other obligations of the electric membership corporation;

(14) To purchase, take, receive, subscribe for, or otherwise acquire; to own, hold, vote, use, or employ; to sell, lend, or otherwise dispose of; to mortgage, pledge, create a security interest in, or otherwise encumber; and otherwise to use and deal in and with shares or other interests in or obligations of electric membership corporations or other domestic or foreign corporations, whether for profit or not, associations, partnerships, or individuals, or direct or indirect obligations of the United States or of any other government, state, territory, governmental district, or municipality or any instrumentality thereof;

(15) To form or acquire the control of other electric membership corporations, foreign electric cooperatives, and other corporations, whether domestic or foreign;

(16) To participate with any other person or persons in any corporation, partnership, transaction, arrangement, operation, organization, or venture, even if such participation involves sharing of control with or delegation of control to others;

(17) To lend money, invest and reinvest its funds, and take and hold real and personal property as security for the payment of funds so loaned or invested;

(18) To make donations, irrespective of corporate benefit, for the public welfare or for community fund, hospital, charitable, scientific, educational, civic, or similar purposes, and in time of war or other national emergency in aid of the national effort with respect thereto;

(19) At the request or direction of the United States government or any agency thereof, to transact any lawful business in time of war or national emergency or in aid of national defense;

(20) To procure for its benefit insurance on the life of any of its directors, officers, or employees or any other person whose death might cause financial loss to the electric membership corporation;

(21) To reimburse and indemnify litigation expenses of directors, officers, and employees and to purchase and maintain liability insurance for their benefit;

(22) To purchase and otherwise acquire and dispose of its own securities;

(23) To pay pensions and establish and carry out pension, savings, thrift, and other retirement, incentive, and benefit plans, trusts, and provisions for any or all of its directors, officers, and employees;

(24) To fix, regulate, and collect rates, fees, rents, or other charges for electric energy and any other facilities, supplies, equipment, or services furnished by the electric membership corporation;

(25) To assist any other electric membership corporation in the execution of its purposes and powers under this article; and

(26) To have and exercise all powers necessary or convenient to effect any or all of the purposes for which the electric membership corporation is organized.

(c) It shall not be necessary to set forth in the articles of incorporation any of the powers enumerated in this Code section.

(d) The articles of incorporation may limit or expand the powers conferred by subsection (b) of this Code section in any manner not inconsistent with any other provisions of this article or any other law or with the purposes of electric membership corporations. (Ga. L. 1937, p. 644, § 4; Ga. L. 1939, p. 312, § 2; Ga. L. 1957, p. 604, §§ 1, 2; Ga. L. 1980, p. 72, § 1; Code 1933, § 34C-202, enacted by Ga. L. 1981, p. 1587, § 1; Ga. L. 1984, p. 22, § 46.)

JUDICIAL DECISIONS

Section applies to corporation chartered before section enacted. — The provisions of Ga. L. 1939, p. 312, § 2 (see O.C.G.A. § 46-3-201) authorizing electrical membership corporations to exercise the power of eminent domain apply to a corporation chartered before the date of the approval of the Act enacting that section. *Hagans v. Excelsior Elec. Membership Corp.*, 207 Ga. 53, 60 S.E.2d 162 (1950).

Necessity or appropriateness of proposed project. — Pursuant to O.C.G.A. § 46-3-201(b)(9), the electric corporation, which had to condemn property in order to effectuate its project, did not have to demonstrate to the county the necessity or the appropriateness of its proposed project; thus, the county ordinance prohibiting the electric lines for three years was unconstitutional. *Rabun County v. Ga. Transmission Corp.*, 276 Ga. 81, 575 S.E.2d 474 (2003).

Discretion in selection of location of route

of transmission line. — Where an electric membership corporation has the right to condemn private property for rights of way for the construction and operation of electric transmission lines, it has a large discretion in the selection of a location for its route over such property; and unless such discretion has been abused, it will not be controlled or interfered with by the courts. *Hagans v. Excelsior Elec. Membership Corp.*, 207 Ga. 53, 60 S.E.2d 162 (1950).

No right of action for destruction of telephone service. — Under Ga. L. 1939, p. 312, § 2 (see O.C.G.A. § 46-3-201) a telephone company has no cause of action for damages allegedly resulting from acts of an electric company in so placing its lines as to destroy the plaintiff's telephone service. *Planters Elec. Membership Corp. v. Savannah Valley Tel. Co.*, 66 Ga. App. 627, 18 S.E.2d 788 (1942).

Sale of satellite dishes. — An electric

membership corporation must require a consumer to be a member of that EMC before the EMC can sell a satellite dish to the consumer. *Washington Elec. Membership Corp. v. Avant*, 256 Ga. 340, 348 S.E.2d 647 (1986).

Requirement that action be “brought” in a particular county is not equivalent to a requirement that action be tried there. *Thompson v. Sawnee Elec. Membership Corp.*, 157 Ga. App. 561, 278 S.E.2d 143 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Cooperative Associations, § 30. 19 Am. Jur. 2d, Corporations, §§ 1990-1999, 2001-2008, 2037-2123. 27A Am. Jur. 2d, Energy and Power Sources, § 39.

C.J.S. — 29 C.J.S., Electricity, §§ 15-23.

ALR. — Furnishing electricity to public as public use or purpose for which power of eminent domain may be exercised, 44 ALR 735; 58 ALR 787.

Elements and measure of compensation for power lines or other wire lines over private property, 49 ALR 697; 124 ALR 407.

Liability of gas or electric light or power company for injury to fireman, policeman, or other public employee seeking to prevent damage to person or property of others, 61 ALR 1028.

Right to cut off supply of electricity or gas because of nonpayment of service bill or charges, 112 ALR 237.

Right of electrical company to discriminate against a concern which desires service for resale, 112 ALR 773.

Use of streets and highways by cooperative utility, 172 ALR 1020.

Correlative rights of dominant and servient owners in right of way for electric line, 6 ALR2d 205.

Deposit required by public utility, 43 ALR2d 1262.

Electric light or power line in street or highway as additional servitude, 58 ALR2d 525.

Validity of contract between public utilities other than carriers, dividing territory and customers, 70 ALR2d 1326.

Co-operative associations: rights in equity credits or patronage dividends, 50 ALR3d 435.

Right of public utility to deny service at one address because of failure to pay for past service rendered at another, 73 ALR3d 1292.

Applicability of zoning regulations to projects of nongovernmental public utility as affected by utility's having power of eminent domain, 87 ALR3d 1265.

46-3-202. Defense of ultra vires.

No act of an electric membership corporation and no conveyance or transfer of real or personal property to or by an electric membership corporation shall be invalid by reason of the fact that the electric membership corporation was without capacity or power to do such act or to make or receive such conveyance or transfer; but such lack of capacity or power may be asserted:

(1) In an action by a member or director against the electric membership corporation to enjoin the doing of any act or the transfer of real or personal property by or to the electric membership corporation, unless the plaintiff has assented to the act or transfer in question or in bringing the action is acting in collusion with officials of the electric membership corporation. If the unauthorized act or transfer sought to be enjoined is being or is to be performed or made pursuant to any contract to which the electric membership corporation is a party, the court may, if all the parties to the contract are parties to the action and if it deems the

same to be equitable, set aside and enjoin the performance of such contract and in so doing may allow to the electric membership corporation or to the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of such contracts; but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as a loss or damage sustained;

(2) In an action by the electric membership corporation, whether acting directly or through a receiver, trustee, or other legal representative or through members in a representative action, against an incumbent or former officer or director of the electric membership corporation for loss or damage due to his unauthorized act; or

(3) In an action by the Attorney General to dissolve the electric membership corporation or in an action by the Attorney General to enjoin the electric membership corporation from the transaction of unauthorized business. (Code 1933, § 34C-203, enacted by Ga. L. 1981, p. 1587, § 1.)

JUDICIAL DECISIONS

Corporation may not borrow money for purpose of lending it to member. — Under the Rural Electrification Act (7 U.S.C. § 901 et seq.) and the Georgia enabling act of 1937 (Ga. L. 1937, p. 644), and the charter of the defendant electric membership corporation, the act of the electric membership corporation in borrowing money from the Federal

Rural Electrification Administration for the purpose of lending it to one of its corporate members or stockholders, in order that the latter might erect and maintain a cold storage plant is ultra vires and illegal. *Galloway v. Mitchell County Elec. Membership Corp.*, 190 Ga. 428, 9 S.E.2d 903 (1940).

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2009-2012, 2014-2016, 2034.

C.J.S. — 19 C.J.S., Corporations, §§ 573-579.

46-3-203. Unauthorized assumption of corporate powers.

All persons who assume to act as an electric membership corporation before the Secretary of State has issued the certificate of incorporation to the incorporator or incorporators or his or their attorney shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof. (Code 1933, § 34C-204, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 1521-1634.

46-3-204. Limitations as to actions growing out of acquisition of rights of way, easements, or occupation of lands of others; damages recoverable.

All rights of action accruing against any electric membership corporation growing out of the acquisition of rights of way or easements or the occupying of lands of others by such electric membership corporations shall be barred at the end of 12 months from the date of the accrual of such cause of action; and in cases where any such electric membership corporation is in possession of the lands of others without having condemned the property as provided, and such electric membership corporation is using any such land of another for any of the purposes for which an electric membership corporation may be created under this article, and the owners of the land took no legal steps to prevent the occupation of the land by the electric membership corporation, the rights of the owner of the land shall be limited to whatever damages may have been caused to his realty by such occupation; and this limitation shall apply to all persons whether sui juris or not. (Ga. L. 1939, p. 312, § 3; Code 1933, § 34C-205, enacted by Ga. L. 1981, p. 1587, § 1.)

JUDICIAL DECISIONS

Cited in *Starr v. Central Ga. Elec. Membership Corp.*, 143 Ga. App. 528, 239 S.E.2d 241 (1977); *Webster v. Snapping Shoals Elec. Membership Corp.*, 176 Ga. App. 265, 335 S.E.2d 637 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 136. 171 et seq.
27 Am. Jur. 2d, Eminent Domain, §§ 910, 911, 912, 917.
C.J.S. — 29 C.J.S., Electricity, § 59.
ALR. — Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 ALR2d 500.
Settlement negotiations as estopping reliance on statute of limitations, 39 ALR3d 127.
Fraud as extending statutory limitations period for contesting will or its probate, 48 ALR4th 1094.

PART 3

CORPORATE NAME

46-3-220. Requirements as to corporate name generally.

- (a) The corporate name shall be written in Roman or cursive letters or Arabic or Roman numbers and:
- (1) Shall contain the words “electric membership corporation” or an abbreviation of such words;
 - (2) Shall not contain any word or phrase:

(A) Which indicates or implies that the electric membership corporation is organized for any purpose other than one or more of the purposes permitted by this article and its articles of incorporation; or

(B) Which, in the reasonable judgment of the Secretary of State, is obscene;

(3) Shall not be the same as or confusingly similar to:

(A) The name of any electric membership corporation or other corporation, whether for profit or not, existing under the laws of this state;

(B) The name of any foreign corporation, whether for profit or not, or any foreign electric cooperative authorized to transact business in this state;

(C) A name the exclusive right to which is at the time reserved in the manner provided in Chapter 3 of Title 14, the "Georgia Nonprofit Corporation Code," Chapter 2 of Title 14, the "Georgia Business Corporation Code," or in this article;

(D) The name of a corporation which has in effect a registration of its corporate name as provided in Chapter 2 of Title 14, the "Georgia Business Corporation Code"; or

(E) Any name prohibited by any other law of this state.

(b) Nothing in this Code section shall:

(1) Prevent the use of the name of any electric membership corporation or other corporation, whether domestic or foreign, by an electric membership corporation where the first such electric membership corporation or other corporation has consented to such use, and the name of the electric membership corporation proposing such use contains other words or characters which distinguish it from the name of the first such electric membership corporation or other corporation;

(2) Require any electric membership corporation existing on July 1, 1981, to add to, modify, or otherwise change its corporate name; or

(3) Abrogate or limit the law as to unfair competition or unfair trade practice nor derogate from the common law, principles of equity, or the statutes of this state or of the United States with respect to the right to acquire and protect trade names and trademarks.

(c) Any electric membership corporation which is precluded from using its corporate name in another state because such name is the same as or confusingly similar to that of an electric membership corporation or other corporation already authorized to transact business therein or to a name already reserved or registered in such state may amend its articles of incorporation to add to its corporate name, solely for use in such other

state, a word, abbreviation, or other distinctive and distinguishing element (such as, for example, the state of its incorporation in parentheses) as may be necessary to resolve any reasonable confusion between the two names. Such amendment shall set forth the state or states as to which it shall apply; and the corporate name with such additions shall be the name of the electric membership corporation in such other state or states and shall be used in all of its dealings with the officials of such state or states and in the conduct of its business and affairs in such state or states.

(d) The words “electric membership corporation” shall not be used in the corporate name of corporations organized under the laws of this state, or authorized to do business in this state, other than electric membership corporations. (Ga. L. 1937, p. 644, § 7; Code 1933, § 34C-301, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 273, 277, 283, 284, 286-294, 296-299.
C.J.S. — 18 C.J.S., Corporations, §§ 98-105.

46-3-221. Reservation of names.

(a) The exclusive right to the use of a corporate name may be reserved by:

(1) Any person intending to organize an electric membership corporation under this article;

(2) Any electric membership corporation intending to change its name;

(3) Any foreign electric cooperative intending to make application for a certificate of authority to transact business in this state;

(4) Any foreign electric cooperative authorized to transact business in this state and intending to change its name; or

(5) Any person intending to organize a foreign electric cooperative and intending to have such foreign electric cooperative make application for a certificate of authority to transact business in this state.

(b) The reservation shall be made by making application to the Secretary of State to reserve a specified corporate name. If the Secretary of State finds that the name is available for corporate use, he shall reserve the name for the exclusive use of the applicant for a period of four calendar months from the date of filing. An extension of this period may be granted by the Secretary of State for good cause shown.

(c) Any person or electric membership corporation acquiring the right to use the corporate name of an electric membership corporation or other

domestic corporation or of a foreign corporation or foreign electric cooperative authorized to transact business in this state may, on furnishing the Secretary of State satisfactory evidence of such acquisition, reserve the exclusive right to such corporate name for a period of five years.

(d) The right to the exclusive use of a specified corporate name reserved as provided in this Code section may be transferred to any person by filing in the office of the Secretary of State a notice of such transfer, executed by the applicant for whom the name was reserved and specifying the name and address of the transferee.

(e) The Secretary of State may revoke any reservation if, after hearing in his office, he finds that the application therefor or any transfer was not made in good faith. (Code 1933, § 34C-302, enacted by Ga. L. 1981, p. 1587, § 1.)

PART 4

REGISTERED OFFICE, REGISTERED AGENTS, SERVICE OF PROCESS, AND VENUE

46-3-240. Registered office and registered agent.

(a) Each electric membership corporation shall have and continuously maintain in this state:

(1) A registered office which may be, but need not be, the same as its place of business; and

(2) A registered agent, which agent may be:

(A) A natural person residing in this state whose business office is identical with such registered office; or

(B) A domestic corporation or a foreign corporation authorized to transact business in this state, such domestic or foreign corporation having a business office identical with such registered office.

(b) The Secretary of State shall maintain current records, alphabetically arranged by corporate name, of the address of each electric membership corporation's registered office and of the name and address of each electric membership corporation's registered agent.

(c) No registered agent shall be appointed without his or its prior written consent. Such written consent shall be filed with or as part of the document first appointing any registered agent and shall be in such form as the Secretary of State may prescribe. (Code 1933, § 34C-401, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, § 306. 19 Am. Jur. 2d, Corporations, §§ 2195, 2196, 2202, 2206, 2212, 2844, 2903.
C.J.S. — 19 C.J.S., Corporations, § 2053.

46-3-241. Change of registered office or registered agent.

(a) An electric membership corporation may change its registered office or change its registered agent, or both, by executing and filing in the office of the Secretary of State a statement setting forth:

(1) The name of the electric membership corporation;

(2) The address of its then registered office;

(3) If the address of its registered office is to be changed, the new address of the registered office;

(4) The name of its then registered agent;

(5) If its registered agent is to be changed, the name of its successor registered agent and the written consent of such successor agent to his appointment; and

(6) That the address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

(b) If the Secretary of State finds that such statement conforms to subsection (a) of this Code section, he shall file such statement in his office; and upon such filing, the change of address of the registered office or the change of the registered agent, or both, as the case may be, shall become effective.

(c) Any registered agent of an electric membership corporation may resign as such agent upon filing a written notice thereof with the Secretary of State. The appointment of such agent shall terminate upon the expiration of 30 days after receipt of such notice by the Secretary of State. There shall be attached to such notice an affidavit of such agent, if an individual, or of an officer thereof, if a corporation, that at least ten days prior to the date of filing such notice a written notice of the agent's intention to resign was mailed or delivered to the president, secretary, or treasurer of the electric membership corporation for which such agent is acting. Upon such resignation's becoming effective, the address of the business office of the resigned registered agent shall no longer be the registered office of the electric membership corporation.

(d) A registered agent may change his or its business address and the address of the registered office of any electric membership corporation of which he or it is registered agent to another place within the same county by filing a statement as required in subsection (a) of this Code section,

except that such statement need be signed only by the registered agent and need not be responsive to paragraph (5) of subsection (a) of this Code section and must state that a copy of the statement has been mailed or delivered to a representative of such electric membership corporation other than the notifying registered agent. (Code 1933, § 34C-402, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-242. Service of process on electric membership corporations.

(a) The registered agent appointed by an electric membership corporation pursuant to Code Section 46-3-240 shall be an agent of the electric membership corporation upon whom any process, notice, or demand required or permitted by law to be served upon the electric membership corporation may be served in the manner provided by law for the service of a summons and complaint.

(b) Whenever an electric membership corporation fails to appoint or maintain a registered agent in this state, or whenever its registered agent cannot with reasonable diligence be found at the registered office, then the Secretary of State shall be an agent of such electric membership corporation upon whom any process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him, or with any person having charge of the corporation department of his office, or with any other person or persons designated by the Secretary of State to receive such service, duplicate copies of such process, notice, or demand. In the event any such process, notice, or demand is served on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered or certified mail or statutory overnight delivery, addressed to the electric membership corporation at its registered office or, if there is no registered office, to the last known address of the electric membership corporation or to an officer listed on the most recent annual report filed with the Secretary of State or, if none, to any officer, director, or incorporator of the electric membership corporation as shown by the records of the Secretary of State. Any service so had on the Secretary of State shall be answerable not more than 30 days from the date so mailed by the Secretary of State. The provisions of this subsection may be used notwithstanding any inconsistent provisions of Chapter 11 of Title 9, the "Georgia Civil Practice Act."

(c) The Secretary of State shall keep a record of all processes, notices, and demands served upon him under this Code section and shall record therein the time of such service and his action with reference thereto.

(d) Nothing in this Code section shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served on an electric membership corporation in any other manner permitted by law. (Code 1933, § 34C-403, enacted by Ga. L. 1981, p. 1587, § 1; Ga. L. 2000, p. 1589, § 3.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to subsection (b) is applicable with respect to notices delivered on or after July 1, 2000.

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2192, 2194-2208, 2210-2214. 62B Am. Jur. 2d, Process, §§ 266, 267.

C.J.S. — 19 C.J.S., Corporations, § 580. 29 C.J.S., Electricity, § 59.

46-3-243. Venue in proceedings against electric membership corporations and foreign electric cooperatives generally.

(a) Notwithstanding Code Section 46-1-2, venue in proceedings against an electric membership corporation or foreign electric cooperative shall be determined in accordance with the Constitution of Georgia and this Code section.

(b) Unless otherwise required by the Constitution of Georgia, an electric membership corporation or foreign electric cooperative may be sued only in the county of its residence, as described below:

(1) Each electric membership corporation and each foreign electric cooperative authorized to transact business in this state shall be deemed to reside in the county where its registered office is maintained. If any such electric membership corporation or foreign electric cooperative fails to maintain a registered office, it shall be deemed to reside in the county in this state where its last-named registered office or principal office, as shown by the records of the Secretary of State, was maintained;

(2) Each electric membership corporation and each foreign electric cooperative authorized to transact business in this state shall be deemed to reside and may be sued on contracts in the county in which the contract sought to be enforced was made or is to be performed, if it has an office and transacts business in that county;

(3) Each electric membership corporation and each foreign electric cooperative authorized to transact business in this state shall be deemed to reside, and may be sued for damages because of torts, wrong, or injury done, in the county where the cause of action originated, if it has an office and transacts business in that county. (Code 1933, § 34C-404, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2180-2184, 2186, 2188, 2189, 2191.

C.J.S. — 29 C.J.S., Electricity, § 59.

PART 5

MEMBERS

46-3-260. Qualifications of members; provision by articles of incorporation or bylaws for transfer, classification, and termination of memberships.

All persons who may lawfully receive service from an electric membership corporation and who are receiving or have agreed to receive such service shall be members therein, subject to complying with such additional conditions and requirements for membership as are set forth in the articles of incorporation or bylaws of the electric membership corporation. The articles of incorporation or bylaws may also provide criteria for, procedures for, and limitations upon the transfer, classification, and termination of memberships in an electric membership corporation. (Ga. L. 1937, p. 644, § 10; Code 1933, § 34C-501, enacted by Ga. L. 1981, p. 1587, § 1.)

JUDICIAL DECISIONS

It is not required that a transmission line serve more than one member. Hagans v. Excelsior Elec. Membership Corp., 207 Ga. 53, 60 S.E.2d 162 (1950).

Fact that property used as resort does not prevent owner from becoming member. — The fact that an applicant's property is used for a fishing camp or pleasure resort, and not as a farm home, permanent dwelling, or place of business, does not prevent the applicant becoming a member of the corpora-

tion and receiving electric service, or the corporation from furnishing electric energy to the applicant. Hagans v. Excelsior Elec. Membership Corp., 207 Ga. 53, 60 S.E.2d 162 (1950).

Cited in Georgia Power Co. v. Okefenokee Rural Elec. Membership Corp., 217 Ga. 219, 121 S.E.2d 777 (1961); **Savannah Elec. & Power Co. v. Planters Elec. Membership Corp.,** 217 Ga. 842, 125 S.E.2d 651 (1962).

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Cooperative Associations, §§ 14, 21. 27A Am. Jur. 2d, Energy and Power Sources, §§ 43, 45.

C.J.S. — 29 C.J.S., Electricity, § 10.

ALR. — Duty of mutual association, non-profit organization or co-operative to furnish utilities services, 56 ALR2d 413.

46-3-261. Liability of members.

A member shall not, solely by virtue of his status as a member, be liable for the debts of an electric membership corporation; and the property of the member shall not, solely by virtue of his status as a member, be subject to attachment, garnishment, execution, or other collection procedure for such debts. (Code 1933, § 34C-502, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 13, 30, 33, 56-60, 468. 27A Am. Jur. 2d, Energy and Power Sources, § 45.
C.J.S. — 18 C.J.S., Corporations, § 414.

46-3-262. Meetings of members generally.

(a) Meetings of members may be held at such place within the service area of the electric membership corporation as may be provided in the bylaws. In the absence of any such provision, all meetings shall be held at a place within the service area of the electric membership corporation designated by the board of directors or, if no place is so designated, then at the registered office of the electric membership corporation in this state.

(b) An annual meeting of the members shall be held at such time as may be provided in the bylaws. In the absence of such designation, the annual meeting shall be held on the second Tuesday of the fourth month following the end of the fiscal year of the electric membership corporation or, if such day is a legal holiday, the next following business day. Failure to hold the annual meeting shall not work a forfeiture; nor shall such failure affect otherwise valid corporate acts. If the electric membership corporation shall fail or refuse to hold the annual meeting on the date provided therefor pursuant to the bylaws or, in the absence of such designation, on the date provided in this Code section and shall thereafter also fail or refuse to hold the annual meeting within 60 days after being requested by any member to do so, the superior court of the county where the registered office of the electric membership corporation is located may, after notice to the electric membership corporation, order a substitute annual meeting to be held upon the application of such member. The superior court may issue such orders as may be appropriate, including, without limitation, orders designating the time and place of such meeting, the record date for determination of members entitled to vote, and the form of notice of such meeting.

(c) Special meetings of members or a special meeting in lieu of the annual meeting of members may be called by the president, the chairman of the board of directors, the board of directors, or such other officers or persons as may be provided in the articles of incorporation or bylaws, or, in the event there are no officers or directors, then by any member. Special meetings of members or a special meeting in lieu of the annual meeting of members shall be called by the electric membership corporation upon the written request of not less than 10 percent of the members of the electric membership corporation.

(d) Any action required by this article to be taken at a meeting of members of an electric membership corporation, or any action which may be taken at a meeting of members, may be taken without a meeting if written consent setting forth the action so taken shall be signed by all the

members. Such consent shall have the same force and effect as a unanimous vote of members and may be stated as such in any articles or document filed with the Secretary of State under this article, except that no consent shall be effective as approval of a plan of merger or plan of consolidation pursuant to Part 10 of this article unless:

(1) Prior to the execution of the consent, the members shall have been given:

(A) A copy of the plan of merger or consolidation or an outline of the material features of the plan; and

(B) A copy of the most recent annual balance sheet and an annual profit and loss statement, or comparable financial statements, of each of the merging or consolidating electric membership corporations or of the merging or consolidating electric membership corporation and foreign electric cooperative, as the case may be; or

(2) The written consent itself conspicuously and specifically states that waiver of the right to receive such information is expressly made.

(e) Unless otherwise provided in the articles of incorporation or bylaws of the electric membership corporation, meetings of the members shall be conducted in accordance with the latest edition of *Robert's Rules of Order*; provided, however, that failure to so conduct any meeting shall not render invalid any action taken at such meeting unless objection citing such failure is made at the time such action is taken. (Ga. L. 1937, p. 644, § 12; Ga. L. 1953, Nov.-Dec. Sess., p. 359, § 1; Code 1933, § 34C-505, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, § 746. 19 Am. Jur. 2d, Corporations, §§ 948, 986, 1159, 1371.

C.J.S. — 18 C.J.S., Corporations, §§ 362-372, 375-383, 385-393, 395, 396.

46-3-263. Notice of members' meetings.

(a) Written notice stating the place, day, and hour of the annual meeting of members and, in case of a special meeting, the purpose or purposes for which the meeting is called shall be provided not less than five nor more than 90 days before the date of the meeting by any reasonable means, by or at the direction of the president, the secretary, or the officer or persons calling the meeting, to each member of record entitled to vote at such meeting. Reasonable means of providing such notice shall include, but not be limited to, United States mail, personal delivery, electric membership corporation newsletter, or member monthly service bill. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail with adequate prepaid postage thereon, addressed to the member at his address as it appears on the record books at the electric membership

corporation; provided, however, that if notice is mailed by other than first-class mail, it shall be deemed to be delivered five days from the date of mailing. Personal delivery may be either by personal delivery to the member or by leaving such notice in a conspicuous place at the member's address as it appears on the record books of the electric membership corporation or at the premises served.

(b) At an annual meeting of members, including any substitute annual meeting ordered in accordance with Code Section 46-3-262, any matter relating to the affairs of the electric membership corporation, whether or not stated in the notice of the meeting, may be brought up for action, except matters which this article, the bylaws, or articles of incorporation require to be stated in the notice of the meeting.

(c) When a meeting is adjourned to another time or place, it shall not be necessary, unless the bylaws require otherwise, to give any notice of the adjourned meeting if the time and place to which the meeting is adjourned are announced at the meeting at which the adjournment is taken; and at the adjourned meeting, any business may be transacted that might have been transacted on the original date of the meeting. If, however, after the adjournment the board fixes a new record date for the adjourned meeting, a notice of the adjourned meeting shall be given, in compliance with subsection (a) of this Code section, to each member of record on the new record date who is entitled to vote at such meeting.

(d) Notice of a meeting of members need not be given to any member who signs a waiver of notice, in person or by proxy, either before or after the meeting. Unless required by the bylaws, neither the business transacted nor the purpose of the meeting need be specified in the waiver, except that any waiver of the notice of a meeting of members required with respect to a plan of merger or a plan of consolidation shall not be effective unless:

(1) Prior to execution of the waiver, the member signing the waiver shall have been given:

(A) A copy of the plan of merger or consolidation or an outline of the material features of the plan; and

(B) A copy of the most recent annual balance sheet and annual profit and loss statement, or comparable financial statements, of each of the merging or consolidating electric membership corporations or of the merging or consolidating electric membership corporation and foreign electric cooperative, as the case may be; or

(2) The waiver itself conspicuously and specifically states that waiver of the right to receive such information is expressly made.

(e) Attendance of a member at a meeting, either in person or by proxy, shall of itself constitute waiver of notice and waiver of any and all objections to the place of the meeting, the time of the meeting, or the manner in

which it has been called or convened, except when a member attends a meeting solely for the purpose of stating, at the beginning of the meeting, any such objection or objections to the transaction of business. (Code 1933, § 34C-507, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 963-967, 969-983, 985, 1368-1370, 1436. **C.J.S.** — 18 C.J.S., Corporations, §§ 365-367.

46-3-264. Closing of record books and fixing of record date.

(a) For the purpose of determining members entitled to notice of or to vote at any meeting of members or any adjournment thereof, or in order to make a determination of members for any other proper purpose, the board of directors of an electric membership corporation may provide that the membership books shall be closed for a stated period not to exceed 90 days.

(b) In lieu of closing the membership books, the bylaws or (in the absence of any applicable bylaws) the board of directors may fix in advance a date as the record date for any such determination of members, such date in any case to be not more than 90 days prior to the date on which the particular action requiring such determination of members is to be taken.

(c) If the membership books are not closed and no record date is fixed for the determination of members entitled to notice of or to vote at a meeting of members, the date on which notice of the meeting is mailed to all of the members shall be the record date for such determination of membership or, if such notice is not mailed to all of the members on the same date, the date ten days prior to the meeting shall be the record date for such determination of membership.

(d) When the determination of members entitled to vote at any meeting of the members has been made as provided in this Code section, such determination shall apply to any adjournment thereof unless the board of directors fixes a new record date under this Code section for the adjourned meeting. (Code 1933, § 34C-511, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 1024-1026, 1030-1033. **C.J.S.** — 18 C.J.S., Corporations, §§ 375-377.

46-3-265. Quorum of members; adjournment of meeting by majority of members represented at meeting.

(a) Unless otherwise provided in the articles of incorporation or in bylaws adopted by the members, 10 percent of the members entitled to vote shall constitute a quorum at a meeting of members.

(b) If a quorum is present, the affirmative vote of a majority of the members represented at the meeting shall be the act of the membership unless the vote of a greater number is required by this article, the articles of incorporation, or the bylaws.

(c) When a quorum is once present to organize a meeting, the members present may continue to do business at the meeting, or at any adjournment thereof, notwithstanding the withdrawal of enough members to leave less than a quorum.

(d) A majority of the members represented at a meeting, whether or not a quorum is present, may adjourn such meeting from time to time. (Code 1933, § 34C-509, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 993-998, 1012-1014, 1372, 1373.

C.J.S. — 18 C.J.S., Corporations, § 370.

46-3-266. Voting by members generally.

(a) A member shall be entitled to only one vote in the exercise of his rights as a member of an electric membership corporation.

(b) No member shall have the right to cumulate his votes by giving one candidate a vote or votes equal to his vote multiplied by the number of directors to be elected or by distributing such votes on the same principle among any number of such candidates.

(c) The chairman of the board, the president, any vice-president, the secretary, or the treasurer or other officer of a corporation, club, school, church, or unincorporated association which is a member of an electric membership corporation shall be deemed by the electric membership corporation to have authority to vote such membership and to execute proxies and written waivers and consents in relation thereto, unless before a vote is taken or a waiver or consent is acted upon it is made to appear by a certified copy of the bylaws or resolution of the board of directors, executive committee, or other governing body of the corporation, club, school, church, or unincorporated association holding such membership that such authority is vested in some other officer or person. In the absence of such certification, a person executing any such proxy, waiver, or consent or presenting himself at a meeting as one of such officers of such a member

shall, for the purpose of this Code section, be deemed prima-facie to be duly elected, qualified, and acting as such officer and to be fully authorized to so act. In case of conflicting representation, such a member shall be deemed to be represented by its senior officer in the order first stated in this subsection.

(d) Unless it is made to appear otherwise by an affidavit, court order, or other document, or by the instrument creating the position, the following persons shall be deemed to be authorized to vote a membership or execute a proxy, waiver, or consent in relation thereto:

- (1) The administrator or executor of an estate which is a member;
- (2) A guardian of a member; or
- (3) A trustee in whose name a membership is held.

(e) If more than one person holds a position described in paragraphs (1) through (3) of subsection (d) of this Code section with respect to the same membership or if a membership is held by two or more persons, whether as fiduciaries, joint tenants, tenants in common, tenants in partnership, or otherwise, then unless the instrument or order appointing them or creating the tenancy otherwise directs and a copy thereof is filed with the secretary of the electric membership corporation or unless the articles of incorporation or bylaws of the electric membership corporation otherwise provide, their acts with respect to voting shall have the following effect:

- (1) If only one votes, his act binds all;
- (2) If more than one vote, the act of the majority so voting binds all;
- (3) If more than one vote and the vote is evenly split, each faction shall be entitled to vote the membership in question proportionally;

(f) The principles of subsection (e) of this Code section shall apply, insofar as possible, to the execution of proxies, waivers, consents, or objections and for the purpose of ascertaining the presence of a quorum.

(g) If there is reasonable doubt as to the person qualified to cast the vote of a member or to execute a proxy, waiver, or consent on behalf of a member, the electric membership corporation may deny the right of such member to vote or to execute a proxy, waiver, or consent until sufficient action has been taken by such member to eliminate the uncertainty. (Ga. L. 1937, p. 644, § 9; Code 1933, § 34C-503, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Cooperative Associations, §§ 2, 14, 15, 21, 26. 19 Am. Jur. 2d, Corporations, §§ 987, 988, 999-1004, 1006, 1007, 1009-1011, 1015-1026, 1030-1033, 1375, 1376, 1379-1381.

46-3-267. Effect of voting requirements provided for in articles of incorporation or bylaws.

(a) Whenever, with respect to any action to be taken by the members of an electric membership corporation, the articles of incorporation or bylaws require the vote or concurrence of a greater number of the members than required by this article with respect to such action, the provisions of the articles of incorporation or bylaws shall control.

(b) Any such provision in the articles of incorporation or bylaws may not itself be amended by a vote less than the vote prescribed in such provision.

(c) The authorization or taking of any action by vote or concurrence of the members may be rescinded or revoked by the same vote or concurrence as at the time of rescission or revocation would be required to authorize or take such action in the first instance, subject to the contract rights of other persons. (Code 1933, § 34C-508, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 1004, 1006, 1379.

C.J.S. — 18 C.J.S., Corporations, § 383.

46-3-268. Voting by proxy generally.

(a) To the extent, and only to the extent, authorized by the articles of incorporation or bylaws, a member may be represented at a meeting of the membership, vote thereat, and execute consents or waivers by one or more persons authorized by a written proxy executed by such member or by his attorney in fact. The exercise of such rights by a person pursuant to a written proxy shall be subject to such limitations and in accordance with such procedures as may be provided in the articles of incorporation or bylaws. The exercise of such rights shall, in any event, be subject to the following limitations and procedures:

(1) No proxy shall be valid after the expiration of 11 months from the date thereof unless otherwise provided in the proxy. Every proxy shall be revocable at the pleasure of the person executing it;

(2) No proxy shall be valid if the person granting it is no longer a member or his rights as a member have been lawfully suspended;

(3) Subject to the limitations of paragraphs (1) and (2) of this subsection, any proxy duly executed is not revoked and continues in full force and effect until an instrument revoking it or a duly executed proxy bearing a later date is received by the secretary of the electric membership corporation. A proxy is not revoked by the death or incapacity of the maker unless, before the vote is counted or the authority is exercised, written notice of such death or incapacity is received by the secretary of

the electric membership corporation. Notwithstanding that a valid proxy is outstanding, the powers of the proxy holder are suspended if the maker is present at a meeting of the members and elects to vote in person;

(4) If the proxy for the same member confers authority upon two or more persons and does not otherwise provide, a majority of such persons present at the meeting, or if only one is present, then that one, may exercise all the powers conferred by the proxy; but if the proxy holders present at the meeting are divided as to the right and manner of voting in any particular case and there is no majority, the vote of the member granting the proxy shall be prorated;

(5) If the proxy expressly provides, any proxy holder may appoint in writing a substitute to act in his place;

(6) A member shall not sell his vote or issue a proxy to vote to any person for any sum of money or anything of value. Any proxy issued in exchange for money or anything of value shall be void.

(b) If proxy voting is authorized in the articles of incorporation or bylaws of the electric membership corporation, attendance at a members' meeting by a proxy holder authorized to vote for a member shall be deemed to be attendance by such member for purposes of determining whether a quorum is present and shall otherwise be considered personal attendance by such member. (Ga. L. 1937, p. 644, § 9; Code 1933, § 34C-504, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Cooperative Associations, § 15. 19 Am. Jur. 2d, Corporations, §§ 1069-1080, 1082-1084, 1086-1097, 1099-1102, 1112, 1114, 1386. **C.J.S.** — 18 C.J.S., Corporations, §§ 385-393.

46-3-269. Dissenters' rights.

No member of an electric membership corporation shall, by dissenting from any merger or consolidation to which the electric membership corporation of which he is a member is a party or otherwise, any sale of all or substantially all the assets of such electric membership corporation, or any amendment of such electric membership corporation's articles of incorporation, have the right to receive any consideration for his membership interest except as provided in the plan of merger or consolidation, the terms of sale, or the amendment of the articles of incorporation. (Code 1933, § 34C-1803, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-270. Credentials and elections committee.

(a) The bylaws of an electric membership corporation may provide for the appointment of a credentials and elections committee composed of

members who are not officers or directors of the electric membership corporation or candidates for such positions. This committee shall be responsible for the counting of all ballots or votes cast and for ruling on the effect of any ballots or votes irregularly marked or cast and on all other questions that may arise relating to member voting and the election of directors, including, but not limited to, the validity of petitions of nomination or qualification of candidates and the regularity of the nomination and election of directors. The procedures for the appointment and qualification of the members of such committee shall be as provided in the bylaws authorizing and establishing such committee. Any committee member related within the third degree by affinity or consanguinity, computed according to the civil law, to any candidate for director shall refrain from participating in any deliberation or vote of the committee concerning such candidate.

(b) On request of the person presiding at the meeting of the members or on the request of any member entitled to vote thereat, such committee shall make a report in writing of any challenge, question, count, or matter determined by the committee and shall execute a certificate of any fact found by them. Any such report or certificate made by them shall be prima-facie evidence of the facts stated and of the vote as certified by them. (Code 1933, § 34C-506, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-271. Maintenance of books and records of account; inspection of books and records by members; preparation of annual financial statements.

(a) Each electric membership corporation shall keep correct and complete books and records of account, shall keep minutes of the proceedings of its members and board of directors, and shall keep at its registered office or principal place of business a record of its members, giving the names and addresses of all members and the number of members.

(b) Subject to the limitations set forth in this Code section and in other applicable laws, any person who is a member of the electric membership corporation in good standing shall, upon written demand stating the purpose thereof and the books and records sought to be examined, have the right to examine, in person or by agent or attorney, at any reasonable time or times, for any proper purpose, its books and records and, at his own expense, may make extracts therefrom. Any such inspection, however, may be denied or limited upon one or more of the following grounds:

(1) The member refuses to warrant and furnish to the electric membership corporation an affidavit that such inspection is desired for a purpose reasonably related to the business of the electric membership corporation;

(2) The inspection seeks information the release of which would unduly infringe upon or invade the privacy of any person;

(3) The inspection is sought for a dishonest purpose or to gratify mere curiosity, or is otherwise inimical to the lawful interest of the electric membership corporation or is not reasonably germane to the interest of the member as such;

(4) The books and records sought to be inspected deal with trade secrets or information which is privileged, confidential, or proprietary; or

(5) The member refuses to warrant and furnish an affidavit that he has not, within the five years preceding the date of the affidavit, sold or offered for sale and does not now intend to sell or offer to sell any list of members of the electric membership corporation or of any other electric membership corporation, or any list of shareholders of a corporation, and that he has not, within such five-year period, aided or abetted and does not now intend to aid or abet any other person in procuring any list of members or shareholders for such purpose.

(c) If the electric membership corporation or an officer or agent of the electric membership corporation refuses to permit the inspection authorized by subsection (b) of this Code section, the member demanding inspection may apply to the superior court of the county in which the electric membership corporation's registered office is located, upon such notice as the court may require, for an order directing the electric membership corporation or its officers or agents to show cause why an order should not be granted permitting such inspection by the applicant. The court shall hear the parties summarily, by affidavit or otherwise; and, if the applicant establishes that he is qualified and is entitled to such inspection, the court shall grant an order permitting such inspection, subject to any limitations which the court may prescribe, and shall grant such other relief, including costs and reasonable attorney's fees, as the court may deem just and proper. The court may deny or restrict inspection if it finds that the member has improperly used information secured through any prior examination of the books and records of account, or minutes or records of members of such electric membership corporation or of any other electric membership corporation, or that any other grounds, as set forth above, exist for denying or restricting such inspection.

(d) Not later than four months after the close of each fiscal year, and in any case prior to the annual meeting of members, each electric membership corporation shall prepare:

(1) A balance sheet or comparable financial statement showing in reasonable detail the financial condition of the electric membership corporation as of the close of its fiscal year; and

(2) A profit and loss statement or comparable financial statement showing the results of its operation during the fiscal year.

(e) Upon written request, an electric membership corporation promptly shall mail to any member of record a copy of the most recent such balance

sheet and profit and loss statement or comparable statement. (Code 1933, § 34C-510, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 333, 335, 336, 338, 339, 348-354, 356-363, 365-368, 381, 383, 384, 393.
C.J.S. — 18 C.J.S., Corporations, § 110.

46-3-272. Derivative actions by members.

(a) A derivative action may be brought by a member in the right of the electric membership corporation to procure a judgment in its favor against directors, officers, or other representatives of the electric membership corporation or members or third parties, or any combination thereof, whenever the electric membership corporation has a claim or cause of action which the representatives of the electric membership corporation, in violation of their duties, have failed to enforce, including a claim or cause of action against such representatives for their failure in this respect. However, a derivative action may not be brought until the expiration of 30 days after a member has delivered written demand upon the directors, officers, or other representatives of the electric membership corporation who are alleged to have failed to enforce such cause of action, setting forth the claim or cause of action which is sought to be enforced and the basis therefor.

(b) In a derivative action brought by one or more members in the right of an electric membership corporation to procure a judgment in favor of the electric membership corporation, the complaint shall be verified and shall allege that the plaintiff is a member at the time of bringing the action. It shall further allege that the plaintiff was a member at the time of the transaction of which he complained and that the demand required by subsection (a) of this Code section has been properly made.

(c) Such action shall not be discontinued, compromised, or settled without the approval of the court having jurisdiction of the action. If the court determines that the interest of the members will be substantially affected by such discontinuance, compromise, or settlement, the court shall direct that notice, by publication or otherwise, of the action and the proposed discontinuance, compromise, or settlement thereof be given to the members. If notice is directed to be given, the court may determine which one or more of the parties to the action shall bear the expense of giving the same in such amount as the court shall determine and find to be reasonable in the circumstances.

(d) If such action is successful in whole or in part or if anything is received by the plaintiff or plaintiffs as the result of the judgment, compromise, or settlement thereof, the court may award the plaintiff or

plaintiffs reasonable expenses, including reasonable fees of attorneys, and shall direct him or them to account to the electric membership corporation for the remainder of the proceeds so received by him or them.

(e) In any such action instituted after July 1, 1981, the court having jurisdiction, upon final judgment and the finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay the parties named as defendants the reasonable expenses, including fees of attorneys, incurred by them in defense of such action. (Code 1933, § 34C-512, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2243, 2244, 2250-2252, 2259-2262, 2272, 2326.

C.J.S. — 1A C.J.S., Actions, § 58.

PART 6

DIRECTORS AND OFFICERS

46-3-290. Management of business and affairs of electric membership corporation by board of directors; knowledge of limitations on directors' authority required; qualifications; compensation and reimbursement for expenses.

(a) Subject to the provisions of the articles of incorporation or the bylaws, the business and affairs of an electric membership corporation shall be managed by a board of directors.

(b) No limitation upon the authority which the directors would have in the absence of such limitation, whether contained in the articles of incorporation, bylaws, or otherwise, shall be effective against persons, other than members and directors, who are without actual knowledge of such limitation.

(c) Directors shall be natural persons of the age of 18 years or over. The articles of incorporation or bylaws may prescribe additional qualifications for directors.

(d) The compensation, if any, of directors for their services as such shall be on a per diem basis and, unless otherwise provided in the bylaws, shall be fixed by the board of directors. Directors also shall be entitled to reimbursement of expenses actually and necessarily incurred by them in the performance of their duties. (Ga. L. 1937, p. 644, § 11; Ga. L. 1950, p. 233, § 1; Ga. L. 1975, p. 783, § 1; Code 1933, § 34C-601, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 1341-1346, 1349-1364, 1381, 1395-1407, 1409-1412, 1414-1420, 1422-1425, 1427-1430, 1432-1440, 1443, 1444, 1475.
C.J.S. — 19 C.J.S., Corporations, §§ 460-467. 29 C.J.S., Electricity, § 10.

46-3-291. Number of directors; statement of names and addresses of initial directors in articles of incorporation; duration of director's service in office.

(a) The number of directors of an electric membership corporation shall not be less than three. Subject to such limitation, the number of directors shall be fixed by the bylaws or a procedure set forth in the bylaws, except that the number constituting the initial board of directors shall be fixed by the articles of incorporation.

(b) The number of directors may be increased or decreased from time to time by amendment to the bylaws or by other procedure set forth in the bylaws; but, unless otherwise provided in the bylaws, no decrease shall have the effect of shortening the term of any incumbent director. In the absence of a bylaw fixing the number of directors or establishing the number of directors by a procedure set forth in the bylaws, the number shall be the same as that stated in the articles of incorporation.

(c) The names and addresses of the members of the initial board of directors shall be stated in the articles of incorporation. Each such person shall hold office until his successor shall have been elected and qualified or until his earlier resignation, removal from office, or death.

(d) At the first annual meeting of members and at each annual meeting thereafter, the members shall elect directors to hold office until the next succeeding annual meeting, except in case of the classification of directors by staggered term as permitted by Code Section 46-3-293. Each director shall hold office for the term for which he is elected and until his successor shall have been elected and qualified or until his earlier resignation, removal from office, or death. (Ga. L. 1937, p. 644, § 11; Ga. L. 1950, p. 233, § 1; Ga. L. 1975, p. 783, § 1; Code 1933, § 34C-602, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-292. Provisional director.

(a) If the directors of an electric membership corporation are deadlocked in the management of the corporate affairs and if injury to the electric membership corporation is being suffered or is threatened by reason thereof, the superior court of the county where the registered office of the electric membership corporation is located may appoint a provisional director pursuant to this Code section, notwithstanding any provisions of

the articles of incorporation or bylaws of the electric membership corporation to the contrary and whether or not an action is pending for an involuntary dissolution of the electric membership corporation.

(b) Action for such appointment may be filed by one-half of the directors or by not less than 25 members, except that, if the electric membership corporation has less than 50 members, action for such appointment may be filed by not less than 25 percent of the members. Notice of such action shall be served upon the directors, other than those who have filed the action, and upon the electric membership corporation in the manner provided by law for service of a summons and complaint; and a hearing shall be held not less than ten days after such service is effected. At such hearing all interested persons shall be given an opportunity to be heard.

(c) The provisional director shall be an impartial person who is neither a member nor a creditor of the electric membership corporation nor related by consanguinity or affinity within the third degree, as computed according to the civil law, to any of the other directors of the electric membership corporation or to any judge of the court by which he is appointed. The provisional director shall have all the rights and powers of a director and shall be entitled to notice of the meetings of the board of directors and to vote at such meetings until he is removed by order of the court or by vote of a majority of the members present and voting at a meeting of members. The provisional director shall be entitled to receive such compensation as may be agreed upon between him and the electric membership corporation; and in the absence of such agreement he shall be entitled to such compensation as shall be fixed by the court. (Code 1933, § 34C-603, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-293. Classification of directors; division of service territory into districts.

(a) The articles of incorporation or a bylaw adopted by the members may provide that the directors be divided into either two or three classes, each class to be as nearly equal in number as possible, the term of office of directors of the first class to expire at the first annual meeting of members after their election, that of the second class to expire at the second annual meeting after their election, and that of the third class, if any, to expire at the third annual meeting after their election.

(b) At each annual meeting after such classification, the number of directors equal to the number of the class whose term expires at the time of such meeting shall be elected to hold office until the second succeeding annual meeting, if there are two classes, or until the third succeeding annual meeting, if there are three classes. No classification of directors shall be effective prior to the first annual meeting of members.

(c) If directors are classified and the number of directors is thereafter changed, any increase or decrease in the number of directors shall be so

apportioned among the classes as to make all classes as nearly equal in number as possible. When the number of directors is increased and any newly created directorships are filled by the board, there shall be no classification of the additional directors until the next election of directors by the members.

(d) Electric membership corporations having a lawfully classified board of directors when this article goes into effect may continue their existing classification even though not conforming to this Code section.

(e) The articles of incorporation or the bylaws may provide for the division of the territory served or to be served by an electric membership corporation into two or more districts for any purpose, including, without limitation, the nomination and election of directors. The articles of incorporation or bylaws shall prescribe the boundaries of the districts, or the manner of establishing such boundaries of the districts, and the manner of changing such boundaries and the manner in which such districts shall function. (Ga. L. 1937, p. 644, § 11; Ga. L. 1950, p. 233, § 1; Code 1933, § 34A-114.1, enacted by Ga. L. 1950, p. 233, § 2; Code 1933, § 34C-604, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-294. Vacancies on board of directors generally.

Unless the articles of incorporation or bylaws otherwise provide:

(1) Except as provided in paragraphs (2) and (3) of this Code section, any vacancy occurring in the board of directors may be filled by the affirmative vote of a majority of the remaining directors, though less than a quorum of the board of directors, or by the sole remaining director, as the case may be, or, if the vacancy is not so filled or if no director remains, by the members;

(2) If a vacancy occurs with respect to a director elected by members from a particular district pursuant to subsection (e) of Code Section 46-3-293, the vacancy may be filled by the remaining director or directors elected by the members from that district or, if no such director remains, by the other remaining directors or by the members in accordance with paragraph (1) of this Code section;

(3) Any directorship to be filled by reason of the removal of a director or directors, as provided in Code Section 46-3-295, shall be filled by the members or, if authorized by the members, by the remaining director or directors as provided in paragraph (1) of this Code section;

(4) A director elected or appointed to fill a vacancy shall be elected or appointed for the unexpired term of his predecessor in office. Any directorship to be filled by reason of an increase in the number of directors may be filled by the board of directors, but only for a term of

office continuing until the next election of directors by the members and the election and qualification of his successor;

(5) A director who resigns may postpone the effectiveness of his resignation to a future date or upon the occurrence of a future event specified in a written tender of resignation. A vacancy shall be deemed to exist at the time of such tender; and the board of directors or the members may then or thereafter elect or appoint a successor to take office when the resignation, by its terms, becomes effective. (Code 1933, § 34C-605, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, § 1400. **C.J.S.** — 19 C.J.S., Corporations, §§ 434, 435.

46-3-295. Removal of directors.

(a) Unless otherwise provided in the bylaws, at any meeting of members with respect to which notice of such purpose has been given, the entire board of directors or any individual director may be removed, with or without cause, by the affirmative vote of a majority of the members of the electric membership corporation.

(b) Whenever the members from a particular district are entitled to elect one or more directors pursuant to subsection (e) of Code Section 46-3-293, this Code section shall apply, in respect of the removal of the director or directors so elected, to the vote of the members from that district and not to the vote of the members as a whole.

(c) If any or all directors are removed, new directors may be elected at the same meeting. (Code 1933, § 34C-606, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-296. Quorum of directors; action by majority vote; conducting of meetings of board or committees by conference calls.

(a) Unless the articles of incorporation or the bylaws provide that a different number shall constitute a quorum, a majority of the number of directors fixed by the bylaws or fixed by the procedure set forth in the bylaws, or, in the absence of such bylaw provisions, then a majority of the number stated in the articles of incorporation, shall constitute a quorum for the transaction of business. In no case shall less than one-third of the total number of directors nor less than two directors constitute a quorum.

(b) The vote of a majority of the directors present and voting at the time of the vote, if a quorum is present at such time, shall be the act of the board of directors unless the vote of a greater number is required by the articles of incorporation or the bylaws.

(c) Unless the articles of incorporation or bylaws otherwise provide, members of the board of directors or any committee designated by such board may participate in a meeting of such board or committee by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other. Participation in a meeting pursuant to this subsection shall constitute presence in person at such meeting. (Ga. L. 1937, p. 644, § 11; Ga. L. 1950, p. 233, § 1; Ga. L. 1975, p. 783, § 1; Code 1933, § 34C-607, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-297. Executive committee and other committees.

(a) Unless prohibited by the articles of incorporation or the bylaws, the board of directors, by resolution adopted by a majority of the full board of directors, may designate from among its members an executive committee and one or more other committees, each consisting of two or more directors and each of which, to the extent provided in such resolution or in the articles of incorporation or the bylaws of the electric membership corporation, shall have and may exercise all the authority of the board of directors; but no such committee shall have the authority of the board of directors in reference to:

(1) Amending the articles of incorporation or the bylaws of the electric membership corporation;

(2) Adopting a plan of merger or consolidation;

(3) The sale, lease, exchange, or other disposition of all or substantially all the property and assets of the electric membership corporation; or

(4) A voluntary dissolution of the electric membership corporation or a revocation thereof.

(b) The board, by resolution adopted in accordance with subsection (a) of this Code section, may designate one or more directors as alternate members of any such committee, which directors may act in the place and stead of any absent member or members at any meeting of such committee.

(c) Unless otherwise provided in the articles of incorporation or the bylaws or unless ordered by the board of directors, any such committee shall act by a majority of its members.

(d) The designation of any such committee and the delegation thereto of authority shall not operate to relieve the board of directors or any member thereof of any responsibility imposed by law.

(e) Nothing in this Code section shall be construed to invalidate any executive committee or other committee validly created under the electric membership corporation law of this state existing on July 1, 1981. (Ga. L.

1937, p. 644, § 12; Code 1933, § 34C-608, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 1470, 1471, 1473, 1474, 1507, 1508, 1510-1512, 1519, 1520.

C.J.S. — 19 C.J.S., Corporations, § 466.

46-3-298. Place, time, and notice of directors' meetings; waiver of notice; adjournment of meetings; notice of adjournment; manner of calling meetings.

(a) Unless the articles of incorporation or bylaws otherwise provide, meetings of the board of directors, whether regular or special, may be held either within or outside of this state. The time and place for holding meetings of the board of directors may be fixed by or under the bylaws or, if not so fixed, by the board.

(b) Regular meetings of the board of directors may be held with or without notice, as prescribed in the articles of incorporation or bylaws or in a standing resolution of the board of directors. Special meetings of the board of directors may be held upon such notice as is prescribed in the articles of incorporation or the bylaws. Unless otherwise prescribed in the articles of incorporation or bylaws, written notice of the time and place of special meetings of the board of directors shall be given to each director either by personal delivery or by mail, telegram, or cablegram at least two days before the meeting.

(c) Notice of a meeting of the board of directors need not be given to any director who signs a waiver of notice either before or after the meeting. Attendance of a director at a meeting shall constitute a waiver of notice of such meeting and waiver of any and all objections to the place of the meeting, the time of the meeting, or the manner in which it has been called or convened, except when a director states, at the beginning of the meeting, any such objection or objections to the transaction of business.

(d) Neither the business to be transacted at nor the purpose of any regular or special meeting of the board of directors need be specified in the notice or waiver of notice of such meeting unless required by the articles of incorporation or bylaws.

(e) A majority of the directors present, whether or not a quorum exists, may adjourn any meeting of the board of directors to another time and place. Unless the articles of incorporation or bylaws otherwise provide, notice of any such adjourned meeting shall be given to the directors who were not present at the time of the adjournment and, unless the time and place of the adjourned meeting are announced at the time of the adjournment, to the other directors.

(f) Meetings of the board of directors may be called by the chairman of the board, by the president, by 25 percent of the directors then in office, or by any other person or persons authorized by the articles of incorporation or bylaws. (Code 1933, § 34C-609, enacted by Ga. L. 1981, p. 1587, § 1; Ga. L. 1982, p. 3, § 46.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 1446-1450, 1464-1467, 1470, 1471, 1473-1479. **C.J.S.** — 19 C.J.S., Corporations, §§ 463, 464.

46-3-299. Action by directors without a meeting.

Unless otherwise provided by the articles of incorporation or bylaws, any action required by this article to be taken at a meeting of the directors of an electric membership corporation or any action which may be taken at a meeting of the directors or of a committee may be taken without a meeting if written consent setting forth the action so taken is signed by all the directors or by all of the members of the committee, as the case may be, and is filed with the minutes of the proceedings of the board or the committee. Such consent shall have the same force and effect as a unanimous vote and may be stated as such in any articles or document filed with the Secretary of State under this article. (Code 1933, § 34C-610, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 1345, 1475, 1483-1487, 1490, 1491.

46-3-300. Dissent by a director.

A director of an electric membership corporation who is present at a meeting of the electric membership corporation's board of directors at which action on any corporate matter is taken shall be presumed to have assented to the action unless:

(1) He votes against such action if a vote is taken; and

(2) His dissent is entered in the minutes of the meeting, or he files his written dissent to such action with the person acting as secretary of the meeting before the adjournment thereof, or he forwards such dissent by registered or certified mail or statutory overnight delivery to the secretary of the electric membership corporation within 48 hours after the adjournment of the meeting. (Code 1933, § 34C-615, enacted by Ga. L. 1981, p. 1587, § 1; Ga. L. 2000, p. 1589, § 3.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to paragraph (2) is applicable with respect to notices delivered on or after July 1, 2000.

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 1311, 1335, 1337, 1339, 1340, 1848, 1849, 1855-1857, 1866, 1876.

46-3-301. Election or appointment of officers generally.

(a) The board of directors shall elect or appoint a president, a secretary, and a treasurer. Other officers may be elected or appointed either by the board or as may be provided in the articles of incorporation or bylaws. Any two or more offices may be held by the same person, except the offices of president and secretary.

(b) The articles of incorporation or bylaws may provide that all officers or specified officers shall be elected by the members instead of by the board.

(c) Unless otherwise provided in the articles of incorporation, bylaws, or resolution of the board, all officers shall be elected or appointed for a term of office running until the meeting of the board following the next annual meeting of members or, in the case of officers elected by the members, until the next annual meeting of members.

(d) Each officer shall hold office for the term for which he is elected or appointed and until his successor has been elected or appointed and has qualified, or until his earlier resignation, removal from office, or death.

(e) All officers and agents of an electric membership corporation, as between themselves and the electric membership corporation, shall have such authority and perform such duties in the management of the electric membership corporation as may be provided in the articles of incorporation or bylaws or as may be determined by action of the board not inconsistent with the articles of incorporation and bylaws.

(f) When the directors are deadlocked, the president shall have authority to institute or defend legal proceedings other than an action seeking appointment of a provisional director.

(g) No electric membership corporation shall be relieved of its liability to any third person for the acts of its officers by reason of any limitations upon the power of the officer which are not known to such third person, whether such limitations are contained in the articles of incorporation, the bylaws, or elsewhere. (Ga. L. 1937, p. 644, § 11; Ga. L. 1950, p. 233, § 1; Ga. L. 1975, p. 783, § 1; Code 1933, § 34C-611, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 1349-1352, 1360-1363, 1381.

C.J.S. — 19 C.J.S., Corporations, §§ 443, 458.

46-3-302. Removal of officers; filling of vacancies.

(a) Any officer or agent elected or appointed by the board of directors may be removed by the board whenever in its judgment the best interests of the electric membership corporation will be served thereby.

(b) An officer or agent elected by the members may be removed only by vote of the members unless the members shall have authorized the board to remove such officer or agent; but the authority of such officer or agent to act for the electric membership corporation may be suspended by the board for cause.

(c) Any officer or agent appointed otherwise than by the board of directors or by the members may be removed with or without cause at any time by any officer having authority to appoint, except as may be otherwise provided in the articles of incorporation or bylaws, whenever such officer in his absolute discretion shall consider that the best interests of the electric membership corporation will be served thereby.

(d) Removal as provided in this Code section shall be without prejudice to the contract rights, if any, of the person removed. Election or appointment of an officer or agent shall not of itself create contract rights.

(e) Any vacancy, however occurring, in any office may be filled by the board of directors unless the articles of incorporation or bylaws shall have expressly reserved such power to the members. (Code 1933, § 34C-612, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, § 1400.

46-3-303. Duty of directors and officers to act in good faith and with due diligence, care, and skill; reliance on financial information prepared by others.

Directors and officers shall discharge the duties of their respective positions in good faith and with that degree of diligence, care, and skill which ordinarily prudent men would exercise under similar circumstances in like positions. In discharging their duties, directors and officers, when acting in good faith, may rely upon financial information concerning the electric membership corporation when such information is represented to them by the president of the electric membership corporation or by the employee of the electric membership corporation having charge of its

books of account, or in the form of a written report by an independent or certified public accountant or firm of such accountants, to be correct and to reflect fairly the financial condition of the electric membership corporation. (Code 1933, § 34C-613, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 1345, 1483-1487, 1490-1492, 1494-1506, 1521-1529, 1531-1574, 1576-1608, 1610-1644, 1646-1651, 1653-1656, 1658-1660, 1663-1678, 1684-1697.

C.J.S. — 19 C.J.S., Corporations, §§ 476-481, 484-486, 489, 491-513, 515, 516, 518-523.

46-3-303.1. Standard of care for directors and officers in discharge of duties on or after July 1, 1988; reliance upon financial information.

(a)(1) A director shall discharge his duties as director, including his duties as a member of a committee:

(A) In good faith; and

(B) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(2) In discharging his duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(A) One or more officers or employees of the electric membership corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(B) Legal counsel, public accountants, investment bankers, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or

(C) A committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

(3) A director is not acting in good faith if he has knowledge concerning the matter in question that makes unwarranted the reliance otherwise permitted by paragraph (2) of this subsection.

(4) A director is not liable for any action taken as a director or any failure to take any action if he performed the duties of his office in compliance with this subsection.

(b)(1) An officer with discretionary authority shall discharge his duties under that authority:

(A) In good faith; and

(B) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(2) In discharging his duties, an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(A) One or more officers or employees of the electric membership corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or

(B) Legal counsel, public accountants, investment bankers, or other persons as to matters the officer reasonably believes are within the person's professional or expert competence.

(3) An officer is not acting in good faith if he has knowledge concerning the matter in question that makes unwarranted the reliance otherwise permitted by paragraph (2) of this subsection.

(4) An officer is not liable for any action as an officer or any failure to take any action if he performed the duties of his office in compliance with this subsection.

(c) The general standards of care and conduct for actions of directors or officers of electric membership corporations, which actions occur on July 1, 1988, shall be as provided in this Code section and not as provided in Code Section 46-3-303.

(d) This Code section shall not relieve any director or officer from liability for the payment of taxes. (Code 1981, § 46-3-303.1, enacted by Ga. L. 1988, p. 1451, § 1.)

46-3-304. Actions against directors and officers.

(a) An action may be brought by any of the persons named in subsection (b) of this Code section against one or more directors or officers of an electric membership corporation to procure for the benefit of the electric membership corporation a judgment for the following relief:

(1) To compel the defendant to account for his official conduct, or any other relief called for by his official conduct, in the following cases:

(A) The neglect of, failure to perform, or other violation of his duties to the electric membership corporation, or violations of his duties in regard to disposition of corporate assets committed to his charge;

(B) The acquisition by him, transfer to others, loss, or waste of corporate assets due to any neglect of, failure to perform, or other violation of his duties; or

(C) The appropriation, in violation of his duties, of any business opportunity of the electric membership corporation;

(2) To enjoin a proposed unlawful conveyance, assignment, or transfer of corporate assets or other unlawful corporate transaction, where there is sufficient evidence that it will be made;

(3) To set aside an unlawful conveyance, assignment, or transfer of corporate assets, where the transferee knew of its unlawfulness and is made a party to the action.

(b) An action may be brought for the relief provided in this Code section by the electric membership corporation, or a receiver, trustee in bankruptcy, officer, director, or judgment creditor thereof, or by a member in accordance with Code Section 46-3-272, relating to derivative actions.

(c) No action shall be brought for the relief provided in this Code section more than four years from the time the cause of action accrued.

(d) This Code section shall not limit any liability otherwise imposed by law upon any director or officer or any third party. (Code 1933, § 34C-614, enacted by Ga. L. 1981, p. 1587, § 1; Ga. L. 1984, p. 22, § 46.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 1695, 1700, 1701, 1703-1707, 1712-1720, 1726-1737, 1739-1745, 1817, 1819, 1820-1831, 1833, 1835-1854.

46-3-305. Interested directors and officers.

(a) No contract or transaction between an electric membership corporation and one or more of its directors or officers, or between an electric membership corporation and any other corporation, partnership, association, or other organization in which one or more of its directors or officers are directors or officers or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the board of directors or committee thereof which authorizes the contract or transaction, or solely because his or their votes are counted for such purpose, if:

(1) The material facts as to his interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors are less than a quorum; or

(2) The material facts as to his interest and as to the contract or transaction are disclosed or are known to the members, and the contract or transaction is specifically approved or ratified in good faith by vote of such members; or

(3) The contract or transaction is fair as to the electric membership corporation as of the time it is authorized, approved, or ratified by the board, a committee thereof, or the members.

(b) Interested directors may be counted in determining the presence of a quorum at a meeting of the board or committee thereof which authorizes the contract or transaction. (Code 1933, § 34C-616, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 1732-1737, 1739-1745.

C.J.S. — 19 C.J.S., Corporations, §§ 519, 520.

46-3-306. Indemnification of officers, directors, employees, and agents; purchase and maintenance of liability insurance; notice to members of payment of indemnification.

(a) As used in this Code section, the term “the electric membership corporation” shall include, in addition to the surviving or new electric membership corporation, any merging or consolidating electric membership corporation, including any merging or consolidating electric membership corporation of a merging or consolidating electric membership corporation, absorbed in a merger or consolidation so that any person who is or was a director, officer, employee, or agent of such merging or consolidating electric membership corporation, or is or was serving at the request of such merging or consolidating electric membership corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, shall stand in the same position under this Code section with respect to the resulting or surviving electric membership corporation as he would if he had served the resulting or surviving electric membership corporation in the same capacity, provided that no indemnification under subsections (b) and (c) of this Code section which are permitted by this subsection shall be mandatory under this subsection or any bylaw of the surviving or new electric membership corporation without the approval of such indemnification by the board of directors or members of the surviving or new electric membership corporation, in the manner provided in paragraphs (1) and (3) of subsection (e) of this Code section.

(b) An electric membership corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action or proceeding, whether civil, criminal, administrative, or investigative (other than an action by or in the right of the electric membership corporation), by reason of the fact that he is or was a director, officer, employee, or agent of the electric membership corporation, or is or was serving at the request of the electric membership corporation as a director, officer, employee, or agent of another corpora-

tion, partnership, joint venture, trust, or other enterprise, against expenses, including attorney's fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by him in connection with such action or proceeding if he acted in a manner he reasonably believed to be in or not opposed to the best interests of the electric membership corporation and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action or proceeding by judgment, order, settlement, or conviction, or upon a plea of *nolo contendere* or its equivalent, shall not of itself create a presumption that the person did not act in a manner which he reasonably believed to be in or not opposed to the best interests of the electric membership corporation and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

(c) An electric membership corporation shall have the power to indemnify any person who was or is a party or who is threatened to be made a party to any threatened, pending, or completed action or suit by, or in the right of, the electric membership corporation to procure a judgment in its favor, by reason of the fact he is or was a director, officer, employee, or agent of the electric membership corporation or is or was serving at the request of the electric membership corporation as a director, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, against expenses, including attorney's fees, actually and reasonably incurred by him in connection with the defense or settlement of such action or suit, if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the electric membership corporation; except that no indemnification shall be made in respect to any claim, issue, or matter as to which such person shall have been adjudged to be liable to the electric membership corporation, unless and only to the extent that the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the court shall deem proper.

(d) To the extent that a director, officer, employee, or agent of an electric membership corporation has been successful, on the merits or otherwise, in defense of any action, suit, or proceeding referred to in subsections (b) and (c) of this Code section or in defense of any claim, issue, or matter therein, he shall be indemnified against expenses, including attorney's fees, actually and reasonably incurred by him in connection therewith.

(e) Any indemnification under subsections (b) and (c) of this Code section, unless ordered by a court, shall be made by the electric membership corporation only as authorized in the specific case, upon a determination that indemnification of the director, officer, employee, or agent is proper in the circumstances because he has met the applicable standard of

conduct set forth in subsections (b) and (c) of this Code section. Such determination shall be made:

(1) By the board of directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit, or proceeding;

(2) If such a quorum is not obtainable or, even if obtainable, if a quorum of disinterested directors so directs, by independent legal counsel in a written opinion; or

(3) By the affirmative vote of the members present and voting at the meeting at which such determination is made.

(f) Expenses incurred in defending a civil or criminal action, suit, or proceeding may be paid by the electric membership corporation in advance of the final disposition of such action, suit, or proceeding upon receipt of an undertaking by or on behalf of the director, officer, employee, or agent to repay such amount if it shall ultimately be determined that he is not entitled to be indemnified by the electric membership corporation as authorized in this Code section.

(g) The indemnification and advancement of expenses provided by or granted pursuant to this Code section shall not be deemed exclusive of any other rights, in respect to indemnification or otherwise, to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, resolution, or agreement, either specifically or in general terms approved by the affirmative vote of a majority of the members entitled to vote thereon, taken at a meeting, the notice of which specified that such bylaw, resolution, or agreement would be placed before the members, both as to action by a director, officer, employee, or agent in his official capacity and as to action in another capacity while holding such office or position, except that no such other rights, in respect to indemnification or otherwise, may be provided or granted to a director, officer, employee, or agent pursuant to this subsection by an electric membership corporation with respect to the liabilities described in divisions (b)(3)(A)(i) through (b)(3)(A)(iii) of Code Section 46-3-321.

(h) An electric membership corporation shall have the power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee, or agent of the electric membership corporation or who is or was serving at the request of the electric membership corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the electric membership corporation would have the power to indemnify him against such liability under this Code section.

(i) If any expenses or other amounts are paid by way of indemnification, otherwise than by court order or action by the members or by an insurance

carrier pursuant to insurance maintained by the electric membership corporation, the electric membership corporation, not later than the next annual meeting of members, unless such meeting is held within three months from the date of such payment, and in any event, within 15 months from the date of such payment, shall send to its members who are entitled to vote for the election of directors a statement specifying the persons paid, the amounts paid, and the nature and status at the time of such payment of the litigation or threatened litigation. Such statement shall be provided to the members in the manner provided in subsection (a) of Code Section 46-3-263 for giving notice of members' meetings.

(j) The indemnification and advancement of expenses provided by or granted pursuant to this Code section shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer, employee, or agent and shall inure to the benefit of the heirs, executors, and administrators of such a person. (Code 1933, § 34C-617, enacted by Ga. L. 1981, p. 1587, § 1; Ga. L. 1988, p. 1451, § 2; Ga. L. 1989, p. 14, § 46.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 1897, 1898.

PART 7

ORGANIZATION OF ELECTRIC MEMBERSHIP CORPORATIONS

46-3-320. Number of incorporators; age requirement.

One or more persons may act as incorporator or incorporators of an electric membership corporation to be formed under this article. Any natural person acting as incorporator shall be at least 18 years of age. (Ga. L. 1937, p. 644, § 5; Ga. L. 1980, p. 72, § 2; Code 1933, § 34C-701, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 189, 190. 27A Am. Jur. 2d, Energy and Power Sources, § 26.

C.J.S. — 18 C.J.S., Corporations, §§ 30, 67-97. 29 C.J.S., Electricity, § 10.

46-3-321. Signing of articles of incorporation; contents of articles of incorporation.

(a) The articles of incorporation shall be signed by the incorporator or incorporators or his or their attorney and shall set forth:

- (1) The name of the electric membership corporation;

(2) That the electric membership corporation is organized pursuant to this article;

(3) The period of duration, which shall be perpetual unless otherwise limited;

(4) The purpose or purposes for which the electric membership corporation is organized;

(5) The address of its initial registered office and the name of its initial registered agent at such address;

(6) The number of directors constituting the initial board of directors and the name and address of each person who is to serve as a member thereof; and

(7) The name and address of each incorporator.

(b) The articles of incorporation may, as a matter of election, also set forth:

(1) Any provision, not inconsistent with law, for the regulation of the internal affairs of the electric membership corporation;

(2) Any provision which under this chapter is required or permitted to be set forth in the bylaws; any such provision set forth in the articles of incorporation need not be set forth in the bylaws; and

(3) (A) A provision eliminating or limiting the personal liability of a director to the electric membership corporation or its members for monetary damages for breach of duty of care or other duty as a director, provided that such provision shall not eliminate or limit the liability of a director:

(i) For any appropriation, in violation of his duties, of any business opportunity of the electric membership corporation;

(ii) For acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or

(iii) For any transaction from which the director derived an improper personal benefit.

(B) No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. (Ga. L. 1937, p. 644, § 6; Ga. L. 1980, p. 72, § 3; Code 1933, § 34C-702, enacted by Ga. L. 1981, p. 1587, § 1; Ga. L. 1988, p. 1451, § 3.)

JUDICIAL DECISIONS

Cited in Flint Elec. Membership Corp. v. Carroll, 89 Ga. App. 440, 79 S.E.2d 832 Posey, 78 Ga. App. 597, 51 S.E.2d 869 (1953).
(1949); Lamar Elec. Membership Corp. v.

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 199, 202-209, 211, 213, 214.

C.J.S. — 18 C.J.S., Corporations, §§ 33-40.

46-3-322. Filing articles of incorporation; issuance of certificate of incorporation; forwarding of copy of certificate to clerk of superior court; rejection of articles of incorporation; publication of notice; commencement of corporate existence.

(a) The incorporator or incorporators or his or their representative shall obtain from the Secretary of State a certificate which states that the name of the proposed electric membership corporation is available in accordance with Code Section 46-3-220. Such certificate shall be issued upon application to reserve the use of the proposed corporate name as provided in Code Section 46-3-221 and shall be valid for the period provided in Code Section 46-3-221, including any extension of such period granted by the Secretary of State. Upon the expiration of such period or any extension thereof, the certificate shall become void unless the electric membership corporation shall have come into existence within such time.

(b) The incorporator or incorporators or his or their representative shall deliver the original articles of incorporation and two conformed copies of the articles to the Secretary of State for filing as provided in subsection (a) of Code Section 46-3-174.

(c) Together with the articles of incorporation, the incorporator or incorporators or his or their representative shall deliver to the Secretary of State:

(1) A certificate issued by the Secretary of State reserving the name of the proposed electric membership corporation, as provided in subsection (a) of this Code section;

(2) Payment to the Secretary of State of the fee provided for in Code Section 46-3-501;

(3) A check, draft, or money order in the amount of \$16.00, payable to the clerk of the superior court of the county where the initial registered office of the electric membership corporation is to be located, in payment of the cost of filing the articles of incorporation in that county and in payment of the fee required in civil actions and proceedings as required by Code Sections 15-6-77 and 47-14-51;

(4) A letter addressed to the publisher of a newspaper which is the official organ of the county where the initial registered office of the electric membership corporation is to be located or which is a newspaper

of general circulation published within that county whose most recently published annual statement of ownership and circulation reflects a minimum of 60 percent paid circulation. This letter shall contain a notice to be published four times in the newspaper and shall be in substantially the following form:

(name and address of the newspaper
designated by the incorporator or
incorporators or his or
their representative)

Dear Sirs:

You are requested to publish, four times, a notice in the following form:

“_____ (name of electric membership corporation) has been duly incorporated on _____ (month, day, and year to be inserted by the Secretary of State), by the issuance of a certificate of incorporation by the Secretary of State in accordance with the applicable provisions of Article 4 of Chapter 3 of Title 46, the ‘Georgia Electric Membership Corporation Act.’ The initial registered office of the electric membership corporation is located at _____ (address of registered office) and its initial registered agent at such address is (name of agent).”

Enclosed is a (check, draft, or money order) in the amount of \$60.00 in payment of the costs of publishing this notice.

Very truly yours,

(Name and address
of incorporator or
incorporators or his or
their representative)

(5) A check, draft, or money order in the amount of \$60.00, payable to the designated newspaper; and

(6) A consent to appointment as registered agent, as provided for in subsection (c) of Code Section 46-3-240.

(d) Upon delivery of the articles of incorporation to the Secretary of State, the Secretary of State shall affix thereon the hour, day, month, and year of delivery. Not later than the close of business on the first business day following the day of delivery, the Secretary of State shall either issue a certificate of incorporation in the manner provided in this Code section or shall reject the articles in the manner provided in this Code section.

(e) If the Secretary of State finds that the articles of incorporation appear to be in proper form for filing and are accompanied by the other

items required by subsection (c) of this Code section, he shall, in addition to the requirements of subsection (a) of Code Section 46-3-174:

- (1) Issue a certificate of incorporation in substantially the following form and attach it to one conformed copy of the articles of incorporation:

State of Georgia
Office of the Secretary of State
Ex Officio Corporation Commissioner

This is to certify that _____ (the name of the electric membership corporation) has been duly incorporated under the laws of the State of Georgia on the _____ day of _____, _____ (insert date articles of incorporation are delivered for filing), by the filing of articles of incorporation in the office of the Secretary of State and the fees therefor paid, as provided by law, and that attached hereto is a true copy of the said articles of incorporation.

Witness my hand and official seal, this _____ day of _____, _____.

Secretary of State
Ex Officio Corporation
Commissioner of the
State of Georgia

- (2) Return the certificate of incorporation with the conformed copy of the articles of incorporation attached thereto to the incorporator or incorporators or his or their representative. A copy of the certificate of incorporation shall be attached to the original articles of incorporation;

- (3) Forward a conformed copy of the articles of incorporation with a copy of the certificate of incorporation attached thereto, along with the check, draft, or money order provided for in paragraph (3) of subsection (c) of this Code section, to the clerk of the superior court in the county where the initial registered office of the electric membership corporation is located, within four business days after the articles of incorporation have been delivered to the Secretary of State for filing;

- (4) Mail the letter and the check, draft, or money order provided for in paragraphs (4) and (5) of subsection (c) of this Code section, with the date of incorporation inserted in the notice, to the designated newspaper within four business days after the articles of incorporation have been delivered to the Secretary of State for filing.

- (f) If the Secretary of State finds that the articles of incorporation do not appear to be in proper form for filing or are not accompanied by the other items required by subsection (c) of this Code section, he shall reject the articles for filing and shall immediately notify the incorporator or incorpo-

rators or his or their representative of such rejection by mailing a notice no later than the close of business on the first business day following the day of delivery of the articles of incorporation for filing. The notice shall specify the reason or reasons for rejection of the articles of incorporation; and the articles and all accompanying materials shall be returned therewith.

(g) The conformed copy of the articles of incorporation, with a copy of the certificate of incorporation attached thereto, provided for in paragraph (3) of subsection (e) of this Code section shall be filed upon receipt by the clerk of the superior court of the county where the initial registered office of the electric membership corporation is to be located. Failure on the part of the Secretary of State to mail the conformed copy of the articles of incorporation or failure on the part of the clerk of the superior court to comply with this subsection shall not invalidate the issuance of the certificate of incorporation by the Secretary of State.

(h) The notice provided for in paragraph (4) of subsection (c) of this Code section shall be published within ten days after receipt of the notice by the newspaper. Failure on the part of the Secretary of State to mail the notice or failure on the part of the newspaper to comply with this subsection shall not invalidate the issuance of the certificate of incorporation by the Secretary of State.

(i) If the Secretary of State issues a certificate of incorporation, the corporate existence of the electric membership corporation shall begin as of the time of delivery to the Secretary of State of the articles of incorporation so certified. (Ga. L. 1937, p. 644, § 8; Ga. L. 1980, p. 72, § 4; Code 1933, § 34C-703, enacted by Ga. L. 1981, p. 1587, § 1; Ga. L. 1992, p. 6, § 46; Ga. L. 1999, p. 81, § 46.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 208, 209, 211, 213.

46-3-323. Effect of issuance of certificate of incorporation.

The certificate of incorporation issued by the Secretary of State shall be conclusive evidence that the electric membership corporation has been incorporated under this article, except as against this state in a proceeding to cancel or revoke the certificate of incorporation or for involuntary dissolution of the electric membership corporation. (Code 1933, § 34C-704, enacted by Ga. L. 1981, p. 1587, § 1; Ga. L. 1992, p. 6, § 46.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 67-72, 260-272, 2914-2920.

C.J.S. — 18 C.J.S., Corporations, §§ 37, 45-61.

46-3-324. Organization meeting of directors.

After the corporate existence has begun, an organization meeting of the board of directors named in the articles of incorporation shall be held, either within or outside of this state, at the call of any incorporator, for the purpose of adopting bylaws, electing officers, and transacting such other business as properly may come before the meeting. The incorporator or incorporators calling the meeting shall give at least three days' notice thereof by mail to each director so named, which notice shall state the time and place of the meeting. (Code 1933, § 34C-705, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-325. Adoption of initial bylaws; authority to alter, amend, repeal, or adopt new bylaws; contents of bylaws generally.

(a) The initial bylaws of an electric membership corporation shall be adopted by its board of directors.

(b) The board of directors shall not have power to alter, amend, or repeal the bylaws or adopt new bylaws directly relating to the election of the board of directors. The board of directors shall otherwise have power to alter, amend, or repeal the bylaws or adopt new bylaws unless such power is reserved exclusively to the members by the articles of incorporation or in bylaws previously adopted by the members; but any bylaws adopted by the board of directors may be altered, amended, or repealed and new bylaws adopted by the members. The members may prescribe that any bylaw or bylaws adopted by them shall not be altered, amended, or repealed by the board of directors.

(c) The bylaws may contain any provisions for the regulation and management of the affairs of the electric membership corporation not inconsistent with law or the articles of incorporation. (Ga. L. 1937, p. 644, § 12; Ga. L. 1953, Nov.-Dec. Sess., p. 359, § 1; Code 1933, § 34C-706, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 17, 18, 310, 311, 314-318, 320, 321, 323, 325-332. **C.J.S.** — 18 C.J.S., Corporations, §§ 110-121. 29 C.J.S., Electricity, §§ 5, 6.

46-3-326. Adoption of bylaws for emergency conditions; emergency powers of board of directors generally.

(a) The board of directors may adopt emergency bylaws, subject to repeal or change by action of the members, which, notwithstanding any other provision to the contrary in this article or in the articles of incorporation or bylaws, shall be operative during any emergency in the

conduct of the business of the electric membership corporation resulting from an attack on the United States or on a locality in which the electric membership corporation conducts its business or customarily holds meetings of its board of directors or its members, or during any nuclear or atomic disaster, or during the existence of any catastrophe or other similar emergency condition, as a result of which a quorum of the board of directors or a standing committee thereof cannot readily be convened for action. The emergency bylaws may make any provision that may be practical and necessary for the circumstances of the emergency, including, without limitation, provisions that:

(1) A meeting of the board of directors may be called by any officer or director in such manner and under such conditions as shall be prescribed in the emergency bylaws;

(2) The director or directors in attendance at the meeting, or any greater number fixed by the emergency bylaws, shall constitute a quorum;

(3) The officers or other persons designated on a list approved by the board of directors before the emergency, all in such order or priority and subject to such conditions and for such period of time (not longer than reasonably necessary after the termination of the emergency) as may be provided in the emergency bylaws or in the resolution approving the list, shall, to the extent required to provide a quorum at any meeting of the board of directors, be deemed directors for such meeting;

(4) Any officer of the electric membership corporation shall have such emergency powers as may be prescribed in the emergency bylaws; and

(5) The board of directors may delegate any of its powers to any officer or director.

(b) The board of directors, either before or during any such emergency, may provide and from time to time may modify lines of succession in the event that during such an emergency any or all officers or agents of the electric membership corporation shall for any reason be rendered incapable of discharging their duties.

(c) The board of directors, either before or during any such emergency, may, effective during the emergency, change the head office or designate several alternative head offices or regional offices or authorize the officers so to do.

(d) To the extent not inconsistent with any emergency bylaws so adopted, the bylaws of the electric membership corporation shall remain in effect during any such emergency; and upon the termination of the emergency, the emergency bylaws shall cease to be operative.

(e) Unless otherwise provided in the emergency bylaws, notice of any meeting of the board of directors during any such emergency may be given

only to such of the directors as it may be feasible to reach at the time and by such means as may be feasible at the time, including publication, radio, or television.

(f) To the extent required to constitute a quorum at any meeting of the board of directors during any such emergency, the officers of the electric membership corporation who are present, unless otherwise provided in the emergency bylaws, shall be deemed, in order of rank and within the same rank in order of seniority, directors for such meeting.

(g) No officer, director, agent, or employee acting in accordance with any emergency bylaws shall be liable except for willful misconduct. No officer, director, agent, or employee shall be liable for any action taken by him in good faith in such an emergency in furtherance of the ordinary business affairs of the electric membership corporation, even though such action is not authorized by the bylaws then in effect.

(h) If emergency bylaws have not been adopted by an electric membership corporation, action by members, directors, officers, agents, or employees during any emergency described in subsection (a) of this Code section shall be valid if it is substantially in compliance with this Code section or if it is otherwise practical and necessary for the emergency operation and management of the business. (Code 1933, § 34C-707, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

C.J.S. — 18 C.J.S., Corporations,
§§ 110-121.

PART 8

OPERATION OF ELECTRIC MEMBERSHIP CORPORATIONS GENERALLY

46-3-340. Nonprofit operation of electric membership corporations required; rates and fees to cover costs of operation and interest payments and for maintaining reserves; bylaw provisions concerning revenues, assets, and member classification.

(a) Each electric membership corporation shall be operated without profit to its members; but the rates, fees, rents, or other charges for electric energy and any other facilities, supplies, equipment, or services furnished by the electric membership corporation shall be sufficient at all times:

(1) To cover all administrative and operating expenses and the costs of purchased capacity and energy as necessary or desirable for the prudent conduct of its business, and to cover the payments of the principal of and interest on the obligations issued or assumed by the electric membership corporation in the performance of the purposes for which it was organized; and

(2) To establish and maintain reasonable reserves.

(b) An electric membership corporation may also accumulate funds for future capital needs and for the purpose of establishing and maintaining a reasonable capital structure.

(c) The bylaws of an electric membership corporation shall contain provisions, consistent with subsection (a) of this Code section, for accounting for, allocating, assigning and disposing of its revenues and assets and may establish classes of members for such purposes. (Ga. L. 1937, p. 644, §§ 12, 14; Ga. L. 1953, Nov.-Dec. Sess., p. 359, § 1; Code 1933, § 34C-801, enacted by Ga. L. 1981, p. 1587, § 1.)

Code Commission notes. — Georgia Laws 1937, p. 644, contained two provisions which were designated as “Section 14,” one such provision appearing on page 653 and the

other appearing on page 654. The provision appearing on page 653 is codified at this section and the provision appearing on page 654 is codified at §§ 46-3-360, 46-3-361.

JUDICIAL DECISIONS

Members disqualified from serving as jurors in action against corporation. — The members of an electric membership corporation are in the same position as the stockholders of a corporation or the policy holders of a mutual insurance company as regards their right to share in the net earnings of the business; accordingly, the members of an electric membership corporation are disqualified from service as jurors in the trial of a case in which damages are sought

from the corporation. *Thompson v. Sawnee Elec. Membership Corp.*, 157 Ga. App. 561, 278 S.E.2d 143 (1981).

Cited in *Flint Elec. Membership Corp. v. Posey*, 78 Ga. App. 597, 51 S.E.2d 869 (1949); *Lamar Elec. Membership Corp. v. Carroll*, 89 Ga. App. 440, 79 S.E.2d 832 (1953); *City of LaGrange v. Troup County Elec. Membership Corp.*, 200 Ga. App. 418, 408 S.E.2d 708 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 32, 33, 728. 27A Am. Jur. 2d, Energy and Power Sources, §§ 43, 45. 64 Am.

Jur. 2d, Public Utilities, § 63.

C.J.S. — 29 C.J.S., Electricity, §§ 10, 34.

46-3-341. Return of revenues upon death of member.

(a) Unless the bylaws otherwise provide, upon the death of a member or former member who is a natural person, the board of directors shall have authority, but shall not be required, to pay revenues allocated but not previously paid to that member or former member.

(b) If the member or former member dies testate, such payments shall be made to the person who is the executor of the estate of the decedent at the time of the payment.

(c) If the member or former member dies intestate and the electric membership corporation is provided a copy of letters of administration for

the estate of the decedent, such payments shall be made to the administrator of the estate named therein.

(d) If the member or former member dies intestate and the electric membership corporation is not provided a copy of letters of administration of the estate of the deceased and such payment is \$2,500.00 or less, such payment shall be made to the persons listed below and according to the priority indicated:

- (1) To the surviving spouse of the decedent;
- (2) If no surviving spouse, then to the surviving children of the decedent, pro rata;
- (3) If no surviving children, then to the surviving mother and father of the decedent, pro rata;
- (4) If no surviving parent, then to the surviving brothers and sisters of the decedent, pro rata.

(e) If the member or former member dies intestate and the electric membership corporation is not provided a copy of the letters of administration and such payment is greater than \$2,500.00, such payment shall be made to the person entitled thereto under the laws of descent and distribution of this state.

(f) Payment to the persons listed in subsections (b) through (e) of this Code section shall operate as a complete acquittal and discharge to the electric membership corporation from any action, claim, or demand of whatever nature for the amount so paid by any heir, distributee, or creditor of the decedent or any other person. Payment to such persons is authorized to be made as provided in subsections (d) and (e) of this Code section without the administration of the estate of the decedent and without the necessity of obtaining an order that no administration is necessary. (Ga. L. 1971, p. 760, § 1; Code 1933, § 34C-802, enacted by Ga. L. 1981, p. 1587, § 1.)

PART 9

AMENDMENT AND RESTATEMENT OF ARTICLES OF INCORPORATION OF ELECTRIC MEMBERSHIP CORPORATIONS

46-3-360. Right of electric membership corporation to amend articles of incorporation.

An electric membership corporation may amend its articles of incorporation from time to time in any and in as many respects as may be desired, so long as the amendment contains only such provisions as might lawfully be contained in original articles of incorporation at the time of making such amendment. (Ga. L. 1937, p. 644, § 14; Ga. L. 1957, p. 604, § 3; Ga. L.

1980, p. 72, § 5; Code 1933, § 34C-901, enacted by Ga. L. 1981, p. 1587, § 1.)

Code Commission notes. — Georgia Laws 1937, p. 644, contained two provisions which were designated as “Section 14,” one such provision appearing on page 653 and the other appearing on page 654. The provision

appearing on page 653 is codified at § 46-3-340 and the provision appearing on page 654 is codified at this section and § 46-3-361.

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, § 79.

C.J.S. — 18 C.J.S., Corporations, § 38. 29 C.J.S., Electricity, § 12.

46-3-361. Procedure to amend articles of incorporation generally.

(a) Before the electric membership corporation has any members, amendments to the articles of incorporation may be made:

(1) Before the organization meeting of the directors, by the incorporator or, if there is more than one incorporator, then by two-thirds of the incorporators; and

(2) At or after the organization meeting of the directors named in the articles of incorporation, by two-thirds of the directors.

(b) After the electric membership corporation has members, amendments to the articles of incorporation shall be made in the following manner:

(1) The board of directors shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of members, which may be either an annual or a special meeting;

(2) Written notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to each member of record entitled to vote thereon within the time and in the manner provided in Code Section 46-3-263 for the giving of notice of meetings of members. If the meeting is an annual meeting, the proposed amendment or such summary may be included in the notice of such annual meeting;

(3) At such meeting a vote of the members shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of a majority of the members present and voting at a meeting at which a quorum is present.

(c) Any number of amendments may be submitted to the members and may be voted upon by them at one meeting. (Ga. L. 1937, p. 644, § 14; Ga. L. 1957, p. 604, § 3; Ga. L. 1980, p. 72, § 5; Code 1933, § 34C-902, enacted by Ga. L. 1981, p. 1587, § 1.)

Code Commission notes. — Georgia Laws 1937, p. 644, contained two provisions which were designated as “Section 14,” one such provision appearing on page 653 and the other appearing on page 654. The provision

appearing on page 653 is codified at § 46-3-340 and the provision appearing on page 654 is codified at § 46-3-360 and this section.

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 80-95.

C.J.S. — 18 C.J.S., Corporations, § 38.

46-3-362. Manner of execution of articles of amendment; contents of articles of amendment.

(a) The articles of amendment, other than an amendment under subsection (b) of this Code section, shall be executed by the electric membership corporation as provided in Code Section 46-3-173 and shall set forth:

- (1) The name of the electric membership corporation;
- (2) The amendment so adopted;
- (3) The date of the adoption of the amendment by the members; and
- (4) The member vote required to adopt the amendment, the number of members entitled to vote, and the number of members who voted for the amendment.

(b) If the amendment is made by the incorporator or incorporators or directors before the electric membership corporation has any members, the articles of amendment shall be executed by the incorporator or incorporators or directors, as the case may be, and shall set forth:

- (1) The name of the electric membership corporation;
- (2) The amendment so adopted and the date of adoption; and
- (3) A statement that the amendment is made by the incorporator or incorporators or directors before the electric membership corporation has any members. (Code 1933, § 34C-903, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-363. Obtaining of certificate from Secretary of State upon amendment of name of electric membership corporation; filing articles of amendment; issuance of certificate of amendment; forwarding of copy of certificate to superior court; rejection of articles of amendment; publication of notice.

(a) If the purpose or one of the purposes of the articles of amendment is to change the corporate name, the electric membership corporation shall

cause to be obtained from the Secretary of State a certificate which states that the proposed name is available in accordance with Code Section 46-3-220. Such certificate shall be issued upon application to reserve the use of the proposed name as provided in Code Section 46-3-221 and shall be valid for the period provided in that Code section, including any extension of such period granted by the Secretary of State. Upon the expiration of such period or any extension thereof, the certificate shall become void unless the amendment changing the corporate name shall have become effective within such time.

(b) The electric membership corporation shall cause the original articles of amendment and two conformed copies of the articles to be delivered to the Secretary of State for filing as provided in subsection (a) of Code Section 46-3-174.

(c) Together with the articles of amendment, the electric membership corporation shall cause to be delivered to the Secretary of State:

(1) If subsection (a) of this Code section is applicable, the certificate issued by the Secretary of State reserving the proposed corporate name;

(2) Payment to the Secretary of State of the fee provided for in Code Section 46-3-501;

(3) A check, draft, or money order in the amount of \$16.00, payable to the clerk of the superior court of the county where the registered office of the electric membership corporation is located on the day of delivery of the articles of amendment to the Secretary of State, in payment of the cost of filing the articles of amendment in said county;

(4) A letter addressed to the publisher of a newspaper which is the official organ of the county where the registered office of the electric membership corporation is located or which is a newspaper of general circulation published within that county whose most recently published annual statement of ownership and circulation reflects a minimum of 60 percent paid circulation. This letter shall contain a notice to be published four times in the newspaper and shall be in substantially the following form:

(Name and address of the newspaper designated by the electric membership corporation)

Dear Sirs:

You are requested to publish, four times, a notice in the following form:

“The Articles of Incorporation of _____ (name of electric membership corporation) have been duly amended on _____, _____ (month, day, and year to be inserted by the Secretary of State), by the issuance of a certificate of amendment by the

Secretary of State, in accordance with the applicable provisions of Article 4 of Chapter 3 of Title 46, the 'Georgia Electric Membership Corporation Act.'"

Enclosed is a (check, draft, or money order) in the amount of \$60.00 in payment of the cost of publishing this notice.

Very truly yours,

(Name and address of the electric membership corporation or its representative)

(5) A check, draft, or money order in the amount of \$60.00 payable to the designated newspaper.

(d) Upon delivery of the articles of amendment to the Secretary of State, the Secretary of State shall affix thereon the hour, day, month, and year of delivery. Not later than the close of business on the first business day following the day of delivery, the Secretary of State shall either issue a certificate of amendment in the manner provided in this Code section or reject the articles in the manner provided in this Code section.

(e) If the Secretary of State finds that the articles of amendment appear to be in proper form for filing and are accompanied by the other items required by subsection (c) of this Code section, he shall, in addition to the requirements of subsection (a) of Code Section 46-3-174:

(1) Issue a certificate of amendment which shall state that the articles of incorporation have been duly amended by the filing of articles of amendment in the office of the Secretary of State and the fees paid therefor, as provided by law, and attach the certificate to one conformed copy of the articles of amendment;

(2) Return the certificate of amendment with the conformed copy of the articles of amendment attached thereto to the electric membership corporation or its representative. A copy of the certificate of amendment shall be attached to the original articles of amendment;

(3) Forward a conformed copy of the articles of amendment with a copy of the certificate of amendment attached thereto, along with the check, draft, or money order provided for in paragraph (3) of subsection (c) of this Code section, to the clerk of the superior court of the county where the registered office of the electric membership corporation is located, within four business days after the articles of amendment have been delivered to the Secretary of State for filing; and

(4) Mail the letter and the check, draft, or money order provided for in paragraphs (4) and (5) of subsection (c) of this Code section, with the date inserted in the notice, to the designated newspaper within four

business days after the articles of amendment have been delivered to the Secretary of State for filing.

(f) If the Secretary of State finds that the articles of amendment do not appear to be in proper form for filing or are not accompanied by the other items required by subsection (c) of this Code section, he shall reject the articles for filing and shall immediately notify the electric membership corporation or its representative of such rejection by mailing a notice no later than the close of business on the first business day following the day of delivery of the articles of amendment for filing. Said notice shall specify the reason or reasons for rejection of the articles of amendment, and said articles and all accompanying materials shall be returned therewith.

(g) The conformed copy of the articles of amendment, with a copy of the certificate of amendment attached thereto, as provided for in paragraph (3) of subsection (e) of this Code section, shall be filed upon receipt by the clerk of the superior court of the county where the registered office of the electric membership corporation is located. Failure on the part of the Secretary of State to mail the conformed copy of the articles of amendment or failure on the part of the clerk of the superior court to comply with this subsection shall not invalidate the issuance of the certificate of amendment by the Secretary of State.

(h) The notice provided for in paragraph (4) of subsection (c) of this Code section shall be published within ten days after receipt of the notice by the newspaper. Failure on the part of the Secretary of State to mail the notice or failure on the part of the newspaper to comply with this subsection shall not invalidate the issuance of the certificate of amendment by the Secretary of State. (Ga. L. 1937, p. 644, § 14; Ga. L. 1957, p. 604, § 3; Ga. L. 1980, p. 72, § 5; Code 1933, § 34C-904, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 88, 95, 208, 209, 211, 213.

C.J.S. — 18 C.J.S., Corporations, §§ 38, 39.

46-3-364. Time of effectiveness of amendment; effect of amendment on pending causes of action.

(a) If the Secretary of State issues a certificate of amendment, the amendment shall become effective as of the time of delivery to the Secretary of State of the articles of amendment so certified; and the articles of incorporation shall be deemed to be amended accordingly.

(b) No amendment shall affect any existing cause of action in favor of or against such electric membership corporation, or any pending action to which such electric membership corporation is a party, or the existing rights of persons other than members; and, in the event the corporate name is

changed by amendment, no action brought by or against such electric membership corporation under its former name shall abate for that reason. (Code 1933, § 34C-905, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-365. Restated articles of incorporation.

(a) An electric membership corporation may at any time restate its articles of incorporation as theretofore amended.

(b) If the restated articles restate the text of the original articles as theretofore amended, without making any further amendment or change, the restated articles may be adopted by the board of directors without a vote of the members. In the alternative, the board may submit the proposed restated articles to the members for approval in accordance with Code Section 46-3-361 relating to amendments of the articles of incorporation.

(c) Any amendment or amendments to the articles of incorporation may be adopted in the form of restated articles of incorporation. In such case the restated articles shall be submitted to the members for approval in accordance with Code Section 46-3-361 relating to amendments of the articles of incorporation.

(d) Upon adoption or approval of the proposed restated articles by the directors or the members, as the case may be, restated articles of incorporation shall be executed by the corporation as provided in Code Section 46-3-173, and shall set forth:

(1) All provisions required by Code Section 46-3-321 to be included in original articles of incorporation at the time of restatement, except for the omissions expressly permitted by subsection (e) of this Code section;

(2) If the restated articles of incorporation restate the text of the original articles of incorporation as theretofore amended without making any further amendment or change, that the restatement purports merely to restate but not to change the original articles of incorporation as theretofore amended and that there is no discrepancy, other than that expressly permitted by subsection (e) of this Code section, between the provisions of the original articles of incorporation and the provisions of the restated articles;

(3) If any amendment or amendments to the articles of incorporation are adopted in the form of restated articles of incorporation, that the restatement purports merely to restate all those provisions then in effect not being amended by such new amendment or amendments;

(4) The date upon which the restatement was authorized by the directors or the members, as the case may be;

(5) If the restatement was authorized by the directors without a vote of the members, the director vote required to adopt the restatement and the number of directors who voted for the restatement;

(6) If the restatement was authorized by the members, the member vote required to adopt the restatement, the number of members entitled to vote, and the number of members who voted for the restatement; and

(7) That the restated articles supersede the original articles of incorporation as theretofore amended.

(e) Restated articles of incorporation need not include statements as to the incorporator, the initial board of directors, the address of the initial registered office, or the name of the initial registered agent.

(f) The electric membership corporation shall cause the original restated articles of incorporation and two conformed copies of the restated articles to be delivered to the Secretary of State for filing as provided in subsection (a) of Code Section 46-3-174.

(g) Together with restated articles of incorporation, the electric membership corporation shall cause to be delivered to the Secretary of State:

(1) If subsection (c) of this Code section is applicable and if the purpose of the amendment or of one of the amendments to the articles of incorporation is to change the corporate name, the certificate issued by the Secretary of State reserving the proposed corporate name;

(2) Payment to the Secretary of State of the fee provided for in Code Section 46-3-501;

(3) If subsection (c) of this Code section is applicable, a letter containing a notice for legal publication substantially in the form provided in paragraph (4) of subsection (c) of Code Section 46-3-363 and a check, draft, or money order in the amount of \$60.00 payable to the designated newspaper; and

(4) A check, draft, or money order in the amount of \$16.00, payable to the clerk of the superior court of the county where the registered office of the electric membership corporation is located on the day of delivery of the restated articles of incorporation to the Secretary of State, in payment of the cost of filing the restated articles of incorporation in that county.

(h) Upon delivery of the restated articles of incorporation to the Secretary of State, the Secretary of State shall affix thereon the hour, day, month, and year of delivery. Not later than the close of business on the first business day following the day of delivery, the Secretary of State shall either issue a restated certificate of incorporation in the manner provided in this Code section or reject the restated articles in the manner provided in this Code section.

(i) If the Secretary of State finds that the restated articles of incorporation appear to be in proper form for filing and are accompanied by the

other items required by subsection (g) of this Code section, he shall, in addition to the requirements of subsection (a) of Code Section 46-3-174:

(1) Issue a restated certificate of incorporation which shall state that the articles of incorporation, as theretofore amended, have been restated and, where subsection (c) of this Code section is applicable, have been amended by the filing of restated articles of incorporation in the office of the Secretary of State and the fees paid therefor, as provided by law, and attach the certificate to one conformed copy of the restated articles of incorporation;

(2) Return the restated certificate of incorporation with the conformed copy of the restated articles of incorporation attached thereto to the electric membership corporation or its representative. A copy of the restated certificate of incorporation shall be attached to the original restated articles of incorporation;

(3) Forward a conformed copy of the restated articles of incorporation with a copy of the restated certificate of incorporation attached thereto, along with the check, draft, or money order provided for in paragraph (4) of subsection (g) of this Code section, to the clerk of the superior court in the county where the registered office of the electric membership corporation is located, within four business days after the restated articles of incorporation have been delivered to the Secretary of State for filing; and

(4) If subsection (c) of this Code section is applicable, mail the letter and the check, draft, or money order provided for in paragraph (3) of subsection (g) of this Code section, with the appropriate date inserted in the notice, to the designated newspaper within four business days after the restated articles of incorporation have been delivered to the Secretary of State for filing.

(j) If the Secretary of State finds that the restated articles of the electric membership corporation do not appear to be in proper form for filing or are not accompanied by the other items required by subsection (g) of this Code section, he shall reject the articles for filing and shall immediately notify the electric membership corporation or its representative of such rejection by mailing a notice no later than the close of business on the first business day following the day of delivery of the restated articles of incorporation for filing. Such notice shall specify the reason or reasons for rejection of the restated articles; and all accompanying materials shall be returned therewith.

(k) The conformed copy of the restated articles of incorporation, with a copy of the restated certificate of incorporation attached thereto, as provided for in paragraph (3) of subsection (i) of this Code section, shall be filed upon receipt by the clerk of the superior court of the county where the registered office of the electric membership corporation is located. Failure

on the part of the Secretary of State to mail the conformed copy of the restated articles of incorporation or failure on the part of the clerk of the superior court to comply with this subsection shall not invalidate the issuance of the restated certificate of incorporation by the Secretary of State.

(l) The notice provided for in paragraph (3) of subsection (g) of this Code section shall be published within ten days after receipt of the notice by the newspaper. Failure on the part of the Secretary of State to mail the notice or failure on the part of the newspaper to comply with this subsection shall not invalidate the issuance of the restated certificate of incorporation by the Secretary of State.

(m) If the Secretary of State issued a restated certificate of incorporation, the restated articles of incorporation shall become effective as of the time of delivery to the Secretary of State of the restated articles so certified; and the restated articles shall supersede the original articles of incorporation as theretofore amended.

(n) When a restatement has been effected without a vote of the members, as permitted by subsection (b) of this Code section, that fact shall be disclosed in the next report furnished by the electric membership corporation to all its members and in any event to all of its members within 12 months of the effective date of such restatement. (Ga. L. 1937, p. 644, § 14; Ga. L. 1957, p. 604, § 3; Ga. L. 1980, p. 72, § 5; Code 1933, § 34C-906, enacted by Ga. L. 1981, p. 1587, § 1.)

PART 10

MERGERS AND CONSOLIDATIONS INVOLVING ELECTRIC MEMBERSHIP CORPORATIONS AND FOREIGN ELECTRIC COOPERATIVES

46-3-380. Procedure for merger generally.

(a) Any two or more electric membership corporations may merge into one of such electric membership corporations pursuant to a plan of merger approved in the manner provided in this part.

(b) The board of directors of each electric membership corporation participating in the merger shall, by resolution adopted by each such board, approve a plan of merger setting forth:

(1) The names of the electric membership corporations proposing to merge, and the name of the electric membership corporation into which they propose to merge, which shall be referred to in this part as the surviving electric membership corporation;

- (2) The terms and conditions of the proposed merger;
- (3) The manner and basis of converting the membership interests into membership interests, rights, obligations, or securities of the surviving electric membership corporation or of any other corporation or, in whole or in part, into cash or other property;
- (4) A statement of any changes in the articles of incorporation of the surviving electric membership corporation to be effected by such merger; and
- (5) Such other provisions with respect to the proposed merger as are deemed necessary or desirable. (Code 1933, § 34C-1001, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2614, 2615, 2621, 2623.

C.J.S. — 19 C.J.S., Corporations, §§ 792-806.

46-3-381. Procedure for consolidation generally.

- (a) Any two or more electric membership corporations may consolidate into a new electric membership corporation pursuant to a plan of consolidation approved in the manner provided in this part.
- (b) The board of directors of each electric membership corporation participating in the consolidation shall, by a resolution adopted by each such board, approve a plan of consolidation setting forth:
 - (1) The names of the electric membership corporations proposing to consolidate and the name of the new electric membership corporation into which they propose to consolidate, which shall be referred to in this article as the new electric membership corporation;
 - (2) The terms and conditions of the proposed consolidation;
 - (3) The manner and basis of converting the membership interests into membership interests, rights, obligations, or securities of the new electric membership corporation or any other corporation or, in whole or in part, into cash or other property;
 - (4) With respect to the new electric membership corporation, all of the statements required to be set forth in articles of incorporation for electric membership corporations organized under this article; and
 - (5) Such other provisions with respect to the proposed consolidation as are deemed necessary or desirable. (Ga. L. 1937, p. 644, § 15; Ga. L. 1980, p. 72, § 6; Code 1933, § 34C-1002, enacted by Ga. L. 1981, p. 1587, § 1.)

JUDICIAL DECISIONS

Cited in Lamar Elec. Membership Corp. v. Carroll, 89 Ga. App. 440, 79 S.E.2d 832 (1953).

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2614, 2615, 2621, 2623. 27A Am. Jur. 2d, Energy and Power Sources, § 20. **C.J.S.** — 29 C.J.S., Electricity, § 10.

46-3-382. Approval of merger or consolidation plan by members.

(a) The board of directors of each electric membership corporation, upon approving such plan of merger or plan of consolidation, shall by resolution direct that the plan be submitted to a vote at a meeting of members, which may be either an annual or special meeting.

(b) Written notice shall be given to each member not less than 30 days before such meeting, in the manner provided in Code Section 46-3-263 for the giving of notice of meetings of members, and, regardless of whether the meeting is an annual or a special meeting, shall state that the purpose or one of the purposes is to consider the proposed plan of merger or consolidation. Such notice shall include:

(1) A copy of the plan of merger or consolidation or an outline of the material features of the plan; and

(2) A copy of the most recent annual balance sheet and annual profit and loss statement, or comparable financial statements, of each of the merging or consolidating electric membership corporations.

If an electric membership corporation which is a party to any such plan provides retail service, notice that the merger is proposed and of the times and places of the proposed meetings of members for the purpose of voting on the merger shall be delivered not less than 30 days nor more than 90 days before such meeting to the publisher of each newspaper which is the official organ of each county in which each electric membership corporation provides service or to the publisher of one or more newspapers of general circulation published within each such county whose most recently published annual statement of ownership and circulation reflects a minimum of 60 percent paid circulation, together with a check, draft, or money order in the amount of \$15.00 in payment of the cost of publishing such notice and a request that such notice be published one time as soon as practicable, but in any event within ten days after receipt of the notice by the newspaper.

(c) At each such meeting, a vote of the members shall be taken on the proposed plan of merger or consolidation. The proposed plan shall be

adopted upon receiving at least two-thirds of the votes of the members present and voting, at a meeting at which a quorum is present.

(d) After the plan of merger or consolidation has been approved and at any time prior to the issuance of the certificate of merger or certificate of consolidation by the Secretary of State as provided in subsection (f) of Code Section 46-3-383, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation. (Ga. L. 1937, p. 644, § 15; Ga. L. 1980, p. 72, § 6; Code 1933, § 34C-1003, enacted by Ga. L. 1981, p. 1587, § 1; Ga. L. 1984, p. 22, § 46.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2612, 2618.

46-3-383. Contents of articles of merger or articles of consolidation; obtaining of certificate from Secretary of State upon use of new name; procedures involving filing, issuance, rejection, and publication of articles of merger or articles of consolidation.

(a) Articles of merger or articles of consolidation shall be executed by each electric membership corporation, as provided in Code Section 46-3-173, and shall set forth:

(1) The plan of merger or the plan of consolidation, including the proposed name of the surviving or new electric membership corporation, which name may be that of any of the merging or consolidating electric membership corporations or any other available name permitted under this article;

(2) As to each consolidating electric membership corporation and as to each merging electric membership corporation the members of which voted on such plan, a statement of the member vote required to adopt the plan of merger or consolidation, the number of members entitled to vote, and the vote for the plan; and

(3) The effective time and date of the merger or consolidation if the effective time and date of the merger or consolidation is to be after the delivery of the articles of merger or articles of consolidation to the Secretary of State, as provided in subsection (a) of Code Section 46-3-384.

(b) If the proposed name of the surviving or new electric membership corporation is not that of any of the merging or consolidating electric membership corporations, any one of those electric membership corporations shall obtain from the Secretary of State a certificate which states that such name is available in accordance with Code Section 46-3-220. Such certificate shall be issued upon application to reserve the use of the proposed corporate name as provided in Code Section 46-3-221 and shall be

valid for the period provided in Code Section 46-3-221, including any extension of such period granted by the Secretary of State. Upon the expiration of such period or any extension thereof, the certificate shall become void unless a certificate of merger or certificate of consolidation shall have been issued by the Secretary of State within such time.

(c) The merging or consolidating electric membership corporations shall cause the original articles of merger or the original articles of consolidation and two conformed copies of the articles of merger or the articles of consolidation to be delivered to the Secretary of State for filing as provided in subsection (a) of Code Section 46-3-174.

(d) Together with the articles of merger or articles of consolidation, the merging or consolidating electric membership corporations shall cause to be delivered to the Secretary of State:

(1) If subsection (b) of this Code section is applicable, the certificate issued by the Secretary of State reserving the proposed name for the surviving or new electric membership corporation;

(2) Payment to the Secretary of State of the fee provided for in Code Section 46-3-501;

(3) A check, draft, or money order in the amount of \$16.00, payable to the clerk of the superior court of the county where the registered office of the surviving or new electric membership corporation is to be located, in payment of the cost of filing the articles of merger or articles of consolidation in that county;

(4) A letter addressed to the publisher of a newspaper which is the official organ of the county where the registered office of the surviving or new electric membership corporation is to be located or which is a newspaper of general circulation published within that county whose most recently published annual statement of ownership and circulation reflects a minimum of 60 percent paid circulation. This letter shall contain a notice to be published four times in the newspaper and shall be in substantially the following form:

(name and address of the newspaper designated by the merging or consolidating electric membership corporations)

Dear Sirs:

You are requested to publish, four times, a notice in the following form:

“A (merger) (consolidation) (has been) (will be) effected by and between _____ (name and state of incorporation of each of the constituent electric membership corporations) on _____ (month, day, and year to be inserted by the Secretary of State) by the issuance of a certificate of (merger)

(consolidation) by the Secretary of State, in accordance with the applicable provisions of Article 4 of Chapter 3 of Title 46, the 'Georgia Electric Membership Corporation Act.' The name of the (surviving electric membership corporation in the merger) (new electric membership corporation resulting from the consolidation) (is) (will be) _____ (set forth the name and state of incorporation of the surviving electric membership corporation or new electric membership corporation, as the case may be), the registered office of which (is) (will be) located at _____ (address of registered office)."

Enclosed is a (check, draft, or money order) in the amount of \$60.00 in payment of the cost of publishing this notice.

Very truly yours,

(Name and address of
merging or consolidating
electric membership cor-
porations or their rep-
resentative)

(5) A check, draft, or money order in the amount of \$60.00 payable to the designated newspaper.

(e) Upon delivery of the articles of merger or articles of consolidation to the Secretary of State, the Secretary of State shall affix thereon the hour, day, month, and year of delivery. Not later than the close of business on the first business day following the day of delivery, the Secretary of State shall either issue a certificate of merger or certificate of consolidation in the manner provided in this Code section or reject the articles in the manner provided in this Code section.

(f) If the Secretary of State finds that the articles of merger or articles of consolidation appear to be in proper form for filing and are accompanied by the other items required by subsection (d) of this Code section, he shall, in addition to the requirements of subsection (a) of Code Section 46-3-174:

(1) Issue a certificate of merger or a certificate of consolidation which shall state that the merging or consolidating electric membership corporations have been or will be duly merged or consolidated, as the case may be, and the effective date thereof, by the filing of articles of merger or articles of consolidation in the office of the Secretary of State and the fees paid therefor, as provided by law, and attach the certificate of merger or certificate of consolidation to one conformed copy of the articles of merger or articles of consolidation;

(2) Return the certificate of merger or certificate of consolidation, with the conformed copy of the articles of merger or articles of consolidation attached thereto, to the surviving or new electric member-

ship corporation, as the case may be, or its representative. A copy of the certificate shall be attached to the original articles of merger or articles of consolidation;

(3) Forward a conformed copy of the articles of merger or articles of consolidation, with a copy of the certificate of merger or certificate of consolidation, as the case may be, attached thereto, along with the check, draft, or money order provided for in paragraph (3) of subsection (d) of this Code section, to the clerk of the superior court of the county where the registered office of the surviving or new electric membership corporation is to be located, within four business days after the articles of merger or articles of consolidation have been delivered to the Secretary of State for filing; and

(4) Mail the letter and the check, draft, or money order provided for in paragraphs (4) and (5) of subsection (d) of this Code section to the designated newspaper within four business days after the articles of merger or articles of consolidation have been delivered to the Secretary of State for filing.

(g) If the Secretary of State finds that the articles of merger or articles of consolidation do not appear to be in proper form for filing or are not accompanied by the other items required by subsection (d) of this Code section, he shall reject the articles for filing and shall immediately notify the merging or consolidating electric membership corporations or their representative of such rejection by mailing a notice no later than the close of business on the first business day following the day of delivery of the articles of merger or articles of consolidation for filing. This notice shall specify the reason or reasons for rejection of the articles of merger or articles of consolidation; and the articles and all accompanying materials shall be returned therewith.

(h) The conformed copy of the articles of merger or articles of consolidation, with a copy of the certificate of merger or certificate of consolidation attached thereto, provided for in paragraph (3) of subsection (f) of this Code section shall be filed upon receipt by the clerk of the superior court of the county where the registered office of the surviving or new electric membership corporation is to be located. Failure on the part of the Secretary of State to mail the conformed copy of the articles of merger or articles of consolidation or failure on the part of the clerk of the superior court to comply with this subsection shall not invalidate the issuance of the certificate of merger or certificate of consolidation by the Secretary of State.

(i) The notice provided for in paragraph (4) of subsection (d) of this Code section and in subsection (b) of Code Section 46-3-382 shall be published within ten days after receipt of the notice by the newspaper. Failure on the part of the Secretary of State to mail the notice provided for in paragraph (4) of subsection (d) of this Code section or failure on the

part of the newspaper to comply with this subsection shall not affect the validity of the meeting of members at which the merger or consolidation is approved or the validity of the certificate of merger or certificate of consolidation issued by the Secretary of State. (Ga. L. 1937, p. 644, § 15; Ga. L. 1980, p. 72, § 6; Code 1933, § 34C-1004, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

C.J.S. — 19 C.J.S., Corporations, § 802.

46-3-384. Effect of merger or consolidation.

(a) If the Secretary of State issues a certificate of merger or certificate of consolidation, the merger or consolidation shall become effective as of the time of delivery to the Secretary of State of the articles of merger or articles of consolidation so certified, as provided in Code Section 46-3-383, or at such later time and date as the articles shall specify, not to exceed 60 days from the date of delivery of the articles to the Secretary of State.

(b) When such merger or consolidation has become effective:

(1) The several electric membership corporations which are parties to the plan of merger or consolidation shall be a single electric membership corporation, which, in the case of a merger, shall be that electric membership corporation designated in the plan of merger as the surviving electric membership corporation and, in the case of a consolidation, shall be the new electric membership corporation provided for in the plan of consolidation;

(2) The separate existence of all electric membership corporations which are parties to the plan of merger or consolidation, except the surviving or new electric membership corporation, shall cease;

(3) Such surviving or new electric membership corporation shall have all the rights, privileges, immunities, and powers and shall be subject to all the duties and liabilities of an electric membership corporation organized under this article;

(4) Such surviving or new electric membership corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises, of a public as well as of a private nature, of each of the merging or consolidating electric membership corporations; and all property, whether real, personal, or mixed, and all debts due on whatever account, and all other choses in action, and all and every other interest of or belonging to or due to each of the electric membership corporations so merged or consolidated shall be taken and deemed to be transferred to and vested in such a single electric membership corporation without further act or deed; and the title to any real estate, or any

interest therein, vested in any of such electric membership corporations shall not revert or be in any way impaired by reason of such merger or consolidation;

(5) Such surviving or new electric membership corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the electric membership corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such electric membership corporations may be prosecuted as if such merger or consolidation had not taken place; or such surviving or new electric membership corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such electric membership corporation shall be impaired by such merger or consolidation;

(6) In the case of a merger, the articles of incorporation of the surviving electric membership corporation shall be deemed to be amended to the extent, if any, that changes in its articles of incorporation are stated in the plan of merger; and, in the case of a consolidation, the statements set forth in the articles of consolidation and which are required or permitted to be set forth in the articles of incorporation of electric membership corporations organized under this article shall be deemed to be the original articles of incorporation of the new electric membership corporation. (Code 1933, § 34C-1005, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2624-2632, 2634-2636, 2639, 2640. **C.J.S.** — 19 C.J.S., Corporations, §§ 807-810.

46-3-385. Merger or consolidation of electric membership corporations and foreign electric cooperatives.

(a) One or more foreign electric cooperatives and one or more electric membership corporations may be merged or consolidated into an electric membership corporation or a foreign electric cooperative, if such merger or consolidation is permitted by the laws of the jurisdiction under which each such foreign electric cooperative is organized.

(b) With respect to procedure, including all filing and advertising requirements:

(1) Each such foreign electric cooperative shall comply with the applicable provisions of the laws of the jurisdiction under which it is organized;

(2) Each electric membership corporation shall comply with the provisions of this article relating to the merger or consolidation, as the

case may be, of electric membership corporations. If the surviving or new corporation is to be a foreign electric cooperative without a registered office in this state, the notice provided for in paragraph (4) of subsection (d) of Code Section 46-3-383 shall be published, and the conformed copy of the articles of merger or articles of consolidation provided for in paragraph (3) of subsection (f) of Code Section 46-3-383 shall be filed in the county where the registered office of any of the electric membership corporations is located.

(c) If the surviving or new corporation, as the case may be, is to be governed by the laws of any jurisdiction other than this state, it shall comply with the provisions of this article with respect to foreign electric cooperatives if it is to transact business in this state, and in every case it shall be deemed to have filed with the Secretary of State of this state:

(1) An agreement that it may be served with process in this state in any proceeding for the enforcement of any obligation of any electric membership corporation which is a party to such merger or consolidation; and

(2) An irrevocable appointment of the Secretary of State of this state as its agent to accept service of process in any such proceeding.

(d) If the surviving or new corporation is to be governed by the laws of this state, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of electric membership corporations. If the surviving or new corporation is to be governed by the laws of any jurisdiction other than this state, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of electric membership corporations except insofar as the laws of such other jurisdiction provide otherwise.

(e) At any time prior to the issuance of the certificate of merger or certificate of consolidation by the Secretary of State, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation. (Code 1933, § 34C-1006, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 1490-1514.

PART 11

SALE AND OTHER DISPOSITION OF CORPORATE ASSETS

46-3-400. Secured transactions and other dispositions of assets not requiring member approval.

(a) Unless the articles of incorporation or bylaws otherwise provide, the board of directors may authorize any of the following transactions without any vote or consent of the members:

(1) Any sale, lease, exchange, or other disposition of less than substantially all the property and assets of the electric membership corporation; and

(2) The execution and delivery of any one or more mortgages, deeds of trust, or deeds to secure debt covering, or the creation by any other means of a security interest in, any or all of the real or personal property, assets, rights, privileges, licenses, franchises, and permits of the electric membership corporation, or any interest therein, as well as the revenues therefrom, whether acquired or to be acquired, and wherever situated, for the purpose of securing the payment or performance of any one or more contracts, notes, bonds, or other obligation of the electric membership corporation.

(b) Any transaction made as permitted by this Code section without any vote or consent of the members may be upon such terms and conditions and for such consideration as the board may deem to be in the best interests of the electric membership corporation. (Code 1933, § 34A-128a, enacted by Ga. L. 1950, p. 233, § 3; Ga. L. 1953, Nov.-Dec. Sess., p. 359, § 2; Ga. L. 1970, p. 555, § 1; Code 1933, § 34C-1101, enacted by Ga. L. 1981, p. 1587, § 1.)

Editor's notes. — The “Electric Membership Corporation Act” was enacted by Ga. L. 1937, p. 644, and was unofficially codified at Title 34A of the 1933 Code. Georgia Laws 1950, p. 233, § 2 amended the 1937 Act by adding a section designated as § 34A-128a, which was unofficially codified at § 34A-128.1. In 1968 the General Assembly

enacted the “Georgia Municipal Election Code” (Ga. L. 1968, p. 885) and officially designated that Act as Title 34A of the 1933 Code. As a means of accommodating the 1968 Act, the “Electric Membership Corporation Act” was unofficially redesignated as Title 34B. Thus, § 34A-128.1 was unofficially redesignated as § 34B-128.1.

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2654, 2659-2668, 2670-2672, 2675, 2676, 2678, 2679.

C.J.S. — 19 C.J.S., Corporations, §§ 651-656, 672-675, 690, 691.

46-3-401. Sale, lease, exchange, or other disposition of corporate assets requiring member approval.

A sale, lease, exchange, or other disposition of all or substantially all the property and assets of an electric membership corporation, with or without the good will of the electric membership corporation, in all cases other than those dealt with in Code Section 46-3-400 may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, either real or personal, including, but not limited to, bonds or other securities of other electric membership corporations or of foreign electric cooperatives, or shares, bonds, or other securities of any other corporations, either domestic or foreign, as shall be authorized in the following manner:

(1) The board of directors shall adopt a resolution recommending such sale, lease, exchange, or other disposition, specifying to the extent that the board sees fit any or all of the terms and conditions thereof and the consideration to be received by the electric membership corporation therefor and directing the submission thereof to a vote at a meeting of members, which may be either an annual or a special meeting;

(2) Written notice shall be given to each member not less than 30 days before such meeting, in the manner provided in Code Section 46-3-263 for the giving of notice of meetings of members, and, regardless of whether the meeting is an annual or a special meeting, shall state that the purpose or one of the purposes is to consider the proposed sale, lease, exchange, or other disposition and shall fairly summarize the material features of the proposed transaction. Such written notice shall also be mailed, on the earliest date such notice is given to any member of the electric membership corporation, to any person who supplies retail electric service in this state and who has a contract with the electric membership corporation under which it is entitled to any of the output of or to be served by any facility owned in whole or in part by the electric membership corporation. If the electric membership corporation provides retail service, notice that the sale, lease, exchange, or other disposition is proposed and of the time and place of the proposed meeting of members for the purpose of voting on such disposition shall be delivered not less than 30 days nor more than 90 days before such meeting to the publisher of each newspaper which is the official organ of each county in which the electric membership corporation provides service or to the publisher of one or more newspapers of general circulation published within each such county whose most recently published annual statement of ownership and circulation reflects a minimum of 60 percent paid circulation, together with a check, draft, or money order in the amount of \$15.00 in payment of the cost of publishing such notice and a request that such notice be published one time as soon as practicable but, in any event, within ten days after receipt

of the notice by the newspaper. Such notice shall be published by each newspaper within ten days of its receipt of the notice; but failure of any newspaper to comply with such publication requirement shall not affect the validity of the meeting of members at which the disposition is approved and shall not affect the validity of the disposition.

(3) At such meeting, the members may authorize such sale, lease, exchange, or other disposition and may approve or fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the electric membership corporation therefor. Such authorization shall require the affirmative vote of a majority of the members of the electric membership corporation.

(4) After such authorization by a vote of the members, the board of directors may nevertheless in its discretion abandon such sale, lease, exchange, or other disposition of assets, subject to the rights of third parties under any contracts relating thereto, without further action or approval by the members. (Code 1933, § 34A-128a, enacted by Ga. L. 1950, p. 233, § 3; Ga. L. 1953, Nov-Dec. Sess., p. 359, § 2; Code 1933, § 34C-1102, enacted by Ga. L. 1981, p. 1587, § 1.)

Editor's notes. — The “Electric Membership Corporation Act” was enacted by Ga. L. 1937, p. 644, and was unofficially codified at Title 34A of the 1933 Code. Georgia Laws 1950, p. 233, § 2 amended the 1937 Act by adding a section designated as § 34A-128a, which was unofficially codified at § 34A-128.1. In 1968 the General Assembly

enacted the “Georgia Municipal Election Code” (Ga. L. 1968, p. 885) and officially designated that Act as Title 34A of the 1933 Code. As a means of accommodating the 1968 Act, the “Electric Membership Corporation Act” was unofficially redesignated as Title 34B. Thus, § 34A-128.1 was unofficially redesignated as § 34B-128.1.

PART 12

DISSOLUTION OF ELECTRIC MEMBERSHIP CORPORATIONS

46-3-420. Commencement of proceedings for voluntary dissolution of an electric membership corporation generally.

An electric membership corporation may be dissolved by the act of the electric membership corporation when authorized in the following manner:

(1) The board of directors shall adopt a resolution recommending that the electric membership corporation be dissolved and directing that the question of such dissolution be submitted to a vote at a meeting of the members, which may be either an annual or a special meeting;

(2) Written notice shall be given to each member not less than 30 days before such meeting, in the manner provided in Code Section 46-3-263 for the giving of notice of meetings of members and, regardless of

whether the meeting is an annual or a special meeting, shall state that the purpose or one of the purposes of such meeting is to consider the advisability of dissolving the electric membership corporation. Such written notice shall also be mailed, on the earliest date such notice is given to any member of the electric membership corporation, to any person who supplies retail electric service in this state and who has a contract with the electric membership corporation under which it is entitled to any of the output of or to be served by any facility owned in whole or in part by the electric membership corporation. If the electric membership corporation provides retail service, notice that dissolution is proposed and of the time and place of the proposed meeting of members for the purpose of voting on dissolution shall be delivered not less than 30 days nor more than 90 days before such meeting to the publisher of each newspaper which is the official organ of each county in which the electric membership corporation provides service or to the publisher of one or more newspapers of general circulation published within each such county whose most recently published annual statement of ownership and circulation reflects a minimum of 60 percent paid circulation, together with a check, draft, or money order in the amount of \$15.00 in payment of the cost of publishing such notice and a request that such notice be published one time as soon as practicable but, in any event, within ten days after receipt of the notice by the newspaper. Such notice shall be published by each newspaper within ten days of its receipt of the notice; but failure of any newspaper to comply with such publication requirement shall not affect the validity of the meeting of members at which dissolution is approved;

(3) At such meeting, a vote of the members entitled to vote thereat shall be taken on a resolution to dissolve the electric membership corporation. The resolution may fix the time within which the statement of intent to dissolve, required by this article, shall be delivered to the Secretary of State for filing and also may authorize the board to abandon dissolution proceedings and to file a statement of revocation of voluntary dissolution proceedings without further member action. Such resolution shall be adopted upon receiving the affirmative vote of a majority of the members of the electric membership corporation;

(4) Upon the adoption of such resolution, a statement of intent to dissolve shall be executed by the electric membership corporation as provided in Code Section 46-3-173, which statement shall set forth:

(A) The name of the electric membership corporation and its date and county of incorporation;

(B) The names and respective addresses of its officers;

(C) The names and respective addresses of its directors;

(D) A copy of the resolution adopted by the members authorizing the dissolution of the electric membership corporation; and

(E) The member vote required to adopt the resolution to dissolve the electric membership corporation, the number of members entitled to vote, and the vote for the resolution. (Ga. L. 1937, p. 644, § 16; Code 1933, § 34C-1201, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2733-2746, 2748, 2750-2756, 2758-2762, 2764-2766, 2770-2778, 2780, 2781, 2812, 2814-2820. **C.J.S.** — 19 C.J.S., Corporations, §§ 811-820, 822-835, 837-851.

46-3-421. Filing of statement of intent to dissolve with Secretary of State and state revenue commissioner.

The statement of intent to dissolve shall be delivered to the Secretary of State for filing as provided in Code Section 46-3-174. The electric membership corporation shall also forward a copy of such statement to the state revenue commissioner for filing. (Code 1933, § 34C-1202, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

C.J.S. — 19 C.J.S., Corporations, §§ 814, 838.

46-3-422. Effect of filing of statement of intent to dissolve.

Upon the filing by the Secretary of State of a statement of intent to dissolve, the electric membership corporation shall cease to carry on its business, except insofar as may be necessary or appropriate for the winding up thereof; but its corporate existence shall continue until the time provided in subsection (g) of Code Section 46-3-428. (Code 1933, § 34C-1203, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2817, 2819.

46-3-423. Procedure after filing statement of intent to dissolve.

(a) The electric membership corporation shall immediately cause notice of its intent to dissolve to be published in a newspaper which is the official organ of the county where the registered office of the electric membership corporation is located or which is a newspaper of general circulation published within that county whose most recently published annual statement of ownership and circulation reflects a minimum of 60 percent paid

circulation. This notice shall be published four times in the newspaper and shall be in substantially the following form:

A Statement of Intent to Dissolve _____ (name of electric membership corporation), a Georgia electric membership corporation with registered office at _____ (address of registered office), has been delivered to the Secretary of State by said electric membership corporation and filed by him on _____, _____ (month, day, and year), in accordance with the applicable provisions of Article 4 of Chapter 3 of Title 46, the "Georgia Electric Membership Corporation Act."

(b) The electric membership corporation shall proceed to collect its assets; convey and dispose of such of its properties as are not to be distributed in kind to its members and former members; pay, satisfy, and discharge its liabilities and obligations; and do all other acts required to liquidate its business and affairs and, after paying or adequately providing for the payment of all its obligations, distribute the remainder of its assets, either in cash or in kind, among its members and former members according to their respective rights and interests as such rights and interests are established under the articles of incorporation and bylaws.

(c) The electric membership corporation, at any time during the liquidation of its business and affairs, may make application to the superior court of the county where the registered office of the electric membership corporation is situated to have the liquidation continued under the supervision of the court as provided in Code Section 46-3-431. (Code 1933, § 34C-1204, enacted by Ga. L. 1981, p. 1587, § 1; Ga. L. 1999, p. 81, § 46.)

46-3-424. Revocation of voluntary dissolution proceedings by electric membership corporation.

An electric membership corporation may, at any time prior to the issuance of a certificate of dissolution by the Secretary of State as provided in subsection (d) of Code Section 46-3-428, revoke voluntary dissolution proceedings theretofore taken, in the following manner:

(1) The board of directors shall adopt a resolution recommending that the voluntary dissolution proceedings be revoked and directing that the question of such revocation be submitted to a vote at a special meeting of members;

(2) Written notice, stating that the purpose or one of the purposes of such meeting is to consider the advisability of revoking the voluntary dissolution proceedings, shall be given to each member within the time and in the manner provided in Code Section 46-3-263 for the giving of notice of special meetings of members;

(3) At such meeting, a vote of the members shall be taken on a resolution to revoke voluntary dissolution proceedings, which resolution

shall require for its adoption the affirmative vote of a majority of all the members;

(4) Upon the adoption of such resolution, a statement of revocation of voluntary dissolution proceedings shall be executed by the electric membership corporation as provided in this article, which statement shall set forth:

(A) The name of the electric membership corporation;

(B) The names and respective addresses of its officers;

(C) The names and respective addresses of its directors;

(D) A copy of the resolution adopted by the members revoking the voluntary dissolution proceedings; and

(E) The member vote required to adopt the resolution to revoke voluntary dissolution proceedings, the number of members entitled to vote, and the vote for the resolution;

(5) If the board has been authorized, in the original resolution to dissolve the electric membership corporation adopted by the members, to abandon dissolution proceedings and to file a statement of revocation of voluntary dissolution proceedings without further member action, then this statement shall be executed by the electric membership corporation as provided in Code Section 46-3-173 upon the adoption by the board of a resolution recommending that the voluntary dissolution proceedings be revoked. In such case, the statement shall set forth a copy of the resolution adopted by the board and shall briefly state why action by the members was not required; but the statement need not be responsive to subparagraphs (D) and (E) of paragraph (4) of this Code section. (Code 1933, § 34C-1205, enacted by Ga. L. 1981, p. 1587, § 1; Ga. L. 1984, p. 22, § 46; Ga. L. 1985, p. 149, § 46.)

RESEARCH REFERENCES

C.J.S. — 19 C.J.S., Corporations, § 839.

46-3-425. Filing of statement of revocation of voluntary dissolution proceedings with Secretary of State.

The statement of revocation of voluntary dissolution proceedings shall be delivered to the Secretary of State for filing as provided in Code Section 46-3-174. (Code 1933, § 34C-1206, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-426. Effect of filing of statement of revocation of voluntary dissolution proceedings.

Upon the filing by the Secretary of State of a statement of revocation of voluntary dissolution proceedings, the revocation of the voluntary dissolu-

tion proceedings shall become effective and the electric membership corporation may again carry on its business. (Code 1933, § 34C-1207, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-427. Execution of articles of dissolution; contents of articles of dissolution.

If voluntary dissolution proceedings under Code Section 46-3-420 have not been revoked, then when all debts, liabilities, and obligations of the electric membership corporation have been paid and discharged, or adequate provision has been made therefor, and all of the remaining property and assets of the electric membership corporation have been distributed to its members and former members, or adequate provision has been made therefor, articles of dissolution shall be executed by the electric membership corporation as provided in Code Section 46-3-173, which articles shall set forth:

- (1) The name of the electric membership corporation;
- (2) That the Secretary of State has theretofore filed a statement of intent to dissolve the electric membership corporation and the date on which such statement was filed;
- (3) That all debts, obligations, and liabilities of the electric membership corporation have been paid and discharged or that adequate provision has been made therefor;
- (4) That all remaining property and assets of the electric membership corporation have been distributed among its members and former members in accordance with their respective rights and interests, or that adequate provision has been made therefor, or that such property and assets have been deposited with the Department of Administrative Services as provided in Code Section 46-3-438; and
- (5) That there are no actions pending against the electric membership corporation in any court or that adequate provision has been made for the satisfaction of any judgment, order, or decree which may be entered against it in any pending action. (Code 1933, § 34C-1208, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

C.J.S. — 19 C.J.S., Corporations, §§ 837, 838.

46-3-428. Filing of articles of dissolution with Secretary of State; procedure involving filing, issuance, and rejection of certificate of dissolution; time of cessation of existence of electric membership corporation.

(a) The electric membership corporation shall cause the original articles of dissolution and two conformed copies of the articles to be delivered to the Secretary of State for filing as provided in subsection (a) of Code Section 46-3-174.

(b) Together with the articles of dissolution, the electric membership corporation shall cause to be delivered to the Secretary of State:

(1) The electric membership corporation's certification that all tax returns which were due the state on the day of delivery of the articles of dissolution to the Secretary of State have been filed, such certification to be attached to the articles;

(2) Payment to the Secretary of State of the fee provided for in Code Section 46-3-501; and

(3) A check, draft, or money order in the amount of \$16.00, payable to the clerk of the superior court of the county where the registered office of the electric membership corporation is located on the day of delivery of the articles of dissolution to the Secretary of State, in payment of the cost of filing the articles of dissolution in the county.

(c) Upon delivery of the articles of dissolution to the Secretary of State, the Secretary of State shall affix thereon the hour, day, month, and year of delivery. Not later than the close of business on the first business day following the day of delivery, the Secretary of State shall either issue a certificate of dissolution in the manner provided in this Code section or reject the articles in the manner provided in this Code section.

(d) If the Secretary of State finds that the articles of dissolution appear to be in proper form for filing and are accompanied by the other items required by subsection (b) of this Code section, he shall, in addition to the requirements of subsection (a) of Code Section 46-3-174:

(1) Issue a certificate of dissolution which shall state that the electric membership corporation has been dissolved by the filing of articles of dissolution in the office of the Secretary of State and the fees paid therefor, as provided by law, and attach the certificate to one conformed copy of the articles of dissolution;

(2) Return the certificate of dissolution with the conformed copy of the articles of dissolution attached thereto to the electric membership corporation or its representative. A copy of the certificate of dissolution shall be attached to the original articles of dissolution; and

(3) Forward a conformed copy of the articles of dissolution with a copy of the certificate of dissolution attached thereto, along with the check, draft, or money order provided for in paragraph (3) of subsection (b) of this Code section, to the clerk of the superior court in the county where the registered office of the electric membership corporation is located, within four business days after the articles of dissolution have been delivered to the Secretary of State for filing.

(e) If the Secretary of State finds that the articles of dissolution do not appear to be in proper form for filing or are not accompanied by the other items required by subsection (b) of this Code section, he shall reject the articles for filing and shall immediately notify the electric membership corporation or its representative of such rejection by mailing a notice no later than the close of business on the first business day following the day of delivery of the articles of dissolution for filing. This notice shall specify the reason or reasons for rejection of the articles of dissolution; and the articles and all accompanying materials shall be returned therewith.

(f) The conformed copy of the articles of dissolution, with a copy of the certificate of dissolution attached thereto, provided for in paragraph (3) of subsection (d) of this Code section shall be filed upon receipt by the clerk of the superior court of the county where the registered office of the electric membership corporation is located. Failure on the part of the Secretary of State to mail the conformed copy of the articles of dissolution or failure on the part of the clerk of the superior court to comply with this subsection shall not invalidate the issuance of the certificate of dissolution by the Secretary of State.

(g) If the Secretary of State issues a certificate of dissolution, and after the electric membership corporation or its representative has filed a copy of its statement of intent to dissolve with the state revenue commissioner, the existence of the electric membership corporation shall cease as of the time of delivery to the Secretary of State of the articles of dissolution so certified, except for the purpose of court actions, other proceedings, and appropriate corporate actions by members, directors, and officers as provided in Code Section 46-3-439. (Code 1933, § 34C-1209, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

C.J.S. — 19 C.J.S., Corporations, § 838.

46-3-429. Commencement of actions for involuntary dissolution of electric membership corporations by superior courts.

(a) If the Secretary of State determines that one of the situations described in subsection (b) of this Code section exists with regard to one or more electric membership corporations, the Secretary of State shall certify

to the Attorney General the names of all such electric membership corporations, together with the facts pertinent thereto. Upon receipt of the certification from the Secretary of State, the Attorney General shall mail a notice that such certification has been made, together with a statement of the facts pertinent thereto, to the registered office of the electric membership corporation or, if there is no registered office, to the last known address of the electric membership corporation, or to an officer listed on the most recent annual report filed with the Secretary of State, or, if none is listed, to any officer, director, or incorporator of the electric membership corporation, as shown by the records of the Secretary of State.

(b) In addition to any other remedies provided by law, the electric membership corporation may be dissolved involuntarily by a decree of the superior court in an action filed by the Attorney General 30 days or more after the date of mailing of the notice to the electric membership corporation under subsection (a) of this Code section, when it is established that:

(1) The electric membership corporation procured its articles of incorporation through fraud;

(2) The electric membership corporation has continued, after the written notice by the Attorney General to the electric membership corporation or one of its principal directors or officers, to violate this article in a manner likely to injure the public or the electric membership corporation's members, creditors, or debtors, except that the Attorney General shall not file such action so long as the electric membership corporation is contesting in good faith, in any appropriate judicial or administrative proceeding, the alleged violation or violations of this article upon which the certification to the Attorney General is based;

(3) The electric membership corporation has been adjudicated bankrupt;

(4) The electric membership corporation has made a general assignment for the benefit of creditors; or

(5) By leave of court, when a receiver has been appointed in any action in which the affairs of the electric membership corporation are to be wound up. (Code 1933, § 34C-1210, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, § 2819.

46-3-430. Venue and service of process in action for involuntary dissolution.

Every action for the involuntary dissolution of an electric membership corporation shall be commenced in the name of the state by the Attorney General in the superior court of the county in which the last known registered office or principal office of the electric membership corporation, as shown by the records of the Secretary of State, is situated. Process shall issue and be served as in other civil actions. (Code 1933, § 34C-1211, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2817, 2819. **C.J.S.** — 19 C.J.S., Corporations, §§ 840-842.

46-3-431. Jurisdiction of court to liquidate assets and business of electric membership corporation.

(a) The superior courts shall have full power to liquidate the assets and business of an electric membership corporation:

(1) In an action by at least 25 members or 10 percent of all of the members of the electric membership corporation, whichever is less, when it is established:

(A) That the directors are deadlocked in the management of the corporate affairs and the members are unable to break the deadlock, that irreparable injury to the electric membership corporation is being suffered or is threatened by reason thereof, and that it is impracticable for the court to appoint a provisional director as provided in Code Section 46-3-292 or to continue one in office;

(B) That the acts of the directors or those in control of the electric membership corporation are illegal or fraudulent;

(C) That the members are deadlocked in voting power and have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors; or

(D) That the corporate assets are being misapplied or wasted;

(2) In an action by a creditor:

(A) When the claim of the creditor has been reduced to judgment and an execution thereon returned unsatisfied, and it is established that the electric membership corporation is insolvent; or

(B) When the electric membership corporation has admitted in writing that the claim of the creditor is due and owing, and it is established that the electric membership corporation is insolvent; or

(3) Upon application by an electric membership corporation which has filed a statement of intent to dissolve, as provided in Code Section 46-3-420, to have its liquidation continued under the supervision of the court; or

(4) When an action has been filed by the Attorney General to dissolve an electric membership corporation and it is established that liquidation of its business and affairs should precede the entry of a decree of dissolution.

(b) Proceedings under paragraph (1), (2), or (3) of subsection (a) of this Code section shall be brought in the county in which the registered office of the electric membership corporation is situated.

(c) It shall not be necessary to make directors or members parties to any such action or proceeding unless relief is sought against them personally. (Code 1933, § 34C-1212, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2736, 2812, 2814-2816.

C.J.S. — 19 C.J.S., Corporations, § 844.

46-3-432. Procedure in liquidation of electric membership corporation by court.

(a) In proceedings to liquidate the assets and business of an electric membership corporation, the court shall have power to issue injunctions; to appoint a receiver or receivers pendente lite with such powers and duties as the court from time to time may direct; and to take such other actions as may be required to preserve the corporate assets wherever situated and carry on the business of the electric membership corporation until a full hearing can be had.

(b) After a hearing had upon such notice as the court may direct to be given to all parties to the proceedings and to any other parties in interest designated by the court, the court may appoint a liquidating receiver or receivers with authority to collect the assets of the electric membership corporation, including all amounts owing to the electric membership corporation by members. Such liquidating receiver or receivers shall have authority, subject to the order of the court, to sell, convey, and dispose of all or any part of the assets of the electric membership corporation wherever situated, either at public sale or at private sale. The assets of the electric membership corporation or the proceeds resulting from a sale, conveyance, or other disposition thereof shall be applied to the expenses of such liquidation and to the payment of the liabilities and obligations of the electric membership corporation; and any remaining assets or proceeds shall be distributed among its members and former members according to their respective rights and interests. The order appointing such liquidating

receiver or receivers shall state their powers and duties. Such powers and duties may be increased or diminished at any time during the proceedings.

(c) The court shall have power to allow from time to time, as expenses of the liquidation, compensation to the receiver or receivers and to attorneys in the proceeding and to direct the payment thereof out of the assets of the electric membership corporation or the proceeds of any sale or disposition of such assets.

(d) A receiver of an electric membership corporation appointed under this Code section shall have authority to sue and defend in all courts in his own name as receiver of such electric membership corporation. The court appointing such receiver shall have exclusive jurisdiction of the electric membership corporation and its property, wherever situated. (Code 1933, § 34C-1213, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2736, 2812, 2814, 2816.

C.J.S. — 19 C.J.S., Corporations, §§ 861-878.

46-3-433. Qualification of receivers; giving of bond.

(a) A receiver shall in all cases be a citizen of the United States or a corporation authorized to act as receiver, which corporation may be a domestic corporation, either business or nonprofit, or a foreign corporation, either business or nonprofit, authorized to transact business in this state.

(b) A receiver shall in all cases give such bond as the court may direct, with such sureties as the court may require. (Code 1933, § 34C-1214, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, § 2740, 2741, 2746. 65 Am. Jur. 2d,

Receivers, §§ 36 et seq., 74 et seq.

C.J.S. — 19 C.J.S., Corporations, § 866.

46-3-434. Filing of claims in liquidation proceedings; effect of failure to file claims.

In proceedings to liquidate the assets and business of an electric membership corporation, the court may require all creditors of the electric membership corporation to file with the clerk of the court or with the receiver, in such form as the court may prescribe, proofs under oath of their respective claims. If the court requires the filing of claims, it shall fix a date, which shall be not less than four months from the date of the order, as the last day for the filing of claims and shall prescribe the notice that shall be

given to creditors and claimants of the date so fixed. Prior to the date so fixed, the court may extend the time for the filing of claims. Creditors and claimants failing to file proofs of claim on or before the date so fixed may be barred, by order of court, from participating in the distribution of the assets of the electric membership corporation. (Code 1933, § 34C-1215, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

C.J.S. — 19 C.J.S., Corporations, §§ 872-874, 878.

46-3-435. Discontinuance of liquidation proceedings.

The liquidation of the assets and business of an electric membership corporation may be discontinued at any time during the liquidation proceedings when it is established that cause for liquidation no longer exists. In such event, the court shall dismiss the proceedings and direct the receiver to redeliver to the electric membership corporation all of its remaining property and assets. (Code 1933, § 34C-1216, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

C.J.S. — 19 C.J.S., Corporations, § 839.

46-3-436. Entry of decree of involuntary dissolution; time of cessation of existence of electric membership corporation.

In proceedings to liquidate the assets and business of an electric membership corporation, when the costs and expenses of such proceedings and all debts, obligations, and liabilities of the electric membership corporation have been paid and discharged, or adequate provision has been made therefor, and all of its remaining property and assets distributed to its members or former members, or adequate provision has been made therefor, or such property and assets have been deposited with the Department of Administrative Services as provided in Code Section 46-3-438, or if its property and assets are not sufficient to satisfy and discharge such costs, expenses, debts, and obligations and all of the property and assets have been applied so far as they will go to their payment, the court shall enter a decree dissolving the electric membership corporation. Upon the filing of the decree with the clerk of the court, the existence of the electric membership corporation shall cease. (Code 1933, § 34C-1217, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

C.J.S. — 19 C.J.S., Corporations,
§§ 840-851.

46-3-437. Filing of decree of involuntary dissolution; giving of notice of entry of decree.

(a) If the court enters a decree dissolving an electric membership corporation, it shall be the duty of the clerk of the court to cause a certified copy of the decree to be filed with the Secretary of State. No fee shall be charged by the Secretary of State for the filing of this certified copy or for giving the notice required by subsection (b) of this Code section.

(b) The Secretary of State shall give notice of the decree dissolving the electric membership corporation and of the date of its entry to:

(1) The clerk of the superior court of the county where the electric membership corporation's last known registered office or principal office, as shown by the records of the Secretary of State, is situated, if such decree has been entered by the superior court of another county; and

(2) The clerk of the superior court of the county where the electric membership corporation's articles of incorporation were filed, if such decree has been entered by the superior court of another county.

No fee shall be charged by such clerks for receiving and filing the notice required by this subsection. (Code 1933, § 34C-1218, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-438. Deposit with Department of Administrative Services of amount due unknown, disabled, or unlocatable creditors or members; disposition of unclaimed amounts; time limitation.

Upon the voluntary or involuntary dissolution of an electric membership corporation, the portion of the assets distributable to a creditor or member who is unknown or cannot be found, or who is under disability and has no known representative legally competent to receive such distributive portion, shall be reduced to cash and deposited with the Department of Administrative Services and shall be paid over to such creditor or member or to his legal representative upon proof satisfactory to the Department of Administrative Services of his right thereto. After the Department of Administrative Services has held the unclaimed cash for six months, the Department of Administrative Services shall pay such cash to the Board of Regents of the University System of Georgia, to be held without liability for profit or interest until a claim for such cash shall be filed with the Department of Administrative Services by the parties entitled thereto. No such claim shall be made more than six years after such cash is deposited with the

Department of Administrative Services. (Code 1933, § 34C-1219, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-439. Survival of remedy after dissolution.

The dissolution of an electric membership corporation in any manner, except by a decree of court when the court has supervised the liquidation of the assets and business of the electric membership corporation as provided in this article, shall not take away or impair any remedy available to or against such electric membership corporation or its directors, officers, or members for any right or claim existing, or any liability incurred, prior to such dissolution if an action or other proceeding thereon is pending on the date of such dissolution or is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the electric membership corporation may be prosecuted or defended by the electric membership corporation in its corporate name. The members, directors, and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right, or claim. (Code 1933, § 34C-1220, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-440. Revival of electric membership corporation after dissolution by expiration of period of duration.

An electric membership corporation that has been dissolved by the expiration of its period of duration but which has continued in business in ignorance of such expiration may revive its corporate existence by amending its articles of incorporation at any time during a period of 15 years immediately following the expiration date fixed by the articles of incorporation so as to extend its period of duration. As of the effective date of the amendment, the corporate existence shall be deemed to have continued without interruption from the expiration date. If during the period between expiration and revival the name of the electric membership corporation has been assumed, reserved, or registered by any other electric membership corporation, the revived electric membership corporation shall not engage in business until it has amended its articles of incorporation to change its name. (Code 1933, § 34C-1221, enacted by Ga. L. 1981, p. 1587, § 1.)

PART 13

POWERS AND DUTIES OF FOREIGN ELECTRIC COOPERATIVES TRANSACTING
BUSINESS IN STATE GENERALLY**46-3-450. Requirement of obtaining certificate of authority by foreign electric cooperative; applicability of state laws generally; acts not constituting transaction of business in this state.**

(a) No foreign electric cooperative shall have the right to transact business in this state until it shall have procured a certificate of authority to do so from the Secretary of State. No foreign electric cooperative shall be entitled to procure a certificate of authority under this article to transact in this state any business which an electric membership corporation organized under the laws of this state is not permitted to transact; and no foreign electric cooperative shall be entitled to procure a certificate of authority to transact any business in this state which under any of the laws of this state a foreign electric cooperative is not permitted to transact. Any foreign electric cooperative to which a certificate of authority is granted shall be subject to all licensing and regulatory statutes of this state relating to businesses of the kind which the foreign electric cooperative proposes to transact in this state. A foreign electric cooperative shall not be denied a certificate of authority by reason of the fact that the laws of the state under which such foreign electric cooperative is organized governing its organization and internal affairs differ from the laws of this state; and nothing contained in this article shall be construed to authorize this state to regulate the organization or the internal affairs of such foreign electric cooperative.

(b) Without excluding other activities which may not constitute transacting business in this state, a foreign electric cooperative shall not be considered to be transacting business in this state, for the purposes of qualification under this article, solely by reason of carrying on in this state any one or more of the following activities:

(1) Maintaining or defending any action or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes;

(2) Holding meetings of its directors or members or carrying on other activities concerning its internal affairs;

(3) Maintaining bank accounts, or share accounts in savings and loan associations, custodian or agency arrangements with a bank or trust company, or stock or bond brokerage accounts;

(4) Securing or collecting debts or enforcing any rights in property securing the same;

(5) Effecting transactions in interstate or foreign commerce;

(6) Owning and controlling a subsidiary electric membership corporation or other corporation incorporated in or transacting business within this state; or

(7) Conducting an isolated transaction not in the course of a number of repeated transactions of like nature.

(c) This Code section shall not be deemed to establish a standard for activities which may subject a foreign electric cooperative to taxation or to service of process under any of the laws of this state. (Code 1933, § 34C-1701, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Foreign Corporations, §§ 45 et seq., 170 et seq.	C.J.S. — 19 C.J.S., Corporations, §§ 883-887, 893-904, 907-918.
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46-3-451. Powers of foreign electric cooperatives under certificate of authority generally.

A foreign electric cooperative which has received a certificate of authority under this article shall, until a certificate of revocation or of withdrawal has been issued as provided in this article, enjoy the same, but no greater, rights and privileges as an electric membership corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, except as otherwise provided in this article, such foreign electric cooperative shall be subject to the same duties, restrictions, penalties, and liabilities imposed upon an electric membership corporation. (Code 1933, § 34C-1702, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Foreign Corporations, § 110 et seq.	C.J.S. — 19 C.J.S., Corporations, §§ 888-892, 905, 906.
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46-3-452. Name of foreign electric cooperative.

(a) No certificate of authority shall be issued to a foreign electric cooperative unless the corporate name shall be written in Roman or cursive letters or Arabic or Roman numbers and:

(1) Shall contain the word “cooperative,” “corporation,” “company,” “incorporated,” or “limited,” or shall contain an abbreviation of one of such words;

(2) Shall not contain any word or phrase which indicates or implies that the foreign electric cooperative is organized for any purpose other than one or more of the purposes permitted by its articles of incorporation;

(3) Shall not be the same as or confusingly similar to:

(A) The name of any electric membership corporation or other corporation, whether for profit or not for profit, existing under the laws of this state;

(B) The name of any foreign electric cooperative or other corporation, whether for profit or not for profit, authorized to transact business in this state;

(C) A name the exclusive right to which is at the time reserved in the manner provided in Chapter 3 of Title 14, the "Georgia Nonprofit Corporation Code," Chapter 2 of Title 14, the "Georgia Business Corporation Code," or in this article;

(D) The name of a corporation which has in effect a registration of its corporate name as provided in Chapter 2 of Title 14, the "Georgia Business Corporation Code"; or

(E) Any name prohibited by any other law of this state.

(b) Whenever a foreign electric cooperative is unable to obtain a certificate of authority to transact business in this state because its corporate name does not comply with subparagraphs (a)(3)(A) through (a)(3)(D) of this Code section, it may nonetheless apply for authority to transact business in this state by adding to its corporate name in such application a word, abbreviation, or other distinctive and distinguishing element, such as, for example, the name of the state of its incorporation in parenthesis. If in the judgment of the Secretary of State the corporate name with such addition would comply with subparagraphs (a)(3)(A) through (a)(3)(D) of this Code section, those subparagraphs shall not be a bar to the issuance to such foreign electric cooperative of a certificate of authority to transact business in this state. In such case, any such certificate issued to such foreign electric cooperative shall be issued in its corporate name with such additions; and the foreign electric cooperative shall use such corporate name with such additions in all its dealings with the Secretary of State and in the conduct of its affairs in this state.

(c) Nothing in this Code section shall:

(1) Prevent the use of the name of any electric membership corporation or other corporation, whether domestic or foreign, by a foreign electric cooperative where such electric membership corporation or corporation has consented to such use and the name of the foreign electric cooperative contains other words or characters which distinguish it from the name of the electric membership corporation or other corporation; or

(2) Abrogate or limit the law as to unfair competition or unfair trade practice nor derogate from the common law or principles of equity or the

statutes of this state or of the United States with respect to the right to acquire and protect trade names and trademarks. (Code 1933, § 34C-1703, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

C.J.S. — 19 C.J.S., Corporations, §§ 888, 889.

46-3-453. Change of name by foreign electric cooperative.

Whenever a foreign electric cooperative which is authorized to transact business in this state changes its name, such foreign electric cooperative shall, within 30 days after such change becomes effective, file an application for an amended certificate of authority in accordance with Code Section 46-3-462. If the foreign electric cooperative fails to file this application or if the name to which it has changed would be unavailable to the foreign electric cooperative on an original application for a certificate of authority, the certificate of authority of such foreign electric cooperative shall be suspended and it shall not thereafter transact any business in this state until it has filed the application or has changed its name to a name which is available to it under the laws of this state. (Code 1933, § 34C-1704, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

C.J.S. — 19 C.J.S., Corporations, § 889.

46-3-454. Contents of application for certificate of authority; submission of consent to appointment as registered agent; execution of application by officers of foreign electric cooperative.

(a) A foreign electric cooperative, in order to procure a certificate of authority to transact business in this state, shall make application therefor to the Secretary of State, which application shall set forth:

(1) The name of the foreign electric cooperative and the jurisdiction under the laws of which it is incorporated;

(2) If the name of the foreign electric cooperative does not comply with Code Section 46-3-452 relating to the corporate name, the name of the foreign electric cooperative with the word or abbreviation or other distinctive and distinguishing element which it elects to add thereto for use in this state;

(3) The date of incorporation and the period of duration of the foreign electric cooperative;

(4) The address of the principal office or registered office of the foreign electric cooperative in the jurisdiction under the laws of which it is incorporated;

(5) The address of the proposed registered office of the foreign electric cooperative in this state and the name of its proposed registered agent in this state at such address;

(6) A brief statement of the purpose or purposes which the foreign electric cooperative proposes to pursue in the transaction of business in this state;

(7) The names and respective addresses of the four principal officers of the foreign electric cooperative;

(8) A statement of the number of members of the foreign electric cooperative; and

(9) Such additional information as may be necessary or appropriate in order to enable the Secretary of State to determine whether such foreign electric cooperative is entitled to a certificate of authority to transact business in this state.

(b) The application shall be accompanied by a consent to appointment as registered agent, as provided for in subsection (c) of Code Section 46-3-457.

(c) Such application shall be made on forms prescribed and furnished by the Secretary of State and shall be executed by the foreign electric cooperative by its president or a vice-president or by its secretary or an assistant secretary. (Code 1933, § 34C-1705, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Foreign Corporations, § 72 et seq. **C.J.S.** — 19 C.J.S., Corporations, § 901.

46-3-455. Filing of application for certificate of authority; issuance of certificate of authority by Secretary of State.

(a) The application of the foreign electric cooperative for a certificate of authority shall be delivered to the Secretary of State for filing as provided in Code Section 46-3-174, together with a copy of its articles of incorporation and all amendments thereto, or, in lieu thereof, if provided by its jurisdiction of incorporation, a copy of its latest restated, composite, or consolidated articles of incorporation and all amendments subsequent thereto, either of which copy shall have been duly authenticated by the proper officer of its jurisdiction of incorporation within 90 days of the date the application is filed under this subsection.

(b) Upon filing the application, the Secretary of State shall issue and deliver to the foreign electric cooperative or its representative a certificate of authority to transact business in this state. (Code 1933, § 34C-1706, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-456. Effect of certificate of authority.

Upon the issuance of a certificate of authority by the Secretary of State, the foreign electric cooperative shall be authorized to transact business in this state for those purposes set forth in its application. Such authority shall continue so long as the foreign electric cooperative retains its authority to do such business in its jurisdiction of incorporation and so long as its authority to do business in this state has not been suspended, revoked, or surrendered as provided in this article. (Code 1933, § 34C-1707, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-457. Designation of registered office and registered agent of foreign electric cooperative; maintenance by Secretary of State of offices and agents; consent to appointment as agent.

(a) Each foreign electric cooperative authorized to transact business in this state shall have and continuously maintain in this state:

(1) A registered office which may be, but need not be, the same as its place of business in this state; and

(2) A registered agent, which agent may be a natural person resident in this state whose business office is identical with such registered office, a domestic corporation, or a foreign corporation authorized to transact business in this state, such domestic or foreign corporation having a business office identical with such registered office.

(b) The Secretary of State shall maintain current records, alphabetically arranged by corporate name, of the address of each foreign electric cooperative's registered office and of the name and address of each foreign electric cooperative's registered agent.

(c) No registered agent shall be appointed without his or its prior written consent. Such written consent shall be filed with or as part of the document first appointing any registered agent and shall be in such form as the Secretary of State may prescribe. (Code 1933, § 34C-1708, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Foreign Corporations, §§ 229, 233, 510, 531, 540.

C.J.S. — 19 C.J.S., Corporations, §§ 902, 955.

46-3-458. Change of registered office or registered agent of foreign electric cooperative.

(a) A foreign electric cooperative authorized to transact business in this state may change its registered office or change its registered agent, or both, upon filing in the office of the Secretary of State a statement setting forth:

(1) The name of the foreign electric cooperative;

(2) The address of its then registered office;

(3) If the address of its registered office is to be changed, the new address of the registered office;

(4) The name of its then registered agent;

(5) If its registered agent is to be changed, the name of its successor registered agent and the written consent of such successor agent to his or its appointment; and

(6) That the address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

(b) Such statement shall be executed by an officer of the foreign electric cooperative and delivered to the Secretary of State. If the Secretary of State finds that such statement conforms to this article, he shall file such statement in his office; and upon such filing, the change of address of the registered office or the change of the registered agent, or both, as the case may be, shall become effective.

(c) A registered agent of a foreign electric cooperative may resign as such agent upon filing a written notice thereof with the Secretary of State. The appointment of such agent shall terminate 30 days after receipt of such notice by the Secretary of State. There shall be attached to such notice an affidavit of such agent, if an individual, or, if a corporation, of an officer thereof, that at least ten days prior to the date of filing such notice a written notice of the agent's intention to resign was mailed or delivered to the president, secretary, or treasurer of the foreign electric cooperative for which such agent is acting. Upon such resignation's becoming effective, the address of the business office of the resigned registered agent shall no longer be the address of the registered office of the foreign electric cooperative.

(d) A registered agent may change his business address and the address of the registered office of any foreign electric cooperative of which he is a registered agent to another place within the same county by filing a statement as required in subsection (a) of this Code section, except that such statement need be signed only by the registered agent and need not be responsive to paragraph (5) of subsection (a) of this Code section and must recite that a copy of the statement has been mailed or delivered to a

representative of such foreign electric cooperative other than the notifying registered agent. (Code 1933, § 34C-1709, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-459. Service of process on foreign electric cooperative authorized to transact business in this state.

(a) The registered agent appointed pursuant to Code Section 46-3-458 by a foreign electric cooperative authorized to transact business in this state shall be an agent of such foreign electric cooperative upon whom any process, notice, or demand required or permitted by law to be served upon the foreign electric cooperative may be served in the manner provided by law for the service of a summons and complaint.

(b) Whenever a foreign electric cooperative doing business or having done business in this state shall fail to appoint or maintain a registered agent in this state, or whenever any such registered agent cannot with reasonable diligence be found at the registered office, or whenever the certificate of authority of a foreign electric cooperative shall be suspended or revoked, then the Secretary of State shall be an agent of such foreign electric cooperative upon whom any such process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him, or with any person having charge of the corporation's division of his office, or with any other person or persons designated by the Secretary of State to receive such service, duplicate copies of such process, notice, or demand. In the event any such process, notice, or demand is served on the Secretary of State, he shall immediately cause one of such copies thereof to be forwarded by registered or certified mail or statutory overnight delivery, addressed to the foreign electric cooperative at its principal office in the jurisdiction under the laws of which it is incorporated. Any service so had on the Secretary of State shall be answerable not more than 30 days from the date so mailed by the Secretary of State.

(c) The Secretary of State shall keep a record of all processes, notices, and demands served upon him under this Code section and shall record therein the time of such service and his action with reference thereto.

(d) Nothing contained in this Code section shall limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a foreign electric cooperative in any other manner permitted by law. (Code 1933, § 34C-1710, enacted by Ga. L. 1981, p. 1587, § 1; Ga. L. 2000, p. 1589, § 3.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to subsection (b) is applicable with respect to notices delivered on or after July 1, 2000.

RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Foreign Corporations, §§ 228 et seq., 283 et seq., 442, 493 et seq. **C.J.S.** — 19 C.J.S., Corporations, §§ 952-955, 957-961.

46-3-460. Filing of amendment to articles of incorporation of foreign electric cooperative.

Whenever the articles of incorporation of a foreign electric cooperative authorized to transact business in this state are amended, such foreign electric cooperative shall, within 30 days after such amendment becomes effective, file in the office of the Secretary of State a copy of such amendment or, in lieu thereof, if provided for by its jurisdiction of incorporation, a copy of its restated, composite, or consolidated articles of incorporation reflecting such amendment, duly certified by the proper officer of its jurisdiction of incorporation; but the filing thereof shall not of itself enlarge or alter the purpose or purposes which such foreign electric cooperative is authorized to pursue in the transaction of business in this state, nor authorize such foreign electric cooperative to transact business in this state under any other name than the name set forth in its certificate of authority. (Code 1933, § 34C-1711, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Foreign Corporations, § 95.

46-3-461. Effect of merger whereby foreign electric cooperative is surviving entity.

Whenever a foreign electric cooperative authorized to transact business in this state is a party to a statutory merger permitted by the laws of its jurisdiction of incorporation and such foreign electric cooperative is the surviving entity, it shall, within 30 days after such merger becomes effective, file with the Secretary of State a copy of the articles or agreement of merger duly certified by the proper officer of the jurisdiction under the laws of which such statutory merger was effected; and it shall not be necessary for such foreign electric cooperative to procure either a new or amended certificate of authority to transact business in this state unless the name of such foreign electric cooperative is changed thereby or unless the foreign electric cooperative desires to pursue in this state other or additional purposes than those which it is then authorized to transact in this state. (Code 1933, § 34C-1712, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Foreign Corporations, §§ 394, 574. **C.J.S.** — 19 C.J.S., Corporations, § 931.

46-3-462. Amending of certificate of authority.

(a) A foreign electric cooperative authorized to transact business in this state shall make application to the Secretary of State for an amended certificate of authority within 30 days after it:

(1) Changes its corporate name; or

(2) Enlarges, limits, or otherwise changes the purpose or purposes which it proposes to pursue in the transaction of business in this state.

(b) Such application shall be made on forms prescribed by the Secretary of State and shall be executed and filed in the same manner as an original application for a certificate of authority and shall set forth:

(1) The name of the foreign electric cooperative as it appears in its original application for a certificate of authority and the jurisdiction under the laws of which it is incorporated;

(2) The proposed amendment to its certificate of authority;

(3) If the amendment includes a change of name, a statement that the change of name has been effected under the laws of its jurisdiction of incorporation; and

(4) If the amendment enlarges, limits, or otherwise changes the business or businesses which it proposes to do in this state, a statement that it is authorized to do such business in its jurisdiction of incorporation.

(c) The issuance of an amended certificate of authority shall be governed by the same provisions, and the effect of its issuance shall be the same, as in the case of an original application for a certificate of authority. (Code 1933, § 34C-1713, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-463. Contents of application for withdrawal; execution of application and attestation by officers; obtaining of certificate from state revenue commissioner.

(a) A foreign electric cooperative authorized to transact business in this state may withdraw from this state upon procuring from the Secretary of State a certificate of withdrawal. In order to procure such certificate of withdrawal, the foreign electric cooperative shall deliver to the Secretary of State an application for withdrawal, which shall set forth:

(1) The name of the foreign electric cooperative and the jurisdiction under the laws of which it is incorporated;

(2) That the foreign electric cooperative is not transacting business in this state;

(3) That the foreign electric cooperative surrenders its authority to transact business in this state;

(4) That the foreign electric cooperative revokes the authority of its registered agent in this state to accept service of process and consents that service of process in any action or proceeding based upon any cause of action that accrued in this state during the time the foreign electric cooperative was authorized to transact business in this state thereafter may be made on such foreign electric cooperative by service thereof on the Secretary of State; and

(5) A post office address to which the Secretary of State may mail a copy of any process against the foreign electric cooperative that may be served on him.

(b) The application for withdrawal shall be made on forms prescribed and furnished by the Secretary of State and shall be executed on behalf of the foreign electric cooperative by its president or a vice-president and attested by its secretary or an assistant secretary. If the foreign electric cooperative is in the hands of a receiver or trustee, the application shall be executed on behalf of the foreign electric cooperative by such receiver or trustee.

(c) Before the Secretary of State shall issue a certificate of withdrawal, the foreign electric cooperative shall secure from the state revenue commissioner a certificate that the foreign electric cooperative has met the requirements concerning reports and taxes. (Code 1933, § 34C-1714, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Foreign Corporations, §§ 278 et seq., 298, 301, 302.

46-3-464. Filing of application for withdrawal; issuance of certificate of withdrawal; time of cessation of authority to transact business.

(a) The application for withdrawal shall be delivered to the Secretary of State for filing as provided in Code Section 46-3-174. Upon filing the application, the Secretary of State shall issue and deliver to the foreign electric cooperative or its representative a certificate of withdrawal.

(b) Upon the issuance of such certificate of withdrawal, the authority of the foreign electric cooperative to transact business in this state shall cease. (Code 1933, § 34C-1715, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Foreign Corporations, § 278.

46-3-465. Effect of termination of existence of foreign electric cooperative.

(a) When a foreign electric cooperative authorized to transact business in this state is dissolved or its authority or existence is otherwise terminated or canceled in its jurisdiction of incorporation, or when such foreign electric cooperative is merged into or consolidated with another foreign electric cooperative, the foreign electric cooperative or its successor, receiver, or trustee shall deliver for filing with the Secretary of State a certificate of the appropriate official of its jurisdiction of incorporation attesting to the occurrence of any such event or an order or decree of a court of such jurisdiction directing the dissolution of such foreign electric cooperative, the termination of its existence, or the cancellation of its authority, together with a statement of the post office address to which the Secretary of State may mail a copy of any process against the foreign electric cooperative that may be served on him.

(b) The filing of such certificate or judgment shall be done in the same manner and shall have the same effect as the filing of an application for withdrawal; and the Secretary of State shall issue a certificate of withdrawal thereon which shall be returned to the foreign electric cooperative or its representative. Upon the issuance of such certificate of withdrawal, the authority of the foreign electric cooperative to transact business in this state shall cease.

(c) Upon the issuance of such certificate of withdrawal, the Secretary of State shall be the agent of the foreign electric cooperative upon whom any process, notice, or demand may be served in any action or proceeding based upon any cause of action accruing in this state prior to the issuance of such certificate. Such service and the action thereon shall be the same as provided in this article in other cases where the Secretary of State is agent for service.

(d) Before the Secretary of State shall issue a certificate of withdrawal, the foreign electric cooperative shall secure from the state revenue commissioner a certificate that the foreign electric cooperative has met the requirements concerning reports and taxes. (Code 1933, § 34C-1716, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-466. Grounds for revocation of certificate of authority; giving notice of revocation.

(a) The certificate of authority of a foreign electric cooperative to transact business in this state may be revoked by the Secretary of State upon the conditions prescribed in this Code section when:

(1) The foreign electric cooperative has failed to file its annual report to the Secretary of State within the time required by Code Section 46-3-481, or has failed to pay any fees or penalties prescribed by this article when they have become due and payable, or has failed to file its annual license or occupation tax return on or before the day such return becomes due;

(2) The foreign electric cooperative has failed to appoint and maintain a registered agent in this state as required by Code Section 46-3-457;

(3) The foreign electric cooperative has failed, after change of its registered office or registered agent, to file in the office of the Secretary of State a statement of such change as required by Code Section 46-3-458;

(4) The foreign electric cooperative has failed to file in the office of the Secretary of State any articles of merger within the time prescribed by Code Section 46-3-461;

(5) The foreign electric cooperative has failed to make application to the Secretary of State for an amended certificate of authority under the circumstances and within the time prescribed by Code Section 46-3-462; or

(6) A misrepresentation has been made of any material matter in any application, report, affidavit, or other document submitted by such foreign electric cooperative pursuant to this article.

(b) No certificate of authority of a foreign electric cooperative shall be revoked by the Secretary of State unless:

(1) He shall have given the foreign electric cooperative not less than 60 days' notice thereof by mail addressed to its registered office in this state; and

(2) The foreign electric cooperative shall fail prior to revocation to file such annual report, or pay such fees or penalties, or file its annual license or occupation tax return, or file the required statement of change of registered agent or registered office, or file such articles of amendment or articles of merger or make application for such amended certificate of authority, or correct such misrepresentation. (Code 1933, § 34C-1717, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-467. Issuance of certificate of revocation; time of cessation of authority to transact business.

(a) Upon revoking any such certificate of authority, the Secretary of State shall:

(1) Issue a certificate of revocation in duplicate;

(2) File one of such certificates in his office; and

(3) Mail to such foreign electric cooperative at its registered office in this state or, if the foreign electric cooperative has no such registered office, at its last known address either within or without this state as shown by the records of the Secretary of State, a notice of such revocation accompanied by one of such certificates.

(b) Upon issuance of such certificate of revocation, the authority of the foreign electric cooperative to transact business in this state shall cease. (Code 1933, § 34C-1719, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-468. Application for reinstatement of certificate of authority.

(a) A foreign electric cooperative whose certificate of authority has been revoked by the Secretary of State under the conditions prescribed by Code Section 46-3-466 shall be reinstated by the Secretary of State by the issuance of a certificate of reinstatement. The certificate of reinstatement may be issued at any time within five years from the date of the certificate of revocation upon approval of an application for reinstatement executed by the foreign electric cooperative as provided in Code Section 46-3-173 and filed with the Secretary of State as provided in Code Section 46-3-174. The Secretary of State shall issue the certificate of reinstatement whenever it is established to the satisfaction of the Secretary of State that in fact there was no cause for revocation or whenever the omission or delinquency resulting in revocation has been corrected and payment made of all fees, taxes, and penalties which accrued before revocation.

(b) The application for reinstatement shall be accompanied by an amount equal to the total of all fees, taxes, and penalties which would have been payable for the years or parts thereof during the period between revocation and reinstatement and a reinstatement filing fee of \$25.00. Reinstatement shall not be authorized if the name of the foreign electric cooperative is not available in accordance with Code Section 46-3-452 unless the application for reinstatement includes an adoption of a corporate name that is available. In the event an application for reinstatement adopts a new corporate name for the foreign electric cooperative as provided in Code Section 46-3-453, the original certificate of authority shall be deemed to have been amended to change the name of the foreign electric cooperative to the name so adopted. In the event that a foreign electric cooperative amends its articles of incorporation or is a party to a merger during the period between revocation and reinstatement, it shall accompany its application for reinstatement with a duly executed copy of such amendment, or of the articles or agreement of merger, pursuant to Code Sections 46-3-460 and 46-3-461. Upon the issuance of the certificate of reinstatement, the foreign electric cooperative's authorization to transact business in this state, pursuant to its original application to transact business, shall be deemed to have continued from the date of the certificate of revocation.

(c) The application for reinstatement shall be in substantially the following form:

Application for Reinstatement of
Certificate of Authority

To: The Secretary of State

Atlanta, Georgia

Pursuant to the provisions of Code Section 46-3-468, the undersigned foreign electric cooperative hereby applies for a certificate of reinstatement of a foreign electric cooperative and, for that purpose, submits the following:

First: The name of the foreign electric cooperative at the date of the certificate of revocation was _____.

Second: The new name by which the foreign electric cooperative will hereafter be known is _____.

Third: The certificate of authority to transact business in the State of Georgia was revoked on _____ for failure to follow the requirements stated in Code Section 46-3-466.

Fourth: The address, including street and number, of its registered office in Georgia is _____; and the name of its registered agent in Georgia at that address is _____.

Fifth: The application is accompanied by all delinquent reports together with the filing fees and penalties required by Article 4 of Chapter 3 of Title 46, the "Georgia Electric Membership Corporation Act."

Date _____, _____.

(President or vice-president)

(Secretary or assistant secretary)

(Code 1933, § 34C-1718, enacted by Ga. L. 1981, p. 1587, § 1; Ga. L. 1999, p. 81, § 46.)

RESEARCH REFERENCES

Am. Jur. 2d. — 36 Am. Jur. 2d, Foreign Corporations, § 280.

46-3-469. Transacting business without certificate of authority.

(a) A foreign electric cooperative that is required under this article to obtain a certificate of authority but fails to do so shall be liable to this state for the years or parts thereof during which it transacted business in this state without a certificate of authority, in an amount equal to all fees which would have been imposed by this article upon such foreign electric cooperative

had it duly applied for and received a certificate of authority to transact business in this state as required by this article and thereafter filed all reports required by this article, plus all penalties imposed by this article. The Attorney General, at the direction of the Secretary of State, shall bring proceedings in the name of the state to recover all amounts due this state under this Code section.

(b) No foreign electric cooperative that is required under this article to obtain a certificate of authority shall be permitted to maintain any action or proceeding in any court of this state unless before commencement of the action it shall have obtained such a certificate. No action or proceeding may be maintained in any court of this state by any foreign electric cooperative that is the successor or assignee of such foreign electric cooperative on any right, claim, or demand arising out of the transaction of business by such foreign electric cooperative in this state unless before commencement of the action a certificate of authority shall have been obtained by such foreign electric cooperative or by a foreign electric cooperative which has acquired all or substantially all of its assets.

(c) The failure of a foreign electric cooperative to obtain a certificate of authority to transact business in this state shall render voidable any contract of such foreign electric cooperative arising out of business transacted in this state at the instance of any other party to such contract; but such voidability may be cured by the foreign electric cooperative's obtaining a certificate of authority, provided that such certificate of authority is obtained prior to final judgment in any action wherein this subsection is relied upon. The failure of such foreign electric cooperative to obtain a certificate of authority shall not prevent such foreign electric cooperative from defending any action or proceeding in any court of this state, nor shall any party avail himself of the benefit of subsection (b) of this Code section except upon motion prior to judgment. (Code 1933, § 34C-1720, enacted by Ga. L. 1981, p. 1587, § 1.)

PART 14

ANNUAL REPORTS

46-3-480. Requirement of annual reports by electric membership corporation and foreign electric cooperative.

(a) Each electric membership corporation and each foreign electric cooperative authorized to transact business in this state shall file, within the time prescribed by this article, an annual report setting forth:

(1) The name of the electric membership corporation or foreign electric cooperative and the jurisdiction under the laws of which it is incorporated;

(2) The address of the registered office of the electric membership corporation or foreign electric cooperative in this state and the name of its registered agent in this state at such address and, in the case of a foreign electric cooperative, the address of its principal office or registered office in the jurisdiction under the laws of which it is incorporated;

(3) The names and respective addresses of the three principal officers of the electric membership corporation or foreign electric cooperative; and

(4) Such additional information as may be necessary or appropriate as determined by the Secretary of State for the performance of his duties under this article.

(b) Such annual report shall be made on forms prescribed by the Secretary of State; and the information therein contained shall be given as of the date of the execution of the report. The Secretary of State shall mail such report forms to the last known address of each electric membership corporation and foreign electric cooperative; however, the failure of any electric membership corporation or foreign electric cooperative to receive such forms shall not relieve that electric membership corporation or foreign electric cooperative of its responsibility to obtain appropriate forms, to complete them, and to file them with the Secretary of State. In the event an electric membership corporation or foreign electric cooperative has not filed a report within two previous calendar years, the Secretary of State shall not be required to mail to such electric membership corporation or foreign electric cooperative the required forms. The report shall be executed for the electric membership corporation or foreign electric cooperative by its president, a vice-president, secretary, an assistant secretary, treasurer, or an assistant treasurer. If the electric membership corporation or foreign electric cooperative is in the hands of a receiver or trustee, the report shall be executed on behalf of the electric membership corporation or foreign electric cooperative by such receiver or trustee. (Code 1933, § 34C-1301, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 333, 339.

C.J.S. — 19 C.J.S., Corporations, § 904.

46-3-481. Filing of annual reports; correction of reports.

The annual report of an electric membership corporation or foreign electric cooperative shall be delivered to the Secretary of State between January 1 and April 1 of each year, except that the initial annual report of a foreign electric cooperative shall be filed with its application for a certificate of authority. The initial annual report of an electric membership corporation shall be filed within 90 days after the day its articles of

incorporation are delivered to the Secretary of State for filing, except that the initial annual report of an electric membership corporation whose articles of incorporation are delivered to the Secretary of State for filing subsequent to October 1 shall be filed between January 1 and April 1 of the year next succeeding the calendar year in which its certificate of incorporation was issued by the Secretary of State. Proof to the satisfaction of the Secretary of State that prior to 12:00 Midnight on the last day of such filing period such report was deposited in the United States mail in a sealed envelope, properly addressed, with first-class postage prepaid, shall be deemed a compliance with this requirement. If the Secretary of State finds that such report conforms to the requirements of this article, he shall file the same. If he finds that it does not so conform, he shall promptly return the same to the electric membership corporation or foreign electric cooperative for any necessary corrections, in which event the penalties prescribed in Code Section 46-3-540 for failure to file such report within the time provided in this Code section shall not apply if such report is corrected to conform to the requirements of this article and returned to the Secretary of State within one calendar month from the date it was returned by him to the electric membership corporation or foreign electric cooperative. (Code 1933, § 34C-1302, enacted by Ga. L. 1981, p. 1587, § 1.)

PART 15

FEES AND CHARGES

46-3-500. Authority of Secretary of State to charge and collect fees generally.

The Secretary of State shall charge and collect in accordance with this article:

- (1) Fees for filing documents and issuing certificates; and
- (2) Miscellaneous charges. (Code 1933, § 34C-1401, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-501. Fees for filing documents and issuing certificates.

The Secretary of State shall charge and collect for:

- (1) Filing articles of incorporation and issuing a certificate of incorporation \$ 15.00
- (2) Filing articles of amendment and issuing a certificate of amendment 15.00
- (3) Filing restated articles of incorporation and issuing a certificate of restated articles 15.00

(4) Filing articles of merger or consolidation and issuing a certificate of merger or consolidation	20.00
(5) Filing an application to reserve a corporate name generally	3.00
(6) Filing an application to reserve a corporate name for a period of five years pursuant to subsection (c) of Code Section 46-3-221	30.00
(7) Filing a notice of transfer of a reserved corporate name	3.00
(8) Filing a statement of change of address of registered office or change of registered agent, or both	3.00
(9) Filing a statement of intent to dissolve	1.00
(10) Filing a statement of revocation of voluntary dissolution proceedings	1.00
(11) Filing articles of dissolution	1.00
(12) Filing an application of a foreign electric cooperative for certificate of authority to transact business in this state and issuing a certificate of authority	100.00
(13) Filing an application of a foreign electric cooperative for an amended certificate of authority to transact business in this state and issuing an amended certificate of authority	20.00
(14) Filing a copy of an amendment to the articles of incorporation of a foreign electric cooperative holding a certificate of authority to transact business in this state	10.00
(15) Filing a copy of articles of merger of a foreign electric cooperative holding a certificate of authority to transact business in this state	20.00
(16) Filing an application for withdrawal of a foreign electric cooperative and issuing a certificate of withdrawal ...	10.00
(17) Filing any other statement or report, except an annual report, of an electric membership corporation or foreign electric cooperative	3.00
(18) Filing the annual report of an electric membership corporation or foreign electric cooperative	5.00

(Code 1933, § 34C-1402, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-502. Fees for furnishing certified copies of documents, instruments, and papers and for furnishing a certificate of search or a certificate of good standing.

The Secretary of State shall charge and collect:

(1) For furnishing a certified copy of any document, instrument, or paper relating to an electric membership corporation or foreign electric cooperative, 30¢ per page and \$1.00 for the certificate and affixing the seal thereto;

(2) For furnishing a certificate of search or a certificate of good standing, \$5.00;

(3) At the time of any service of process on him as resident agent of an electric membership corporation or foreign electric cooperative, \$10.00, which amount may be recovered as taxable costs by the party to the action causing such service to be made if such party prevails in the action. (Code 1933, § 34C-1403, enacted by Ga. L. 1981, p. 1587, § 1; Ga. L. 1983, p. 1474, § 4.)

46-3-503. Fees for advertising.

The fee to be allowed to publishers for publishing any notice required under this article shall be \$15.00 for each insertion. (Code 1933, § 34C-1404, enacted by Ga. L. 1981, p. 1587, § 1.)

PART 16

PROVISIONS RELATING TO THE SECRETARY OF STATE

46-3-520. Powers of Secretary of State generally.

The Secretary of State shall have such power and authority as is reasonably necessary to enable him to administer this article efficiently and to perform the duties imposed upon him by this article, including, without limitation, the power and authority to employ from time to time such additional personnel as in his judgment are required for those purposes. (Code 1933, § 34C-1503, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 72 Am. Jur. 2d, States, Territories, and Dependencies, § 62.

46-3-521. Propounding of interrogatories by Secretary of State.

The Secretary of State may propound to any electric membership corporation or foreign electric cooperative subject to this article, and to any

officer or director thereof, such interrogatories as may be reasonably necessary and proper to enable him to ascertain whether such electric membership corporation or foreign electric cooperative had complied with all of the provisions of this article applicable to such electric membership corporation or foreign electric cooperative. Such interrogatories shall be answered within 30 days after the mailing thereof or within such additional time as shall be fixed by the Secretary of State; and the answers thereto shall be full and complete and shall be made in writing and under oath. If such interrogatories are directed to an individual, they shall be answered by him; and, if directed to an electric membership corporation or foreign electric cooperative, they shall be answered by the president, a vice-president, secretary, an assistant secretary, treasurer, or an assistant treasurer thereof. The Secretary of State need not file any document to which such interrogatories relate until such interrogatories are answered as provided in this Code section and not then if the answers thereto disclose that such document is not in conformity with this article. The Secretary of State shall certify to the Attorney General, for such action as the Attorney General may deem appropriate, all interrogatories and answers thereto which disclose a violation of any of the provisions of this article. (Code 1933, § 34C-1501, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-522. Disclosure of facts and information obtained from interrogatories.

Interrogatories propounded by the Secretary of State and the answers thereto shall not be open to public inspection, nor shall the Secretary of State disclose any facts or information obtained therefrom except insofar as his official duty may require the same to be made public or in the event such interrogatories or the answers thereto are required for evidence in any criminal proceedings or in any other action by this state. (Code 1933, § 34C-1502, enacted by Ga. L. 1981, p. 1587, § 1.)

46-3-523. Notification of actions taken by Secretary of State; appeal of Secretary of State's decision to superior court; appeal by foreign electric cooperative whose certificate is revoked; appeal of decision of superior court.

(a) If the Secretary of State refuses to grant a name certificate, revokes the reservation of a corporate name as provided in subsection (e) of Code Section 46-3-221, or refuses to file any articles of incorporation, amendment, merger, consolidation, or dissolution, or any other document required by this article to be filed by the Secretary of State, he shall, within ten days after application for the name certificate is made, or his revocation of a reservation of a corporate name, or the delivery of any of the aforesaid documents to him, give written notice of his action to the person making such application, or having made such reservation of corporate name, or

delivering such document, which notice shall specify the date of and the reasons for his action.

(b) Within 40 days from the date of such action by the Secretary of State, such person may appeal to the superior court of the county in which the registered office of the electric membership corporation or foreign electric cooperative affected by such action is, or is proposed to be, situated by filing with the clerk of such court a petition setting forth a copy of such application, or of such reservation, or of the articles or other document sought to be filed, and a copy of the written notice from the Secretary of State of his action; whereupon the matter shall promptly be tried de novo by the court without a jury. The court shall either sustain the action of the Secretary of State or direct him to take such action as the court may deem proper.

(c) If the Secretary of State revokes the certificate of authority to transact business in this state of any foreign electric cooperative, pursuant to Code Sections 46-3-466 and 46-3-467, such foreign electric cooperative may appeal to the superior court of the county where the registered office of such foreign electric cooperative in this state is situated, by filing with the clerk of such court a petition setting forth a copy of its certificate of authority to transact business in this state and a copy of the notice of revocation given by the Secretary of State; whereupon the matter shall be tried de novo by the court without a jury. The court shall either sustain the action of the Secretary of State or direct him to take such action as the court may deem proper.

(d) Appeals from all final orders and judgments entered by the superior court under this Code section in review of any ruling or decision of the Secretary of State may be taken to the Court of Appeals or the Supreme Court in the same manner as in other civil cases. (Code 1933, § 34C-1504, enacted by Ga. L. 1981, p. 1587, § 1.)

PART 17

PENALTIES

46-3-540. Civil penalties for actions or omissions by electric membership corporations and foreign electric cooperatives.

(a) Each electric membership corporation and each foreign electric cooperative that fails or refuses to file its annual report for any year shall be subject to a civil penalty of \$25.00 for each year in which it so fails or refuses.

(b) Each foreign electric cooperative that transacts business in this state without authority shall, after 30 days, be subject to a civil penalty of \$500.00 for each year or part thereof during which it so transacts business.

(c) The Attorney General, at the direction of the Secretary of State, shall bring proceedings in the name of the state to enforce the penalties imposed by this Code section.

(d) When an electric membership corporation or foreign electric cooperative fails or refuses to answer truthfully and fully, within the time prescribed by Code Section 46-3-521, interrogatories propounded by the Secretary of State in accordance with Code Section 46-3-521, the Secretary of State shall certify such fact to the Attorney General and shall concurrently mail to the electric membership corporation or foreign electric cooperative at its registered office, or, if there is no registered office, at its last known address as shown by the records of the Secretary of State, a notice that such certification has been made, together with a statement of the facts pertinent thereto. Within 60 days of the date of such certification, the Attorney General shall apply in the name of the state to the superior court of the county where the registered office or principal office of the electric membership corporation, as shown by the records of the Secretary of State, is situated for an order compelling the electric membership corporation to answer the interrogatories truthfully and fully, unless prior to the filing of such application the electric membership corporation shall have so answered the interrogatories. If the electric membership corporation fails or refuses to comply with the order within 30 days from the date of its entry, such failure or refusal may be considered a contempt of that court; and the electric membership corporation may be fined therefor in any amount not exceeding \$500.00.

(e) Each foreign electric cooperative that fails to comply with Code Section 46-3-460 shall be subject to a civil penalty of \$50.00 for each such violation. (Code 1933, § 34C-1601, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 333, 339. 36 Am. Jur. 2d, Foreign Corporations, § 241.

C.J.S. — 19 C.J.S., Corporations, § 542.

46-3-541. Civil and criminal penalties for actions or omissions by officers and directors of electric membership corporations and foreign electric cooperatives.

(a) When an officer or director of an electric membership corporation or foreign electric cooperative fails or refuses within the time prescribed by Code Section 46-3-521 to answer truthfully and fully interrogatories propounded to him by the Secretary of State in accordance with Code Section 46-3-521, the Secretary of State shall certify such fact to the Attorney General and shall concurrently mail to the officer or director a notice, addressed to such officer or director at the registered office of the electric membership corporation or foreign electric cooperative, or, if there is no

such registered office, at the last known address of the electric membership corporation or foreign electric cooperative as shown by the records of the Secretary of State, that such certification has been made, together with a statement of the facts pertinent thereto. Within 60 days of the date of such certification, the Attorney General shall apply in the name of the state to the superior court of the county where the registered office or principal office of the electric membership corporation, as shown by the records of the Secretary of State, is situated for an order compelling the officer or director to answer the interrogatories truthfully and fully, unless prior to the filing of such application the officer or director shall have so answered the interrogatories. If the officer or director fails or refuses to comply with the order within 30 days from the date of its entry, such failure or refusal may be considered a contempt of that court; and the officer or director may be fined therefor in any amount not exceeding \$500.00.

(b) Each officer or director of an electric membership corporation or foreign electric cooperative who signs any articles, statement, report, application, or other document filed with the Secretary of State which is known to such officer or director to be false in any material respect shall be guilty of a misdemeanor and, upon conviction thereof, may be fined in any amount not exceeding \$500.00. (Code 1933, § 34C-1602, enacted by Ga. L. 1981, p. 1587, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 1684-1686. 36 Am. Jur. 2d, Foreign Corporations, § 281.

CHAPTER 3A

INTEGRATED RESOURCE PLANNING

Sec.		Sec.	
46-3A-1.	Definitions.		base; review of construction work in progress; verification of expenditures; recovery of costs of canceled construction.
46-3A-2.	Filing and approval of an integrated resource plan.	46-3A-8.	Recovery of actual cost of certificated long-term power purchase.
46-3A-3.	Actions prohibited without a certificate of public convenience and necessity.	46-3A-9.	Recovery of actual cost of certificated demand-side capacity option.
46-3A-4.	Issuance of a certificate of public convenience and necessity; application to include plan and cost-benefit analysis.	46-3A-10.	Effect on rates of changed revenues and risks; basis and effect of commission decision.
46-3A-5.	Application for certificate; hearing; decision; contents of certificate; fee.	46-3A-11.	Inapplicability of chapter to providers whose rates not fixed by commission.
46-3A-6.	Reexamination of a certificate of public convenience and necessity; modification or revocation.		
46-3A-7.	Construction costs as part of rate		

Law reviews. — For note on 1991 enactment of this chapter, see 8 Ga. St. U.L. Rev. 171 (1992).

For comment, “Integrated Resource Plan-

ning and Demand-Side Management In Electric Utility Regulation: Public Utility Panacea or A Waste of Energy?,” see 43 Emory L.J. 815 (1994).

46-3A-1. Definitions.

As used in this chapter:

- (1) “Capacity resource” means an electric plant, a long-term power purchase, or a demand-side capacity option.
- (2) “Commission” means the Georgia Public Service Commission.
- (3) “Construction” means clearing of land, excavation, or other substantial activity leading to the operation of an electric plant other than planning, land surveying, land acquisition, subsurface exploration, design work, licensing or other regulatory activity, contracting for construction, or environmental protection measures and activities associated therewith.
- (4) “Demand-side capacity option” means a program proposed by a utility or the commission for the reduction of future electricity requirements the utility’s Georgia retail customers would otherwise impose, including, but not limited to, conservation, load management, cogeneration, and renewable energy technologies.

(5) “Electric plant” means any facility, or the portion of a facility, that produces electricity or that, at the time application for certification is made pursuant to this chapter, is intended to produce electricity for a utility’s Georgia retail customers. “Electric plant” includes the realty and ancillary facilities for the construction of the plant.

(6) “Long-term power purchase” means a purchase of electric capacity and energy for a period exceeding one year, the principal purpose of which is to supply the requirements of the Georgia retail customers of a utility.

(7) “Plan” means an integrated resource plan which contains the utility’s electric demand and energy forecast for at least a 20 year period, contains the utility’s program for meeting the requirements shown in its forecast in an economical and reliable manner, contains the utility’s analysis of all capacity resource options, including both demand-side and supply-side options, and sets forth the utility’s assumptions and conclusions with respect to the effect of each capacity resource option on the future cost and reliability of electric service. The plan shall also:

(A) Contain the size and type of facilities which are expected to be owned or operated in whole or in part by such utility and the construction of which is expected to commence during the ensuing ten years or such longer period as the commission deems necessary and shall identify all existing facilities intended to be removed from service during such period or upon completion of such construction;

(B) Contain practical alternatives to the fuel type and method of generation of the proposed electric generating facilities and set forth in detail the reasons for selecting the fuel type and method of generation;

(C) Contain a statement of the estimated impact of proposed and alternative generating plants on the environment and the means by which potential adverse impacts will be avoided or minimized;

(D) Indicate in detail the projected demand for electric energy for a 20 year period and the basis for determining the projected demand;

(E) Describe the utility’s relationship to other utilities in regional associations, power pools, and networks;

(F) Identify and describe all major research projects and programs which will continue or commence in the succeeding three years and set forth the reasons for selecting specific areas of research;

(G) Identify and describe existing and planned programs and policies to discourage inefficient and excessive power use; and

(H) Provide any other information as may be required by the commission.

(8) "Supply-side capacity option" means an electric plant, a long-term power purchase, or any other source of additional energy.

(9) "Utility" means any electric supplier whose rates are fixed by the commission. (Code 1981, § 46-3A-1, enacted by Ga. L. 1991, p. 1696, § 1.)

46-3A-2. Filing and approval of an integrated resource plan.

(a) On or before January 31, 1992, and at least every three years thereafter as may be determined by the commission, each utility shall file with the commission an integrated resource plan as described in this chapter.

(b) Not more than 60 days after a utility has filed its plan, the commission shall convene a public hearing on the adequacy of the plan. At the hearing any interested person may make comments to the commission regarding the contents and adequacy of the plan. After the hearing, the commission shall determine whether:

(1) The utility's forecast requirements are based on substantially accurate data and an adequate method of forecasting;

(2) The plan identifies and takes into account any present and projected reductions in the demand for energy which may result from measures to improve energy efficiency in the industrial, commercial, residential, and energy-producing sectors of the state; and

(3) The plan adequately demonstrates the economic, environmental, and other benefits to the state and to customers of the utility, associated with the following possible measures and sources of supply:

(A) Improvements in energy efficiency;

(B) Pooling of power;

(C) Purchases of power from neighboring states;

(D) Facilities which operate on alternative sources of energy;

(E) Facilities that operate on the principle of cogeneration or hydro-generation; and

(F) Other generation facilities and demand-side options.

(c) Within 120 days after the filing of each integrated resource plan, the commission shall approve and adopt an integrated resource plan. (Code 1981, § 46-3A-2, enacted by Ga. L. 1991, p. 1696, § 1.)

46-3A-3. Actions prohibited without a certificate of public convenience and necessity.

(a) After January 31, 1992, no utility shall commence the construction of an electric plant, sell an existing plant or any portion thereof which is

included in the retail rate base or which has been certified, enter into a long-term purchase of electric power, or make expenditures for a demand-side capacity option for serving the utility's Georgia retail customers without having first obtained from the commission a certificate that public convenience and necessity requires, or will require, such construction, sale, purchase, or expenditure.

(b) No utility shall increase or decrease the capacity of:

- (1) A generating unit of an electric power plant;
- (2) A long-term power purchase; or
- (3) A demand-side capacity option

by more than 15 percent of its demonstrated capacity in megawatts for serving the utility's Georgia retail customers without first obtaining a certificate or an amendment to a certificate, as appropriate, that public convenience or necessity requires or will require such increase or decrease; provided, however, no certificate shall be required if the increase or decrease is caused by a rule, regulation, or law mandated by any duly constituted local, state, or federal governmental body or agency or is caused by power pooling, forced or maintenance outages, or short-term sales for a period of less than one year. (Code 1981, § 46-3A-3, enacted by Ga. L. 1991, p. 1696, § 1.)

46-3A-4. Issuance of a certificate of public convenience and necessity; application to include plan and cost-benefit analysis.

(a) The commission shall issue a certificate upon a finding that there is or will be a need for the proposed capacity resource at the time that the proposed resource is proposed to be utilized to assure an economical and reliable supply of electric power and energy for the Georgia retail customers of a utility, that the certificate is required by the public convenience and necessity, and that the certificate complies with the provisions of this chapter and the rules of the commission.

(b) The utility's application for a certificate shall be accompanied by its current integrated resource plan, whether or not previously filed.

(c) The utility's application for a certificate shall contain a cost-benefit analysis covering the estimated useful life of all capacity resource options considered in developing its current integrated resource plan. The estimated cost of the capacity resource proposed to be certificated shall be presented in such reasonable detail as the commission may require. (Code 1981, § 46-3A-4, enacted by Ga. L. 1991, p. 1696, § 1.)

46-3A-5. Application for certificate; hearing; decision; contents of certificate; fee.

(a) A utility seeking a certificate or an amendment to a certificate shall make an application to the commission which contains the information required by this chapter.

(b) No sooner than 30 days after an application is made for a certificate or an amendment, the commission shall conduct a public hearing on the application. Within 300 days after filing of the first such application and within 180 days after filing of each application thereafter, the commission shall issue an order adopting a forecast of future Georgia retail electricity requirements of the utility and describing in what manner the prospective certificate relates to the integrated resource plan and either granting the requested certificate or denying the requested certificate and authorizing a specific alternative means of supplying the requirements found by the commission to exist. Each certificate shall describe the capacity resource, its approximate construction or implementation schedule, and its approved cost. If the commission fails to so act within 300 days after the first such application has been made and within 180 days after each subsequent application has been made, the forecast application and certificate shall be deemed granted by operation of law.

(c) Within 60 days after the filing of an integrated resource plan or an application has been made with the commission for a certificate or amendment, the commission shall establish a fee therefor and notify the applicant thereof. The fee amount so established shall be in an amount reasonably necessary to defray the expense of the commission in reviewing the plan or determining whether to grant the application, including but not limited to the expense of conducting any certification proceedings required for such application. The fee so established shall not be recoverable from ratepayers of the applicant if the application or certification is denied nor shall the fee for review of the plan or any subsequent amendment thereto be recoverable from ratepayers. Such fee must be remitted to the commission before the commission may take any further action upon the application. For purposes of any time periods established in subsection (b) of this Code section and subsection (c) of Code Section 46-3A-2, an application shall be deemed to have been filed only when the fee established therefor has been remitted to the commission. In the event a joint application is filed by more than one utility, a single such fee only shall be required. The funds assessed and collected pursuant to this subsection shall be deposited in the state's general fund. (Code 1981, § 46-3A-5, enacted by Ga. L. 1991, p. 1696, § 1.)

46-3A-6. Reexamination of a certificate of public convenience and necessity; modification or revocation.

Upon application of a utility or upon its own motion, the commission may reexamine any certificate granted under this chapter to determine

whether new forecasts of future requirements require the modification of the construction, purchase, sale, or expenditure for a certificated capacity resource. If upon such reexamination the commission finds that the certificated capacity resource is no longer needed or that any additional certificated capacity resource is needed to assure a reliable supply of electric power and energy for the utility's Georgia retail customers, the commission may modify or revoke the certificate. If the utility cancels, abandons, or increases some or all of the capacity resource as a result of such modification or revocation of the certificate, it may recover through any rate-making vehicle over a reasonable period of time, absent fraud, concealment, failure to disclose a material fact, imprudence, or criminal misconduct, the amount of its investment in such capacity resource, along with the cost of carrying the unamortized portion of that investment, net of actual salvage value, to the extent such investment is verified as made pursuant to the certificate. The commission shall disallow such investment and costs resulting from fraud, concealment, failure to disclose a material fact, imprudence, or criminal misconduct. (Code 1981, § 46-3A-6, enacted by Ga. L. 1991, p. 1696, § 1.)

46-3A-7. Construction costs as part of rate base; review of construction work in progress; verification of expenditures; recovery of costs of canceled construction.

(a) So long as the commission has not modified or revoked the certificate for an electric plant under Code Section 46-3A-6 and to the extent the utility seeks to add to its rate base upon completion of the plant construction costs that do not exceed 100 percent of those approved by the commission under Code Section 46-3A-5, Code Section 46-3A-6, or subsection (b) of this Code section, that construction cost amount may be excluded from the rate base only on the basis of fraud, concealment, failure to disclose a material fact, imprudence, or criminal misconduct. Inclusion of costs in excess of 100 percent of those approved by the commission shall not be permitted unless shown by the utility to have been reasonable and prudent.

(b) In addition to the review of the continuing need for an electric plant under construction prescribed in Code Section 46-3A-6, the commission, upon its own motion, may conduct or the utility may request that the commission conduct an ongoing review of such construction as it proceeds. Every one to three years, or at such lesser intervals upon the direction of the commission or request of the utility, the applicant shall file a progress report and any proposed revisions in the cost estimates, construction schedule, or project configuration. Within 180 days of such filing, the commission shall verify and approve or disapprove expenditures made pursuant to the certificate and shall approve, disapprove, or modify any proposed revisions. If the commission fails to so act within 180 days after

such filing, the previous expenditures and any proposed revisions shall be deemed approved by operation of law.

(c) If the commission verifies expenditures as made pursuant to a certificated capacity resource, that verification forecloses subsequent exclusion of those costs from the utility's rate base, absent fraud, concealment, failure to disclose a material fact, imprudence, or criminal misconduct.

(d) If the commission disapproves of all or part of the proposed revisions and the utility cancels construction of some or all of the facility as a result of the disapproval, the utility may recover through any rate-making vehicle over a reasonable period of time, absent fraud, concealment, failure to disclose a material fact, imprudence, or criminal misconduct, the amount of its actual investment, net of actual salvage value, in the partially completed portion of the facility along with the cost of carrying the unamortized balance of that investment to the extent such investment is verified as made pursuant to the certificate. (Code 1981, § 46-3A-7, enacted by Ga. L. 1991, p. 1696, § 1.)

46-3A-8. Recovery of actual cost of certificated long-term power purchase.

The approved or actual cost, whichever is less, of purchase of any certificated long-term power purchase shall be recovered in rates by the utility, along with an additional sum as determined by the commission to encourage such purchases. The commission shall consider lost revenues, if any, changed risks, and an equitable sharing of benefits between the utility and its retail customers. (Code 1981, § 46-3A-8, enacted by Ga. L. 1991, p. 1696, § 1.)

46-3A-9. Recovery of actual cost of certificated demand-side capacity option.

The approved or actual cost, whichever is less, of any certificated demand-side capacity option shall be recovered by the utility in rates, along with an additional sum as determined by the commission to encourage the development of such resources. The commission shall consider lost revenues, if any, changed risks, and an equitable sharing of benefits between the utility and its retail customers. (Code 1981, § 46-3A-9, enacted by Ga. L. 1991, p. 1696, § 1.)

JUDICIAL DECISIONS

Authority of commission. — The commission had authority under O.C.G.A. § 46-3A-9 to allow a utility to recover the costs of demand-side energy conservation programs and interruptible service credits through

riders or surcharges outside of a general rate case and the test year statute. *Georgia Power Co. v. Georgia Indus. Group*, 214 Ga. App. 196, 447 S.E.2d 118 (1994).

46-3A-10. Effect on rates of changed revenues and risks; basis and effect of commission decision.

In setting rates for any certificated capacity resource, the commission shall consider changed revenues and changed risks, if any. The commission's decision in any certification, recertification, modification, or construction review proceeding shall be based on evidence of record. Compliance with the provisions of the certificate as approved or modified by the commission shall result in a presumption of prudence. The commission's findings, although subject to judicial review, shall not be subject to relitigation in any other proceeding; provided, however, the issuance of a certificate under this Code section shall not preempt any duly constituted local, state, or federal governmental body or agency from its regulation of environmental or safety matters incidental to construction of electric generating plants. (Code 1981, § 46-3A-10, enacted by Ga. L. 1991, p. 1696, § 1.)

46-3A-11. Inapplicability of chapter to providers whose rates not fixed by commission.

This chapter shall not apply to any provider of wholesale or retail electric service whose rates are not fixed by the commission. (Code 1981, § 46-3A-11, enacted by Ga. L. 1991, p. 1696, § 1.)

CHAPTER 4

DISTRIBUTION, STORAGE, AND SALE OF GAS

Article 1

Sec.

General Provisions

Sec.

46-4-1.

Bringing of actions by commission to enjoin violations of rules, orders, or regulations established for safe installation and operation of natural gas facilities.

46-4-28.

with existing pipeline or distribution systems or service by persons constructing or extending pipeline or distribution systems.

46-4-29.

Suspension, revocation, alteration, or amendment of certificates by commission.

46-4-30.

Transfer and hypothecation of certificates.

Jurisdiction of commission over controversies as to extensions of gas distribution service; factors to be considered by commission in resolving controversies.

46-4-31.

Adoption by commission of rules and orders to enforce article.

46-4-32.

Applicability of article to liquefied petroleum gas sold in liquid form under pressure.

46-4-33.

Applicability of certificate requirements under article generally.

46-4-34.

Injunctions.

46-4-35.

Civil penalty.

Article 2

Intrastate Pipelines and Distribution Systems

46-4-20.

"Person" defined.

46-4-21.

Certificate of public convenience and necessity required by persons constructing or operating gas pipeline or distribution systems for transportation, distribution, or sale of gas; distribution systems in operation before February 17, 1956; jurisdiction of commission generally.

46-4-22.

Determination by commission of manner and form of application for certificate of public convenience and necessity; giving of notice of receipt of application.

46-4-23.

Power of commission to issue or deny certificate.

46-4-24.

Application for certificate by persons engaged in constructing or operating gas pipeline or distribution system or extension thereof as of February 17, 1956.

46-4-25.

Factors to be considered by commission in granting certificates.

46-4-26.

Filing with commission complaints regarding persons operating without certificate; cease and desist order by commission; hearing; final order of commission.

46-4-27.

Unreasonable interference

Article 3

Underground Storage of Gas

46-4-50.

Short title.

46-4-51.

Definitions.

46-4-52.

Declaration of public purpose.

46-4-53.

Application to commission by gas utility for order approving utilization or operation of underground reservoir; hearing on application generally; giving notice of hearing.

46-4-54.

Investigation by state geologist of site of proposed storage project; procedures involving state geologist; investigation of proposed storage project by director of Environmental Protection Division; procedures involving director; investigation of proposed storage project by commission.

Sec.		Sec.	
46-4-55.	Receipt and recording of evidence at hearing on application; order of commission approving or disapproving underground storage project.	46-4-85.	Authority members — Terms of office.
46-4-56.	Judicial review of commission's order.	46-4-86.	Election committee members.
46-4-57.	Exercise of right of eminent domain by gas utilities.	46-4-87.	Weighted vote of election committee members; quorum for election committee.
46-4-58.	Determination of ownership of gas injected into underground storage reservoir; protection of rights of owners of other interests in the land.	46-4-88.	Vacancies in membership of authority.
46-4-59.	Effect of abandonment of reservoir by gas utility; evidence of abandonment; approval of abandonment by commission.	46-4-89.	Officers.
46-4-60.	Adoption by Board of Natural Resources of rules and regulations governing construction, installation, utilization, and operation of underground reservoirs and stations, wells, fixtures, and other facilities; enforcement of rules and regulations; inspection and examination.	46-4-90.	Quorum; majority vote.
46-4-61.	Adoption by commission of rules, regulations, and orders necessary for enforcement and administration of article; enforcement by injunction, mandamus, and other relief.	46-4-91.	Annual and special meetings.
46-4-62.	Effect of article on authority of Department of Natural Resources.	46-4-92.	Compensation; expenses; personnel.
Article 4		46-4-93.	Removal of authority members from office.
Municipal Gas Authority of Georgia		46-4-94.	Records required.
46-4-80.	Legislative findings; declaration of need.	46-4-95.	Purpose.
46-4-81.	Definitions.	46-4-96.	Powers.
46-4-82.	Creation of authority; principal office; legal situs.	46-4-97.	Not for profit operation.
46-4-83.	Membership election committee; election of members of the authority.	46-4-98.	Public purpose; tax exemption; payments in lieu of taxes.
46-4-84.	Authority members — Representation of political subdivisions; eligibility of election committee members; successive terms.	46-4-99.	Contracts with political subdivisions.
		46-4-100.	Applicability of article to entities with gas distribution systems.
		46-4-101.	Enabling resolution; issuance of revenue bonds; petition for judicial validation; fees; federal tax implications.
		46-4-102.	Necessary parties to revenue bonds validation petition; intervention by citizens; adjudication.
		46-4-103.	Failure of district attorney to file revenue bonds validation petition.
		46-4-104.	Bonds as legal investments.
		46-4-105.	Pledge of revenue to retire bonds.
		46-4-106.	Trust agreement or indenture to secure bonds.
		46-4-107.	Proceeds of bonds.
		46-4-108.	Lost, stolen, or mutilated bond certificates.
		46-4-109.	Interest on bonds after due date.
		46-4-110.	Cancellation or destruction of retired bonds.
		46-4-111.	Records of bond and note transactions required.
		46-4-112.	Paying agents.
		46-4-113.	Bond anticipation notes.
		46-4-114.	Negotiability of bonds.

Sec.

- 46-4-115. Liability of authority members, political subdivisions, and state.
- 46-4-116. Impairment of contracts.
- 46-4-117. Appointment of receiver upon default.
- 46-4-118. Charges for use of facilities or services.
- 46-4-119. Revenues held in trust for bondholders.
- 46-4-120. Annual audit.
- 46-4-121. Jurisdiction for rights protection or enforcement actions.
- 46-4-122. Exemption from regulation by Public Service Commission.
- 46-4-123. Conduct of meetings; records.
- 46-4-124. Effect of other laws.
- 46-4-125. Liberal construction.

Article 5**Natural Gas Competition and Deregulation**

- 46-4-150. Short title.
- 46-4-151. Legislative findings and intent; bill of rights for consumers.
- 46-4-152. Definitions.
- 46-4-153. Certificates of authority.
- 46-4-153.1. Certificates of authority for EMC gas affiliates; terms and conditions; requirements.
- 46-4-154. Notice of election; unbundling; rates; application requirements; surcharge on interruptibles.
- 46-4-155. Regulation of unbundled services; peaking service; customer services; interstate capacity assets.
- 46-4-156. Customer assignment methodology; commission determination of adequate market conditions and effect of such determination; lost and unaccounted for gas; notice to customers; petition proceedings; change of marketers; deposit.
- 46-4-157. Temporary directives.
- 46-4-158. Obligations of an electing distribution company; conditions.
- 46-4-158.1. Rules and regulations; reporting on service quality; noncompliance with service quality standards; third party forecast-

Sec.

- ing; independent auditors; gas held in storage for marketer.
- 46-4-158.2. Rules governing marketer's terms of service.
- 46-4-158.3. Adequate and accurate consumer information disclosure statements; bills.
- 46-4-158.4. Authority to establish minimum standards for nonresidential customers.
- 46-4-158.5. Continuing review by commission.
- 46-4-159. Standards of conduct for electing distribution companies; response to complaints.
- 46-4-160. Commission's authority over certificated marketers; access to records; investigations and hearings; price summary; billing; violations; slamming.
- 46-4-160.1. Dispute resolution between marketer and retail customer; reporting to credit bureaus.
- 46-4-160.2. Requirements of marketer for billing errors; requiring written request for credit or refund prohibited.
- 46-4-160.3. Voluntary contributions for low-income residential customers.
- 46-4-160.4. Natural Gas Consumer Education Advisory Board; membership; responsibilities.
- 46-4-160.5. Retail customer recovery for violations.
- 46-4-161. Universal service fund.
- 46-4-162. Commission's authority to approve certain pilot programs.
- 46-4-163. Special or negotiated contracts valid.
- 46-4-164. Construction of article; electric membership corporations and EMC gas affiliates; liquefied petroleum gas.
- 46-4-165. Annual reports.
- 46-4-166. Selection by proposal of regulated provider to service low-income residential consumers and certain firm natural gas consumers; rates; annual review.

Cross references. — Blasting or excavating operations near underground gas pipes and other underground utility facilities, Ch. 9, T. 25.

Administrative rules and regulations. — Gas companies' certificates and safe installa-

tion and operation of transmissions and distribution systems, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Public Service Commission, Chapters 515-7-1 and 515-9-1 through 515-9-3.

ARTICLE 1

GENERAL PROVISIONS

46-4-1. Bringing of actions by commission to enjoin violations of rules, orders, or regulations established for safe installation and operation of natural gas facilities.

The commission may bring a civil action to enjoin the violation of any rule, order, or regulation established by the commission for the safe installation and operation of all natural gas transmission and distribution facilities within this state. (Code 1933, § 93-419, enacted by Ga. L. 1970, p. 158, § 1.)

RESEARCH REFERENCES

ALR. — Special services of facilities afforded by shipper as a factor in carrier's rates, 25 ALR 191.

Liability of gas company for injury or damage due to defects in service lines on consumer's premises, 26 ALR2d 136.

ARTICLE 2

INTRASTATE PIPELINES AND DISTRIBUTION SYSTEMS

46-4-20. "Person" defined.

As used in this article, the term "person" means any corporation, whether public or private; company; individual; firm; partnership; or association. (Ga. L. 1956, p. 104, § 14.)

46-4-21. Certificate of public convenience and necessity required by persons constructing or operating gas pipeline or distribution systems for transportation, distribution, or sale of gas; distribution systems in operation before February 17, 1956; jurisdiction of commission generally.

(a) No person shall construct or operate in intrastate commerce within this state any pipeline or distribution system, or any extension thereof, for the transportation, distribution, or sale of natural or manufactured gas without first obtaining from the commission a certificate that the public convenience and necessity require such construction or operation. In addition, no person shall sell natural or manufactured gas from such

pipeline or acquire ownership or control of such pipeline or distribution system, whether directly or indirectly, without obtaining from the commission a certificate of public convenience and necessity.

(b) This article shall not be construed to require any gas distribution system to secure a certificate for an extension within any municipality within which such gas distribution system has lawfully commenced operations prior to February 17, 1956, or for an extension within or to territory already served by such gas distribution system, which extension is necessary in the ordinary course of business, or for substitute facilities within or to any municipality or territory already served by such gas distribution system, or for an extension into territory contiguous to that already served by such gas distribution system and not receiving similar service from another such person if no certificate of public convenience and necessity has been issued to or applied for by any other person covering such territory.

(c) As to distribution and sales in intrastate commerce, all gas pipeline systems shall be subject to the regulation and jurisdiction of the commission in all respects, including, but not limited to, rates, charges, rules, regulations, service, financing, accounts, and such other matters involving a privately owned gas public utility distribution system as are subject to the regulation or jurisdiction of the commission. (Ga. L. 1956, p. 104, § 1.)

Cross references. — Exercise of power of eminent domain for purposes of constructing gas pipelines, § 22-3-83.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 109. 61 Am. Jur. 2d, Pipelines, § 7.

C.J.S. — 13 C.J.S., Carriers, §§ 356-366. 38 C.J.S., Gas, §§ 6, 17 et seq., 20.

ALR. — Validity of imposition, by state regulation, of natural gas use priorities, 84 ALR3d 541.

46-4-22. Determination by commission of manner and form of application for certificate of public convenience and necessity; giving of notice of receipt of application.

The manner and form of application for a certificate of public convenience and necessity provided for in Code Section 46-4-21 shall be established by such rules and regulations as the commission may from time to time prescribe. Upon the receipt of any such application, the commission shall cause notice thereof to be given by personal service or by mail to the chief executive officer of any municipality affected and to any person serving the territory affected, and shall publish such notice once a week for three consecutive weeks in some newspaper of general circulation in each territory affected. (Ga. L. 1956, p. 104, § 3.)

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 109. 61 Am. Jur. 2d, Pipelines, § 7.
C.J.S. — 13 C.J.S., Carriers, §§ 356-366. 38 C.J.S., Gas, §§ 6, 17 et seq., 20.

46-4-23. Power of commission to issue or deny certificate.

The commission shall have power, after hearing, to issue the certificate of public convenience and necessity, as prayed for, or to refuse to issue the same, or to issue it for the construction, operation, or acquisition of a portion only of the contemplated pipeline or distribution system or extension thereof. (Ga. L. 1956, p. 104, § 4.)

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 109. 61 Am. Jur. 2d, Pipelines, § 7.
C.J.S. — 13 C.J.S., Carriers, §§ 356-366. 38 C.J.S., Gas, §§ 6, 17 et seq., 20.

46-4-24. Application for certificate by persons engaged in constructing or operating gas pipeline or distribution system or extension thereof as of February 17, 1956.

(a) Any person engaged in the construction or operation of any pipeline or distribution system, or any extension thereof, as of February 17, 1956, shall be entitled to receive a certificate of public convenience and necessity from the commission authorizing that person to continue the construction or operation of such pipeline or distribution system, or any extension thereof, in the territory being served by that person on February 17, 1956, if by February 17, 1957, that person filed maps with the commission showing the territory being served by that person.

(b) If, pursuant to subsection (a) of this Code section, more than one person filed maps indicating service in the same territory, the commission shall, after a hearing conducted after the giving of reasonable notice to the interested parties, determine from such evidence as it may reasonably require which of such persons shall be entitled to the certificate of public convenience and necessity. In making such determination, the commission shall consider the ability of such persons to furnish thereafter reasonably adequate service in the territory in question.

(c) Pending the granting of a certificate as provided in this Code section, a person applying for such certificate under this Code section may lawfully continue the construction or operation of any pipeline or distribution system, or any extension thereof, in the territory being served by such person on February 17, 1956. (Ga. L. 1956, p. 104, § 5.)

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 109. 61 Am. Jur. 2d, Pipelines, § 7.
C.J.S. — 13 C.J.S., Carriers, §§ 356-366. 38 C.J.S., Gas, §§ 6, 17 et seq., 20.

46-4-25. Factors to be considered by commission in granting certificates.

(a) In determining whether a certificate of public convenience and necessity shall be granted, the commission must consider the following:

(1) Whether existing gas pipelines or distribution systems are adequate to meet the reasonable public needs;

(2) The volume of demand for such gas, and whether such demand and that reasonably to be anticipated in the future can support already existing gas pipeline and distribution systems, if any, and also the pipeline or distribution system proposed by the applicant;

(3) The financial ability of the applicant to furnish adequate continuous service and to meet the financial obligations of the service which the applicant proposes to perform;

(4) The adequacy of the supply of gas to serve the public;

(5) The economic feasibility of the pipeline or distribution system and the propriety of the engineering and contracting fees, the expenses, and the financing charges and costs connected with the pipeline or distribution system; and

(6) The effect on existing revenues and service of other pipelines or distribution systems, and particularly whether the granting of the certificate will or may seriously impair existing public service.

(b) This Code section shall not be construed as exhaustively describing all factors which the commission may consider in its decision to grant or deny a certificate.

(c) If the applicant seeks a certificate of public convenience and necessity authorizing the applicant to acquire a gas pipeline or distribution system of a municipal corporation, the commission shall also consider whether the purchase price is reasonable in light of the present value of the system to be acquired. Issuance by the commission of a certificate of public convenience and necessity authorizing such acquisition is a determination by the commission, among other things, that the purchase price is the measure of the value of the system to be included in the applicant's rate base for rate-making purposes, subject to the depreciation thereafter allowed upon such system. (Ga. L. 1956, p. 104, § 7; Ga. L. 1991, p. 1804, § 1.)

JUDICIAL DECISIONS

Cited in *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 61 Am. Jur. 2d, Pipelines, § 7. **C.J.S.** — 13 C.J.S., Carriers, §§ 356-366, 38 C.J.S., Gas, §§ 6, 17 et seq., 20.

46-4-26. Filing with commission complaints regarding persons operating without certificate; cease and desist order by commission; hearing; final order of commission.

Whenever any person is engaged or is about to engage in the construction, operation, or acquisition of any gas pipeline or distribution system, or extension thereof, without having secured a certificate of public convenience and necessity as required by this article, any interested person may file a complaint with the commission. The commission may, with or without notice, make an order requiring the person complained of to cease and desist from such construction, operation, or acquisition until the commission makes and files its decision on said complaint or until the further order of the commission. The commission may, after a hearing conducted after reasonable notice, make such order and prescribe such terms and conditions with respect to the matter as are just and reasonable. (Ga. L. 1956, p. 104, § 6.)

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 109. **C.J.S.** — 13 C.J.S., Carriers, §§ 356-366, 38 C.J.S., Gas, §§ 6, 17 et seq., 20.

46-4-27. Unreasonable interference with existing pipeline or distribution systems or service by persons constructing or extending pipeline or distribution systems.

If any person in constructing or extending his pipeline or distribution system unreasonably interferes or is about to interfere unreasonably with any pipeline or distribution system or service of any other person, the commission, on its own initiative or on complaint of any person claiming to be injuriously affected, may, after a hearing conducted after reasonable notice, make such order and prescribe such terms and conditions with respect to the matter as are just and reasonable. (Ga. L. 1956, p. 104, § 2.)

RESEARCH REFERENCES

ALR. — Right of public utility not having an exclusive franchise to protection against, or damages for, interference with its operations, property, or plant by a competitor, 119 ALR 432.

Liability of one excavating in highway for injury to public utility cables, conduits, or the like, 73 ALR3d 987.

46-4-28. Suspension, revocation, alteration, or amendment of certificates by commission.

(a) At any time after notice and opportunity to be heard, and for reasonable cause, the commission may suspend, revoke, alter, or amend any certificate issued under this article if it appears that the holder of the certificate has willfully violated or refused to observe any of the lawful and reasonable orders, rules, or regulations prescribed by the commission or any other law of this state regulating these pipeline or distribution systems, or if in the opinion of the commission the holder of the certificate is not furnishing adequate service, or if the continuance of the certificate in its original form is incompatible with the public interest.

(b) If and when the commission undertakes to revoke or modify any certificate on the ground that conditions are such as not to justify the number of certificates which have been granted within the territory involved, preference shall be given to certificates in order of the time of their issuance, so that those which have been issued later in time shall, other things being equal, be canceled rather than those issued earlier in time. (Ga. L. 1956, p. 104, § 9.)

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 109. 61 Am. Jur. 2d, Pipelines, §§ 7, 9.

C.J.S. — 13 C.J.S., Carriers, §§ 356-366. 38 C.J.S., Gas, §§ 6, 17 et seq., 20.

46-4-29. Transfer and hypothecation of certificates.

Any certificate of public convenience and necessity issued under this article may be transferred or hypothecated only upon application to and approval by the commission. (Ga. L. 1956, p. 104, § 10.)

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 109. 61 Am. Jur. 2d, Pipelines, § 7.

C.J.S. — 13 C.J.S., Carriers, §§ 356-366. 38 C.J.S., Gas, §§ 6, 17 et seq., 20.

46-4-30. Jurisdiction of commission over controversies as to extensions of gas distribution service; factors to be considered by commission in resolving controversies.

Whenever a certificate of public convenience and necessity has been issued to a gas distribution system and a controversy arises as to whether an extension of service should or should not be made within the territory included in the certificate, the commission shall have jurisdiction to determine whether or not such extension shall be made and, if so, upon what terms. In making this determination, the commission shall consider the economic feasibility of that particular extension and the supply of gas available therefor. This Code section shall not apply to extensions of gas distribution systems by municipalities and counties of this state. (Ga. L. 1956, p. 104, § 13.)

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 109. 61 Am. Jur. 2d, Pipelines, § 7. **C.J.S.** — 13 C.J.S., Carriers, §§ 356-366. 38 C.J.S., Gas, §§ 6, 17 et seq., 20.

46-4-31. Adoption by commission of rules and orders to enforce article.

The commission is authorized to adopt such rules and orders as it may deem necessary in the enforcement of this article. Without limiting its authority to adopt rules and orders in general, the commission may by such rules and orders determine not only the locations or territories to be served but also the volumes of gas to be sold by pipelines direct to consumers. The commission may also define what territories are contiguous to others. (Ga. L. 1956, p. 104, § 8.)

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 109. 61 Am. Jur. 2d, Pipelines, § 11. **C.J.S.** — 38 C.J.S., Gas, §§ 6, 17 et seq.

46-4-32. Applicability of article to liquefied petroleum gas sold in liquid form under pressure.

Nothing in this article shall be construed to apply to liquefied petroleum gas sold in liquid form under pressure. (Ga. L. 1956, p. 104, § 11.)

Cross references. — Sale and storage of liquefied petroleum gas, § 10-1-260 et seq.

46-4-33. Applicability of certificate requirements under article generally.

Notwithstanding any other statute or ordinance to the contrary, the requirements of this article for a certificate of public convenience and

necessity shall apply to each and every individual and to each and every firm or corporation, whether public or private, excepting only municipal corporations and counties of this state. (Ga. L. 1956, p. 104, § 12.)

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 109. 61 Am. Jur. 2d, Pipelines, § 7. **C.J.S.** — 13 C.J.S., Carriers, §§ 356-366. 38 C.J.S., Gas, §§ 6, 17 et seq., 20.

46-4-34. Injunctions.

In addition to the civil monetary penalty provided for in Code Section 46-4-35, the commission may bring a civil action to enjoin a violation of any provision of this article or of any rule, regulation, or order issued by the commission under this article. In order to obtain this equitable relief, the commission shall not be required to allege or prove that there is no adequate remedy at law. (Ga. L. 1970, p. 145, § 2.)

RESEARCH REFERENCES

C.J.S. — 13 C.J.S., Carriers, § 373.

46-4-35. Civil penalty.

(a) Any person who violates any provision of this article, or any rule, regulation, or order issued by the commission under this article, shall be subject to a civil penalty of not more than \$1,000.00 for each day that such violation persists, provided that the maximum civil penalty shall not exceed \$200,000.00 for any related series of violations.

(b) A civil penalty under subsection (a) of this Code section may be imposed by the commission only after notice and hearing. In determining the amount of the penalty, the commission shall consider the size of the business charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance after notice of a violation. The amount of such penalty may be collected by the commission in the manner provided in Code Section 9-11-69 for the enforcement of money judgments. (Ga. L. 1970, p. 145, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 109. **C.J.S.** — 13 C.J.S., Carriers, § 373. 38 C.J.S., Gas, §§ 6, 17 et seq.

ARTICLE 3

UNDERGROUND STORAGE OF GAS

Cross references. — Powers and duties of deep drilling for oil and gas, § 12-4-40 et seq.
Board of Natural Resources pertaining to

46-4-50. Short title.

This article shall be known and may be cited as the “Underground Gas Storage Act.” (Code 1933, § 93-801, enacted by Ga. L. 1965, p. 463, § 1; Ga. L. 1984, p. 22, § 46.)

46-4-51. Definitions.

As used in this article, the term:

(1) “Gas” means natural gas or manufactured gas, or a combination of both.

(2) “Gas utility” means any individual, firm, corporation, organization, or other entity holding a certificate of public convenience and necessity issued by the commission authorizing the transportation, distribution, or sale of gas.

(3) “Underground reservoir” means any subsurface sand, strata, formation, aquifer, cavern, or void, whether natural or artificially created, which is suitable for the injection and storage of gas therein and for the withdrawal of gas therefrom. (Code 1933, § 93-802, enacted by Ga. L. 1965, p. 463, § 1.)

46-4-52. Declaration of public purpose.

The underground storage of gas, which permits the building of reserves for orderly withdrawal in periods of peak demand, will promote the economic development of the State of Georgia and provide for more economical distribution of gas to the domestic, commercial, and industrial consumers of this state, thereby serving the public interest. Therefore, the underground storage of gas by a gas utility is recognized and declared to be affected with a public interest; and all of the property used in such underground storage is recognized and declared to be devoted to public use. (Code 1933, § 93-803, enacted by Ga. L. 1965, p. 463, § 1.)

46-4-53. Application to commission by gas utility for order approving utilization or operation of underground reservoir; hearing on application generally; giving notice of hearing.

(a) Any gas utility desiring to utilize or operate an underground reservoir shall first apply to the Public Service Commission for an order approving the proposed project. The application shall include:

(1) A legal description of the roads, grounds, waters, buildings, and other improvements of any kind under which such underground reservoir is proposed, together with a map thereof;

(2) A map showing the location of existing and proposed stations, wells, fixtures, machinery, and other facilities necessary for the construction, maintenance, and operation of such underground reservoir;

(3) A map prepared by a qualified engineer or geologist showing the location, extent, and depth of the proposed underground reservoir and of all wells drilled or proposed to be drilled to such reservoir; and

(4) Such other information as will provide a clear and concise presentation of the matters relevant to the application.

(b) Upon the filing of the application, the commission shall fix a date for a hearing thereon, and the applicant shall thereupon cause notice of such hearing and a copy of the application to be filed with the Department of Natural Resources, accompanied by an examination fee of \$200.00. Notice of such hearing and a copy of the application shall be served upon the director of the Environmental Protection Division of the Department of Natural Resources and upon the state geologist of the Geologic Surveys Branch of the Environmental Protection Division. The applicant shall also cause notice of such hearing to be given by publishing notice thereof at least once each week for three successive weeks in some newspaper of general circulation in the county or counties wherein the gas is proposed to be stored, the first such publication to be made at least 21 days prior to the date of the hearing. (Code 1933, § 93-805, enacted by Ga. L. 1965, p. 463, § 1.)

46-4-54. Investigation by state geologist of site of proposed storage project; procedures involving state geologist; investigation of proposed storage project by director of Environmental Protection Division; procedures involving director; investigation of proposed storage project by commission.

(a) Upon receiving the notice of the hearing and the copy of the application, the state geologist shall immediately initiate an investigation of the site of the proposed storage project for the purpose of determining the facts involved in the findings which the Public Service Commission is required to consider in preparing an order under Code Section 46-4-55 and for the purpose of such other matters as the state geologist or the Public Service Commission may deem relevant in evaluating the feasibility and safety features of the proposed underground storage project. The gas utility shall make available to the state geologist for his consideration and evaluation all geological and reservoir engineering studies and other information in the utility's possession concerning the proposed underground storage project. The state geologist shall complete his investigation

and shall file a written report of same with the Public Service Commission prior to the date of the hearing. The state geologist and any members of his staff having knowledge of the investigation may be called as witnesses at the hearing.

(b) Upon receiving the notice of the hearing and the copy of the application, the director of the Environmental Protection Division shall immediately initiate an investigation of the proposed storage project for the purpose of determining whether such project will injure, pollute, or contaminate any usable fresh-water resources. The director shall complete his investigation and shall file a written report of same with the Public Service Commission prior to the date of the hearing. The director and any member of his staff having knowledge of the investigation may be called as witnesses at the hearing.

(c) At any time after the filing of the application under Code Section 46-4-53, but prior to the time of entering an order approving or disapproving same, the commission may conduct an investigation of the site of the proposed underground storage project for the purpose of determining any matters relevant to the consideration of such application or may cause such investigation to be made by an independent qualified engineer or geologist, or both, selected by the commission and paid by the gas utility. (Code 1933, § 93-806, enacted by Ga. L. 1965, p. 463, § 1.)

46-4-55. Receipt and recording of evidence at hearing on application; order of commission approving or disapproving underground storage project.

(a) At the hearing on an application made pursuant to Code Section 46-4-53, the commission shall receive, hear, and make a record of such relevant evidence on the issues as may be offered by any person directly interested and shall enter an order either approving or disapproving the proposed underground storage project.

(b) Any order approving a proposed underground storage project shall contain and be based on findings that:

(1) The proposed underground storage of gas is in the public interest and welfare;

(2) The underground reservoir is reasonably practicable and suitable for the underground storage of gas, and the applicant has complied with all applicable conservation laws of the State of Georgia;

(3) The underground reservoir is nonproductive of economically recoverable valuable minerals or materials or of oil or gas in commercial quantities under either primary or secondary recovery methods and nonproductive of fresh water in commercial quantities with feasible and reasonable pumping lift;

(4) The underground storage project will not injure, pollute, or contaminate any usable fresh-water resources;

(5) The underground storage project will not injure, interfere with, or endanger any mineral resources or the development or extraction thereof; and

(6) The gas utility carries public liability insurance, or has deposited collateral in amounts satisfactory to the commission, or has furnished a financial statement showing assets in an amount satisfactory to the commission, so as to demonstrate the ability of the gas utility to secure payment of any liability resulting from any reasonably anticipated occurrence which may arise out of or be caused by the operation or use of any underground reservoir or facilities incidental thereto.

(c) The issuance of an order of approval by the commission shall be a condition precedent to the utilization or operation of an underground gas storage project. The commission may attach to the order such terms, conditions, and restrictions as it deems appropriate in the public interest. (Code 1933, § 93-807, enacted by Ga. L. 1965, p. 463, § 1.)

46-4-56. Judicial review of commission's order.

Any party appearing at the hearing who is directly affected by an order of the commission approving or disapproving a proposed underground storage project considered at such hearing shall have the right to judicial review of the order by filing a petition with the Superior Court of Fulton County within 30 days after the entry of the order by the commission. In the event no such petition is filed within such time, the order of the commission shall be final and conclusive. In such action the burden of proof shall be upon the party complaining of such order, and such order shall be deemed prima facie valid. Any person directly interested in the subject matter may, in the discretion of the court, be permitted to intervene in such action. Any party to such action may offer in evidence all or any part of the record of the hearing before the commission and any other relevant evidence. The practice, pleading, and proceedings in such action shall be equitable in nature. The court shall have jurisdiction to enter a decree affirming or setting aside such order or remanding the cause to the commission with directions to modify such order so that it shall conform to this article. Such action shall have precedence over other matters before the court. Appeals may be taken by any party to such action in the same manner and to the same extent as in other civil actions. (Code 1933, § 93-808, enacted by Ga. L. 1965, p. 463, § 1.)

46-4-57. Exercise of right of eminent domain by gas utilities.

(a) Any gas utility shall have the right of eminent domain, to be exercised in the manner provided in Title 22, to acquire for its use any

underground reservoir for the storage of gas, as well as such other property or interests in property as may be required to explore adequately for, examine, prepare, maintain, utilize, and operate such underground reservoir for the storage of gas, including easements and rights of way for access to and egress from such underground storage reservoir.

(b) Without limiting the generality of subsection (a) of this Code section, a gas utility may condemn the following rights in property for use in connection with the underground storage of gas:

(1) The right to conduct such operations, including the drilling of test holes or wells, as may be necessary or convenient to determine the suitability of a geological stratum or formation for the underground storage of gas;

(2) The right to lay, operate, and maintain pipes and pipelines necessary or convenient for the transportation of gas to and from the underground reservoir;

(3) The right to prepare, establish, maintain, utilize, and operate the underground reservoir for the storage of gas in and the injection of gas into the reservoir and the withdrawal of gas from the reservoir; and

(4) The right to install, operate, and maintain any stations, wells, fixtures, machinery, and other facilities necessary or convenient in connection with any of the operations described in this subsection.

(c) The right of eminent domain granted by this Code section shall apply to property or property interests held by private owners, by the State of Georgia or by any political subdivision of the state, by any municipal corporation, or by any other public or quasi-public body.

(d) Any property or interest therein acquired by any gas utility pursuant to this Code section shall be used exclusively for the purposes for which it was acquired.

(e) The right of eminent domain granted by this Code section is cumulative of any other right of eminent domain now possessed by any gas utility or public utility to condemn property for use in its operations. The power of eminent domain which was granted and conferred by Ga. L. 1929, p. 219, upon persons engaged in constructing or operating pipelines for the transportation or distribution of natural or artificial gas and upon persons engaged in furnishing natural or artificial gas for heating, lighting, or power purposes in this state, and the manner of exercising such power of eminent domain as provided in Chapter 1 of Title 22 and Article 1 of Chapter 2 of Title 22 is ratified, confirmed, and continued. (Code 1933, § 93-804, enacted by Ga. L. 1965, p. 463, § 1; Ga. L. 1982, p. 3, § 46; Ga. L. 2004, p. 631, § 46.)

The 2004 amendment, effective May 13, 2004, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (e).

Editor's notes. — Provisions corresponding to those enacted by Ga. L. 1929, p. 219, referred to in subsection (e) of this section, are codified at §§ 22-1-1 and 22-3-83.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, § 79.

C.J.S. — 29A C.J.S., Eminent Domain, § 48.

ALR. — Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.

Condemner's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 ALR2d 724.

Right to intervene in court review of zoning proceeding, 46 ALR2d 1059.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

Rights and liabilities with respect to natural gas reduced to possession and subsequently stored in natural reservoir, 94 ALR2d 543.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 ALR4th 840.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific owner, 26 ALR4th 68.

46-4-58. Determination of ownership of gas injected into underground storage reservoir; protection of rights of owners of other interests in the land.

All gas which has previously been reduced to possession and which is subsequently injected into an underground storage reservoir shall at all times be deemed the property of the injector, its heirs, successors, or assigns; and in no event shall such gas be subject to any right of the owner of the surface of the land under which such underground reservoir lies, or of the owner of any mineral interest therein, or of any person other than such injector, its heirs, successors, or assigns, to release, produce, take, reduce to possession, or otherwise interfere with or exercise any control thereof; provided, however, that the right of condemnation granted by Code Section 46-4-57 shall be without prejudice to the right of the owner of the condemned land or the owner of any other right or interest therein to drill or bore through the underground reservoir in such a manner as will protect the underground reservoir against pollution and against the escape of gas and as will comply with the order of the commission and the rules and regulations of the Department of Natural Resources issued for the purpose of protecting underground storage; provided, further, that the right of condemnation granted by Code Section 46-4-57 shall be without prejudice to the rights of the owner of such land or the owner of any other

right or interest therein as to all other uses thereof. (Code 1933, § 93-811, enacted by Ga. L. 1965, p. 463, § 1.)

Cross references. — Extent of surface owner's title downward and upward, §§ 44-1-2, 51-9-9.

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gas and Oil, § 14. to natural gas reduced to possession and subsequently stored in natural reservoir, 94 ALR2d 543.

ALR. — Rights and liabilities with respect

46-4-59. Effect of abandonment of reservoir by gas utility; evidence of abandonment; approval of abandonment by commission.

When a gas utility which has exercised the power of eminent domain pursuant to Code Section 46-4-57 permanently abandons the entire underground reservoir for the storage of gas, the condemned property shall revert to the then owners of the land, the mineral rights, royalties, and other interests relating to the property in proportion to their several ownership interests. Good faith exploration or development work relative to a proposed or approved underground gas storage project shall be conclusive evidence that such project has not been abandoned. No gas utility shall abandon an underground reservoir for the storage of gas without first receiving an order of the commission approving such abandonment. (Code 1933, § 93-812, enacted by Ga. L. 1965, p. 463, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gas and Oil, § 13. to natural gas reduced to possession and subsequently stored in natural reservoir, 94 ALR2d 543.

ALR. — Rights and liabilities with respect

46-4-60. Adoption by Board of Natural Resources of rules and regulations governing construction, installation, utilization, and operation of underground reservoirs and stations, wells, fixtures, and other facilities; enforcement of rules and regulations; inspection and examination.

(a) The Board of Natural Resources shall adopt rules and regulations prescribing minimum standards reasonably necessary for the protection of the health, welfare, and safety of the public. Such rules and regulations shall govern the construction, installation, utilization, and operation of underground reservoirs and the stations, wells, fixtures, machinery, and other facilities used in connection therewith, and shall govern the condition in which such reservoirs and facilities are to be kept. The commissioner of

natural resources or any other interested party may commence a civil action for the enforcement of such rules and regulations against any offending gas utility or other party by filing a complaint in the superior court of any county where the whole or any part of a violation of such rules and regulations occurs.

(b) The Department of Natural Resources, shall from time to time inspect and examine the methods of construction, maintenance, utilization, and operation exercised in connection with all underground reservoirs and the stations, wells, fixtures, machinery, and other facilities used in connection therewith, and shall inspect and examine the condition of all such reservoirs and facilities. One such inspection and examination shall be made each calendar year (at a time selected by the commissioner) by an independent qualified engineer employed by the gas utility and approved by the commissioner. A written report of such inspection and examination shall be filed with the commissioner and the Public Service Commission within 30 days after the time selected for the inspection and examination. Whenever the commissioner determines that any such underground reservoir or facility used in connection therewith is unsafe and dangerous, he shall immediately issue a written order to the gas utility responsible therefor directing it to correct such unsafe and dangerous condition within the time specified in the order. If the gas utility fails to comply with such order within the time prescribed, the commissioner may commence an action in the superior court of the county where the whole or any part of such unsafe or dangerous condition exists to compel the correction of same. If the court finds that such order is reasonable and just, it shall enter an appropriate decree compelling obedience to and compliance with such order and may grant such other relief as may be just and proper. (Code 1933, § 93-809, enacted by Ga. L. 1965, p. 463, § 1.)

RESEARCH REFERENCES

ALR. — Liability of gas company for injury or damage by escaping gas, 25 ALR 262; 29 ALR 1250; 47 ALR 488; 90 ALR 1082; 138 ALR 870.

Gasoline or other fuel storage tanks as nuisance, 50 ALR3d 209.

46-461. Adoption by commission of rules, regulations, and orders necessary for enforcement and administration of article; enforcement by injunction, mandamus, and other relief.

The commission is authorized to adopt such rules, regulations, and orders as it deems necessary in the enforcement or administration of this article. The commission is further authorized to enforce this article and the rules, regulations, and orders adopted thereunder by instituting actions for injunction, mandamus, or other appropriate relief. (Code 1933, § 93-810, enacted by Ga. L. 1965, p. 463, § 1.)

46-4-62. Effect of article on authority of Department of Natural Resources.

No provision of this article shall in any way be construed to impair or interfere with the authority of the Department of Natural Resources to prevent or abate injury, pollution, or contamination of any usable fresh-water resources. (Code 1933, § 93-813, enacted by Ga. L. 1965, p. 463, § 1.)

ARTICLE 4**MUNICIPAL GAS AUTHORITY OF GEORGIA****46-4-80. Legislative findings; declaration of need.**

The General Assembly finds that certain political subdivisions of this state now own and operate gas distribution systems to serve their citizens, inhabitants, and customers by providing them with gas for all purposes; and if such political subdivisions are to furnish, and if the members of the public in the areas they serve are to receive, adequate service, such political subdivisions must have adequate, dependable, and economical sources of gas supplies. The General Assembly declares that there exists in this state a need for an authority to function without profit in developing and promoting for the public good in this state adequate, dependable, and economical sources and supplies of gas for the purposes expressed in this Code section, and to assist in the financing of additions and other expenditures for the municipal gas systems of such political subdivisions. (Code 1981, § 46-4-80, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-81. Definitions.

As used in this article, the term:

(1) "Authority" means the Municipal Gas Authority of Georgia and any successor thereto. Any change in name or composition of the authority shall in no way affect the vested rights of any person under this article or impair the obligations of any contracts existing under this article.

(2) "Bond anticipation notes" or "notes" means obligations issued after validation of bonds and in anticipation of the issuance of the bonds as validated.

(3) "Bonds" or "revenue bonds" means any bonds issued by the authority under this article, including refunding bonds.

(4) "Cost of project" or "cost of construction" means all costs of construction; all costs of real and personal property required for the purposes of such project and facilities related thereto, including land and

any leases, rights or undivided interest therein, easements, franchises, water rights, fees, permits, approvals, licenses, and certificates, and the securing of such permits, approvals, licenses, and certificates and the preparation of applications therefor, and including all machinery and equipment, including equipment for use in connection with such construction; financing charges; working capital; interest prior to and during construction and during such additional period as the authority may determine; operating expenses during such period as the authority may determine; costs of engineering, architectural, and legal services; costs of plans and specifications and all expenses necessary or incidental to determining the feasibility or practicability of the project; costs of insurance or of self-insuring any project; administrative expenses; amounts payable under any judgment against the authority; disposal costs; all costs associated with acquiring contract rights or other contractual arrangements for the short-term or long-term provision of gas supplies, including reserves, transmission, storage, peaking, or other services associated therewith, including prepayments for such; and such other expenses as may be necessary or incidental to the financing authorized by this article. All funds paid or advanced for any of the purposes mentioned in this paragraph by political subdivisions contracting with the authority prior to the issuance of any of the authority's bonds or notes may be refunded to such political subdivisions out of the proceeds of any bonds or notes so issued. The costs of any project may also include a fund or funds for the creation of a debt service reserve, a renewal and replacement reserve, and such other reserves as may be reasonably required by the authority for the operation of its projects and as may be authorized by any bond resolution or trust agreement or indenture pursuant to the provisions of which the issuance of any such bonds or bond anticipation notes may be authorized. Any obligation or expense incurred for any of the purposes mentioned in this paragraph shall be regarded as a part of the cost of the project and may be paid or reimbursed as such out of the proceeds of revenue bonds or notes issued under this article for such project.

(5) "Distribution" means the conveyance of gas to the ultimate consumer.

(6) "Election committee" means the Municipal Gas Authority of Georgia Membership Election Committee, as created in Code Section 46-4-83.

(7) "Exploration" means the processes, properties, activities, and facilities used for the discovery of deposits of gas, and the study and implementation of enhanced gas recovery methods.

(8) "Gas" means either natural or synthetic gas, including propane, manufactured, methane from coal beds, geothermal gas, or any mixture thereof, whether in gaseous or liquid form, or any byproduct resulting therefrom.

(9) "Production" means the physical activities, processes, properties, and facilities for development, manufacture, synthesis, production, coal gasification, extraction, gathering, or storage of gas or conversion of one form of gas to another.

(10) "Project," "undertaking," or "facility" means any plant, works, system, facility, and real and personal property of any nature whatsoever, together with all parts thereof and appurtenances thereto, and any contract rights, relating to the storage, acquisition, exploration, production, distribution, enrichment, transmission, purchase, sale, exchange, or interchange of gas and relating to the acquisition, extraction, conversion, transportation, storage, or reprocessing of fuel of any kind for any such purposes, or any interest in, or right to the use, services, enrichment, output, or capacity of any such plant, works, system, or facilities. "Project" or "undertaking" as used in this paragraph is intended to include contracts and contract rights as well as tangible property.

(11) "Storage" means any process, properties, activities, or facilities used to hold, store, or maintain gas.

(12) "System" means those properties, facilities, projects, contractual rights, or combination thereof of the authority which are designated by the authority as constituting a specific combination for the purposes of financing such or for the purposes of providing gas supplies or services to a specified group of political subdivisions or to a specified geographic area.

(13) "Transmission" means the transfer of gas from its acquisition site to, between, or among cities or municipal gas agencies or other persons with whom they may contract, but does not include distribution, except where incidental or necessary to transmission. (Code 1981, § 46-4-81, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-82. Creation of authority; principal office; legal situs.

(a) There is created a public body corporate and politic to be known as the Municipal Gas Authority of Georgia, which shall be a public corporation of the State of Georgia and which shall have perpetual existence. The authority, however, shall not be a political subdivision of the state but shall be an instrumentality of the state, a mere creature of the state, having distinct corporate entity and being exempt from Article 2 of Chapter 17 of Title 50.

(b) The authority shall have its principal office either in Fulton County or in a county contiguous to Fulton County. The authority's residence for the purposes of this article shall be either Fulton County or such other county contiguous to Fulton County. If the authority designates a county other than Fulton County as its principal office, notice of such designation

shall be given in writing to the Secretary of State and the address of such designated office shall be available for public inspection in the office of the Secretary of State. (Code 1981, § 46-4-82, enacted by Ga. L. 1987, p. 745, § 1; Ga. L. 1989, p. 471, § 1.)

46-4-83. Membership election committee; election of members of the authority.

(a) The authority shall consist of nine members. The first nine members shall be elected as provided in this Code section.

(b) On or before June 16, 1987, each of those political subdivisions which have, prior to such date, by proper resolution of their respective governing bodies, declared their intention to contract with the authority for the purchase of all or some substantial portion of its gas supply (other than short-term purchases) shall designate one person, who shall be a resident of the State of Georgia, as its representative on a body to be known as the "Municipal Gas Authority of Georgia Membership Election Committee," provided that at least five political subdivisions have declared their intention to contract with the authority. All such resolutions of declaration of intention to contract with the authority shall be presented to the election committee at its first meeting, which shall be held in the office of the Georgia Municipal Association at 11:00 A.M. on June 23, 1987.

(c) At its first meeting, the election committee shall organize and shall elect a chairman and such other officers as may be desirable in the determination of the election committee. The election committee shall then determine the sufficiency of the resolutions presented to it and shall determine the number of votes (including fractions thereof) which each representative to the election committee shall be entitled to cast in accordance with Code Section 46-4-87. Nominations for membership on the authority shall then be received by the election committee prior to adjournment of its first meeting.

(d) The election committee shall then meet for the second time on June 30, 1987, at the same time and at a place designated by the election committee at its initial meeting to receive any other nominations to the authority that may be made. A vote shall then be taken; and the nine nominees receiving the largest number of votes cast by a quorum of the election committee, as such quorum is determined by subsection (c) of Code Section 46-4-87, shall be declared the first nine members of the authority. Insofar as may be consistent with the remaining provisions of this Code section, in the election of the first nine members, the three nominees receiving the highest number of votes shall be elected to terms of three years; the three nominees receiving the next highest number of votes shall be elected to terms of two years; and the three nominees receiving the next highest number of votes shall be elected to terms of one year. Any tie votes

shall be resolved by lot in such manner as shall be prescribed by the election committee.

(e) Notwithstanding any other provision of this Code section to the contrary, in the event it should be mathematically necessary in the election of the members of the authority for two members to be residents of the same political subdivision, then one of the two members who are residents of the same political subdivision shall be elected for an initial term of one year. In the event there are four political subdivisions from which two residents must be elected, one of the residents of one of such political subdivisions shall be elected for an initial term of two years. (Code 1981, § 46-4-83, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-84. Authority members — Representation of political subdivisions; eligibility of election committee members; successive terms.

Each member of the authority shall be a resident of one of the political subdivisions represented on the election committee; provided, however, that an employee of the gas department or utility commission of a political subdivision represented on the election committee shall be qualified to be a member of the authority even though not a resident of one of the political subdivisions so represented for so long as he or she remains such an employee; but, insofar as is mathematically possible, no two members shall be residents or employees of the same political subdivision. Representatives to the election committee shall be eligible for membership on the authority. Members shall be eligible to succeed themselves. (Code 1981, § 46-4-84, enacted by Ga. L. 1987, p. 745, § 1; Ga. L. 1992, p. 1055, § 1.)

46-4-85. Authority members — Terms of office.

Upon the expiration of the terms of the first members of the authority, members shall be elected for three-year terms, provided that in the year in which a member's term is to expire, the term shall not expire until the adjournment of the annual meeting for that year and until a successor is elected. The election committee shall meet at a date not more than 30 days prior to each annual meeting of the authority and shall elect members to fill the terms which will expire at the conclusion of such annual meeting. (Code 1981, § 46-4-85, enacted by Ga. L. 1987, p. 745, § 1; Ga. L. 1992, p. 6, § 46.)

46-4-86. Election committee members.

(a) Each political subdivision contracting with the authority for all or a substantial portion of its gas supply (other than short-term purchases) following the election of the first nine members of the authority shall designate a representative to the election committee no more than 30 days

following the execution of such contract by and between the authority and such political subdivision. The term of such additional representative shall begin with the next meeting of the election committee.

(b) Representatives to the election committee shall serve at the pleasure of the governing body of the political subdivision which appointed them. (Code 1981, § 46-4-86, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-87. Weighted vote of election committee members; quorum for election committee.

(a) In elections held by the election committee to elect members to the authority, each political subdivision entitled to representation on the election committee shall have and shall be entitled to have its representative on the election committee cast: (1) one whole vote; (2) plus an additional vote or votes (including fractions thereof) to be determined by arriving at a percentage by dividing the number of MCF per day of contract demand purchased by the respective political subdivision during the immediately preceding calendar year by the total number of MCF per day of contract demand purchased by all such political subdivisions during the immediately preceding calendar year and applying such percentage to the total number of political subdivisions entitled to representation on the election committee; and (3) plus an additional vote or votes (including fractions thereof) to be determined by arriving at a percentage by dividing the annual quantity of MCF purchased by the respective political subdivision during the immediately preceding calendar year by the total of the annual quantities of MCF purchased by all such political subdivisions during the immediately preceding calendar year and applying such percentage to the total number of political subdivisions entitled to representation on the election committee.

(b) At such time as contracts or facilities of the authority are placed in commercial operation, as determined by the authority, and gas is being supplied by the authority to political subdivisions contracting with the authority, then and thereafter each such political subdivision entitled to representation on the election committee shall have and shall be entitled to have its representative on the election committee cast: (1) one whole vote; (2) plus an additional vote or votes (including fractions thereof) to be determined by arriving at a percentage by dividing the number of MCF per day of contract demand purchased from the authority by the respective political subdivision during the immediately preceding calendar year by the total number of MCF per day of contract demand purchased from the authority by all such political subdivisions during the immediately preceding calendar year and applying such percentage to the total number of political subdivisions entitled to representation on the election committee; and (3) plus an additional vote or votes (including fractions thereof) to be determined by arriving at a percentage by dividing the annual quantity of

MCF purchased from the authority by the respective political subdivisions during the immediately preceding calendar year by the total of the annual quantities of MCF purchased from the authority by all such political subdivisions during the immediately preceding calendar year and applying such percentage to the total number of political subdivisions entitled to representation on the election committee.

(c) The presence at any meeting of the election committee of representatives entitled to cast two-thirds of the total votes to which the election committee shall be entitled shall constitute a quorum of the election committee. The authority is authorized to round fractional votes to the nearest 1/1000. (Code 1981, § 46-4-87, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-88. Vacancies in membership of authority.

Any vacancy in the membership of the authority shall be filled by a new member who shall be elected by the remaining members of the authority and who shall serve until the next meeting of the election committee. At the first meeting of the election committee following the filling of such vacancy, the election committee shall elect a member to fill the remainder, if any, of the unexpired term for which such vacancy was filled. Upon such election by the election committee, the membership on the authority of the member previously elected by the remaining members of the authority to fill such vacancy shall terminate. (Code 1981, § 46-4-88, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-89. Officers.

The authority shall elect from among its membership a chairman, a vice chairman, a secretary-treasurer, and an assistant secretary-treasurer. Such officers shall serve for such terms as shall be prescribed by resolution of the authority or until their successors are elected and qualified. (Code 1981, § 46-4-89, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-90. Quorum; majority vote.

At all meetings of the authority, the presence in person of a majority of the members in office shall be necessary for the transaction of business, and the affirmative vote of a majority of the members then in office shall be necessary for any action of the authority. No vacancy in the membership of the authority shall impair the right of such majority to exercise all the rights and perform all the duties of the authority. If at any meeting there is less than a majority present, a majority of those present may adjourn the meeting to a fixed time and place, and notice of such time and place shall be given in accordance with subsection (c) of Code Section 46-4-91, provided that if the time element of subsection (c) of Code Section 46-4-91

cannot reasonably be complied with, such notice, if any, of such adjourned meeting shall be given as is reasonably practicable. (Code 1981, § 46-4-90, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-91. Annual and special meetings.

(a) The annual meeting of the authority shall be held on the anniversary date of the first meeting of the authority unless the date, time, and place of such annual meeting shall otherwise be fixed by resolution of the authority.

(b) Special meetings of the authority may be called by resolution of the authority, by the chairman or vice chairman, or upon the written request of at least three members of the authority.

(c) Written notice of all meetings shall be delivered to each political subdivision contracting with the authority and to each member of the authority not less than ten days prior to the date of such meeting in the case of regular meetings and not less than three days prior to the date of such meeting in the case of special meetings.

(d) Notice of a meeting of the authority need not be given to any member who signs a waiver of notice either before or after the meeting. Attendance of a member at a meeting shall constitute a waiver of notice of such meeting and a waiver of any and all objections to the place or time of the meeting or to the manner in which it has been called or convened, except when a member states at the beginning of the meeting any such objection or objections to the transaction of business. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the authority need be specified in the notice or the waiver of notice of such meetings.

(e) In addition to the annual meeting of the authority, regular meetings of the authority may be established by resolution of the authority; and no notice, other than notice of the adoption of such resolution conveyed to any member of the authority who was absent when it was adopted, shall be required for such meeting, except for the notice required by subsection (c) of this Code section. (Code 1981, § 46-4-91, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-92. Compensation; expenses; personnel.

The members of the authority shall not be entitled to compensation for their services, but may be reimbursed by the authority for their actual expenses properly incurred in the performance of their duties. The authority shall make rules and regulations for its own government and may retain, employ, and engage all necessary staff and personnel, including professional and technical supervisors, assistants, and experts and other agents and employees, whether temporary or permanent, as it may require.

Any one or more of such persons so engaged may be designated as an additional assistant secretary-treasurer of the authority and may be given the duties of keeping the books, records, and minutes of the authority; of giving all notices required by Code Sections 46-4-90, 46-4-91, and 46-4-93; and, in the absence of or in lieu of the secretary-treasurer, of performing all other functions of the secretary-treasurer. Officers designated by the authority pursuant to this Code section shall serve at the pleasure of the authority. (Code 1981, § 46-4-92, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-93. Removal of authority members from office.

The election committee shall have the power to remove from office any member of the authority for cause after written notice and public hearing. (Code 1981, § 46-4-93, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-94. Records required.

The authority shall keep suitable books and records of all its obligations, contracts, transactions, and undertakings; of all income and receipts of every nature; and of all expenditures of every kind. (Code 1981, § 46-4-94, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-95. Purpose.

The purpose of the authority shall be: (1) to acquire or construct, or to acquire and construct, and to operate and maintain, or to cause to be constructed, operated, and maintained, systems, projects, and facilities for the storage, acquisition, exploration, production, distribution, transmission, purchase, sale, exchange, or interchange of gas; and (2) in addition thereto, to take all other necessary or desirable actions in order to provide or make available an adequate, dependable, and economical supply of gas and related services to those political subdivisions of this state identified in Code Section 46-4-100 which may desire the same and, incidentally and so as to take advantage of economies of scale, in the storage, acquisition, exploration, production, distribution, transmission, purchase, sale, exchange, or interchange of gas to other persons and entities. (Code 1981, § 46-4-95, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-96. Powers.

(a) The authority shall have all powers necessary or convenient to carry out and effectuate the purpose and provisions of this article including, but without limiting the generality of the foregoing, the power:

(1) To sue and be sued in contract and in tort and to complain and defend in all courts;

(2) To adopt and to alter a corporate seal;

(3) To acquire in its own name, inside and outside this state, real property or rights and easements therein and franchises and personal property necessary or convenient for its corporate purposes, by purchase, on such terms and conditions and in such manner as it may deem proper, or by the exercise of the power of eminent domain in accordance with any and all existing laws of the State of Georgia applicable to the condemnation of property for public use, including the power to proceed as a condemning body under Article 2 of Chapter 2 of Title 22 or by gift, grant, lease, or otherwise; to insure the same against any and all risks as such insurance may, from time to time, be available; and to use such property, rent or lease the same to or from others, make contracts with respect to the use thereof, or sell, lease, or otherwise dispose of any such property in any manner it deems to the best advantage of the authority and the purposes thereof. The power to acquire, use, and dispose of property provided in this paragraph shall include the power to acquire, use, and dispose of any interest in such property, whether divided or undivided, which acquisition may result in the ownership of such property or any part thereof in common with any other party, whether public or private. Title to any such property of the authority, however, shall be held by the authority exclusively for the benefit of the public. The authority shall be under no obligation to accept and pay for any property condemned under this article except from the funds provided under the authority of this article and, in any proceedings to condemn, such orders may be made by the court having jurisdiction of the action as may be just to the authority and to the owners of the property to be condemned. If the authority shall deem it expedient to construct any project on lands which are subject to the control of the state or of any political subdivision or public corporation of the state, the appropriate state authorities, in the case of lands controlled by the state, or the governing authorities of such political subdivisions or such public corporations are authorized to convey such lands to the authority for such consideration, not exceeding reasonable value, as may be agreed upon by the authority, as grantee, and by the appropriate state authorities or by the governing body of such political subdivision or by such public corporation, as grantor, taking into consideration the public benefit to be derived from such conveyance;

(4) To appoint and select officers, agents, and employees, including engineering, architectural, and construction experts, fiscal agents, and attorneys, and to fix their compensation;

(5) To acquire, by purchase or otherwise, in whole or in part, inside or outside this state, as provided in paragraph (3) of this Code section, and to place into operation and operate or cause to be placed into operation and operated, either as owner of all or of any part in common with others or as agent, facilities and projects for the storage, acquisition, explora-

tion, production, distribution, transmission, purchase, sale, exchange, or interchange of gas; to acquire and to provide, by sale or otherwise, an adequate, dependable, and economical gas supply to political subdivisions of this state contracting with the authority pursuant to the authority of Code Section 46-4-100; and, through such political subdivisions, to supply such gas to the members of the public in the areas served by them; and, as agent for such political subdivisions, to secure gas contracts and arrangements with other persons. The authority shall also have the power, which may be exercised either as principal or as agent, to manufacture, store, and transmit gas for light, heat, power, and energy; to manufacture, buy, sell, import, export, lease, or otherwise acquire and generally deal in gas apparatuses of all kinds and machinery and devices and materials and fossil fuels for the manufacture, storage, and transmission of gas for light, heat, power, and energy; to purchase gas at retail or wholesale from any other person; to purchase or construct part of the capacity of projects or facilities sponsored and owned by or in common with others, making any such purchase at wholesale or retail inside or outside this state; to contract for the purchase of gas from, or the sale of gas to, the United States government and gas utility systems either privately or publicly owned, inside or outside this state; to execute long-term or short-term gas purchase or sale contracts on terms which may include agreements with respect to resale rates and the disposition of revenues; to interchange, exchange, store, and purchase gas from any person; to erect, buy, lease, or otherwise acquire, operate, and maintain gas lighting and heating projects; to transmit gas both for itself and on behalf of others; to erect, buy, sell, lease, or otherwise acquire, maintain, and operate or cause to be maintained and operated plants, underground subways, conduits, and pipelines above, upon, and under the streets, alleys, lands, and territories of political subdivisions, public or private corporations, or individuals; and to continue to sell gas to political subdivisions of this state which are authorized to contract with the authority pursuant to Code Section 46-4-100 and to other persons and entities inside or outside this state and, as agent for any or all of the same, to make gas otherwise available to them through arrangements with other persons, all in the exercise of the powers of the authority and to effectuate the purposes of this article;

(6) To designate one or more systems in effectuating any of its purposes;

(7) To contract with the state and its agencies, instrumentalities, and departments; with those political subdivisions of the state which are authorized to contract with the authority pursuant to Code Section 46-4-100; and with private persons and corporations inside or outside this state. This power includes the making of contracts for the construction of projects, which contracts for construction may be made either as sole owner of the project or as owner, in common with other public or private

persons, of any divided or undivided interest therein; and is further intended to include, without limitation, the making of contracts for the purchase, sale, exchange, interchange, pooling, transmission, distribution, or storage of gas and fuel of any kind for any such purposes, inside and outside the State of Georgia, in such amounts as it shall determine to be necessary and appropriate to make the most effective use of its powers and to meet its responsibilities, on such terms and for such period of time, not exceeding 50 years, as the authority shall determine; and is further intended to include, without limitation, the making of contracts for furnishing gas supply development services and management services to political subdivisions contracting with the authority pursuant to Code Section 46-4-100.

(8) To exercise any one or more of the powers, rights, and privileges conferred by this article either alone or jointly or in common with one or more other parties or utilities, whether public or private. In any such exercise of such powers, rights, and privileges jointly or in common with others with respect to the construction, operation, and maintenance of gas projects or facilities, the authority may own an undivided interest in such facilities with any other parties, whether public or private. The authority may enter into agreements with respect to any such gas exploration, storage, manufacturing, distribution, or transmission facility with the other parties participating therein, and any such agreement may contain such terms, conditions, and provisions consistent with this article as the parties thereto shall deem to be in their best interests. Any such agreement may include, but need not be limited to, provisions for the construction, operation, and maintenance of such gas exploration, storage, manufacturing, or transmission facility by any one or more of the parties to such agreement, which party or parties shall be designated in or pursuant to such agreement as agent or agents on behalf of itself and one or more of the other parties thereto, or by such other means as may be determined by the parties thereto. Such an agreement may also include provisions for methods of determining and allocating among or between the parties the costs of construction, operation, maintenance, renewals, replacements, improvements, and disposals with respect to such facility. In carrying out its functions and activities as such agent with respect to the construction, operation, and maintenance of such facility, such agent shall be governed by the laws and regulations applicable to such agent as a separate legal entity, and not by any laws or regulations which may be applicable to any of the other participating parties. Notwithstanding any other law to the contrary, pursuant to the terms of any such agreement, the authority may delegate its powers and duties with respect to the construction, operation, and maintenance of such facility to the party acting as agent; and all actions taken by such agent in accordance with the provisions of such agreement may be made binding upon the authority without further action or approval by the authority;

(9) To accept, receive, and administer gifts, grants, appropriations, and donations of moneys, materials, and property of any kind, including loans and grants from the United States government or the State of Georgia or any agency, department, authority, or instrumentality of either, upon such terms and conditions as the United States government, the State of Georgia, or such agency, department, authority, or instrumentality shall impose; to administer trusts; and to sell, lease, transfer, convey, appropriate, and pledge any and all of its property and assets;

(10) To invest any accumulation of its funds and any sinking fund or reserves in any manner that the authority considers prudent, including entering into hedging, options, and future transactions, notwithstanding any other law of this state relating to investment of public funds, and to purchase its own bonds and notes;

(11) To employ such investment and money-management techniques as the authority shall determine to be prudent and not inconsistent with this article or the other laws of the state;

(12) To do any and all things necessary to reduce the cost of gas furnished to political subdivisions contracting with the authority including, without limitation, entering into interest rate swaps and other arrangements for restructuring the authority's capitalization;

(13) To provide management, technical, financial, informational, promotional, and educational services to and for the benefit of the political subdivisions;

(14) To do any and all things necessary or proper for the accomplishment of the objectives of this article and to exercise any power usually possessed by private corporations performing similar functions which is not in conflict with the Constitution and laws of this state, including:

(A) Employment of professional and administrative staff and personnel and retaining of legal, engineering, and other professional services;

(B) The purchase of all kinds of insurance, including, without limitation, insurance against tort liability and against risks of damage to property;

(C) The borrowing of money for any of the corporate purposes of the authority, provided that obligations of the authority other than revenue bonds for which provision is made in this article shall be payable from funds of the authority other than any special fund allocated to the payment of revenue bonds, and shall not be a charge against such special fund;

(D) The power to indemnify and hold harmless any parties contracting with the authority or its agents from damage to persons or property; and

(E) The power to act as self-insurer with respect to any loss or liability; and

(15) To issue its revenue bonds as provided in this article in evidence of its indebtedness incurred with respect to the powers described in this article, such bonds to be payable from the revenues, receipts, and earnings of the projects or systems of the authority and other available funds thereof; to execute trust agreements or indentures; to sell, convey, pledge, and assign any and all of its funds, assets, property, and income as security for the payment of such revenue bonds; and to provide for the payment of the same and for the rights of the owners thereof.

(b) Notwithstanding any other provision of this article, the authority shall not have the power or authority to engage in the distribution or sale of gas or the transmission of gas to an ultimate consumer thereof, irrespective of whether such consumer is a public or private person or other entity, and irrespective of whether the authority acts alone, in conjunction with, on behalf of, or as an agent for another or others in any such transaction. (Code 1981, § 46-4-96, enacted by Ga. L. 1987, p. 745, § 1.)

Code Commission notes. — Pursuant to § 28-9-5, in 1987, a comma was inserted following “such agreement” in the last sen-

tence of paragraph (a)(8), and “indemnify” was substituted for “idemnify” in subparagraph (a)(14)(D).

46-4-97. Not for profit operation.

The authority shall not operate or construct any project for profit, except insofar as any such profit will inure to the benefit of the public. The authority shall fix the rates, fees, and charges consistent with this declaration of policy such as will produce revenues only in amounts sufficient, together with all other funds of the authority, to pay the principal or purchase price of and premium, if any, and interest on bonds and all other indebtedness and contractual obligations of the authority; to provide for maintenance and operation of the authority and of its projects; to provide for payment of any judgment against the authority; and to maintain such reserves as shall have been created in amounts sufficient in the judgment of the authority for the security of the bonds and other obligations; and for the improvement, replacement, or expansion of the facilities or services of the authority or to provide fuel for its projects. (Code 1981, § 46-4-97, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-98. Public purpose; tax exemption; payments in lieu of taxes.

(a) It is found, determined, and declared that the creation of the authority and the carrying out of its corporate purposes are in all respects for the benefit of the people of this state and that the authority is an institution of purely public charity performing an essential governmental function.

(b)(1) The property of the authority is declared, and shall in all respects be considered, to be public property. Title to the authority's property shall be held by the authority only for the benefit of the public; and the use of such property pursuant to this article shall be and is declared to be for essential public and governmental purposes, that is, for the promotion of public general welfare in the matter of providing an adequate, dependable, and economical gas supply in an effort to better the general condition of society in this state, which promotion is declared to be a public beneficence for the good of humanity and for the general improvement and happiness of society.

(2)(A) It is recognized, however, that removal from local tax digests of the value of all property owned by the authority might impose an unfair burden on many taxpayers whose property is taxable. In the interest of weighing these benefits and concerns and arriving at an equitable policy regarding treatment of authority property, the General Assembly finds and declares that equity requires that the authority should rightfully make payments in lieu of taxes so that the authority may fulfill its good and public purposes without incidental harm to the state's local governments.

(B) The authority shall make payments in lieu of taxes on its tangible property as provided in this Code section. It shall file a return within the same time and in the same form and manner as public utilities. The taxing authorities shall assess the tangible property of the authority which is made subject by this Code section to payments in lieu of taxes in accordance with the law and procedures applicable to public utilities and shall apply to such assessments in each year in which any such payments are due the appropriate millage levies of the state and of the political subdivisions in which such property is located in order to arrive at the amounts of the respective payments in lieu of taxes. The authority shall be notified of the amounts of the payments in lieu of taxes due and shall pay such amounts to the state and its respective political subdivisions within the time in which payments of taxes by public utilities are allowed or required.

(c) Except as specifically provided for in this Code section for payments in lieu of taxes, all property of the authority, all income, obligations, and interest on the bonds and notes of the authority, and all transfers of such property, bonds, or notes shall be and are declared to be exempt from taxation by the state or any of its political subdivisions. (Code 1981, § 46-4-98, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-99. Contracts with political subdivisions.

(a) The authority may contract with any political subdivision of this state which is authorized by Code Section 46-4-100 to make such contracts for the

payment of such rates, tolls, fees, and charges as may be prescribed by the authority for the use by such subdivisions or the residents thereof of the services, projects, and facilities of the authority, including the purchase of gas supply planning and development services. Any such political subdivision shall have the right and power, by resolution of its governing body, to make such a contract; and the amounts contracted to be paid by such political subdivision to the authority under such a contract shall constitute general obligations of such political subdivision for the payment of which the full faith and credit of such political subdivision may be pledged to provide the funds required to fulfill all obligations arising under any such contract.

(b) Any such political subdivision which enters into such a contract pursuant to this article shall, annually in each and every fiscal year during the term of such contract, include in a general revenue or appropriation measure, whether or not any other items are included, sums sufficient to satisfy the payments required to be made in each year by such contract until all payments required under such contract have been paid in full.

(c) If for any reason a provision or appropriation pursuant to subsection (b) of this Code section is not made, then the fiscal officers of such political subdivision are authorized and directed to set up as an appropriation on their accounts in each fiscal year the amounts required to pay the obligations called for under any such contract. The amount of an appropriation made under this subsection in each fiscal year shall be due and payable and shall be expended for the purpose of paying and meeting the obligations provided under the terms and conditions of such contract; and such appropriation shall have the same legal status as if the contracting political subdivision had included the amount of the appropriation in its general revenue or appropriation measure. Such fiscal officers shall make such payment to the authority if for any reason such appropriation is not otherwise made.

(d) Any contract entered into pursuant to this Code section may provide for the purchase of gas from one or more projects or from a system and may provide for all of the gas requirements of the political subdivision's municipal gas system or for a portion of such requirements or may provide for the purchase by the political subdivision of a specified portion of the output or volume of a particular project.

(e) Any such contract may provide that the political subdivision is obligated to make payments, whether or not a project is completed, operable, or operating; whether or not the output, volume, capacity, or service of a project is suspended, interrupted, interfered with, reduced, or curtailed; whether or not the gas or services contracted for are furnished, made available, or delivered; and regardless of the performance or non-performance of the authority or another political subdivision under the contract or any other instrument.

(f) Any such contract may provide that if another political subdivision or other person defaults in the payment of its obligations, then the political subdivision that is party to such contract is required to pay for, is entitled to, and may use or otherwise dispose of its proportionate share of the output that was to be purchased by the defaulting political subdivision or other person.

(g) Loans made to a political subdivision pursuant to Code Section 46-4-101 shall be for use in the municipal gas system of such political subdivision, and such loan shall be made and repaid, with interest, on such terms as the authority and political subdivision shall agree.

(h) Any such contract may obligate the political subdivision to pay such amounts as the authority may determine as necessary or desirable to establish reserves for rate stabilization purposes. (Code 1981, § 46-4-99, enacted by Ga. L. 1987, p. 745, § 1; Ga. L. 1994, p. 97, § 46.)

46-4-100. Applicability of article to entities with gas distribution systems.

The political subdivisions with which the authority shall be authorized to contract to provide a gas supply pursuant to this article shall be those political subdivisions of this state which own and operate a gas distribution system. (Code 1981, § 46-4-100, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-101. Enabling resolution; issuance of revenue bonds; petition for judicial validation; fees; federal tax implications.

(a) When the authority desires to issue revenue bonds as permitted by this article, the authority shall, prior to the adoption of a resolution authorizing the issuance of such bonds, enter into one or more contracts with no less than five political subdivisions which are authorized to contract with the authority in accordance with Code Section 46-4-100. All such contracts shall be in accordance with Code Section 46-4-99.

(b) The acquisition, construction, reconstruction, improvement, equipping, alteration, repair, or extension of any project, and the issuance, in anticipation of the collection of the revenues from such project, of bonds to provide funds to pay the cost thereof, may be authorized under this article by resolution of the authority. Unless otherwise provided therein, such resolution shall take effect immediately and need not be laid over or published or posted. The authority, in determining such cost, may include all costs and estimated costs of the issuance of the bonds; all engineering, inspection, fiscal, and legal expenses; the interest which it is estimated will accrue during the construction period and during such additional period as the authority may determine on money borrowed, or which it is estimated will be borrowed pursuant to this article; and all costs included in the definition of "cost of project" as defined in Code Section 46-4-81. Such

bonds may also be issued to pay off, refund, or refinance any outstanding bonds or other obligations of any nature owed by the authority, whether or not such bonds or other obligations shall then be subject to redemption; and the authority may provide for such arrangements as it may determine for the payment and security of the bonds being issued or for the payment and security of the bonds or other obligations to be paid off, refunded, or refinanced. Such bonds may also be issued for the purpose of loaning the proceeds thereof to political subdivisions for use in their municipal gas systems and to finance any other corporate purposes of the authority.

(c) Revenue bonds may be issued under this article in one or more series; may bear such date or dates; may mature at such time or times, not exceeding 50 years from their respective dates; may bear interest at such rate or rates, that may be fixed or may vary in accordance with a specified formula or method of determination, payable at such time or times; may be payable in such medium of payment at such place or places; may be in such denomination or denominations; may be in such form, either coupon or fully registered without coupons; may be issued in any specific amounts; may carry such registration, conversion, and exchangeability privileges; may be declared or become due before the maturity date thereof; may provide such call or redemption privileges; may have such rank or priority; and may contain such other terms, covenants, assignments, and conditions as the bond resolution authorizing the issuance of such bonds or any indenture or trust agreement may provide. The authority may sell such bonds in such manner, at such price or prices, and upon such terms and conditions as shall be determined by the authority. The authority may arrange for insurance contracts, surety bonds, letters of credit, lines of credit, commitments to purchase, or other liquidity or credit support mechanisms and may remarket bonds to provide security to assure timely payment of bonds. The authority may by resolution delegate to such officers, employees, or agents as the authority's members may select the power to authorize the issuance and sale of bonds and fix, within limits prescribed in the resolution, the time and manner of their sale, maturities, date or rates of interest, and other terms and conditions the officer, employee, or agent considers appropriate.

(d) The bonds shall be signed by the chairman or other authorized officers of the authority; the corporate seal of the authority shall be impressed, imprinted, or otherwise reproduced on the bonds; and the bonds shall be attested by the signature of the secretary-treasurer or assistant secretary-treasurer of the authority. The coupons, if any, shall be signed in such manner as may be directed by the authority. The signatures of the officers of the authority and the seal of the authority upon any bond, note, or other debt security issued by the authority may be by facsimile if the instrument is authenticated or countersigned by a trustee or other authenticating agent other than the authority itself or an officer or employee of the authority. All bonds or notes issued under authority of this article bearing

signatures or facsimiles of the signatures of officers of the authority in office on the date of the signing thereof shall be valid and binding, notwithstanding that before the delivery thereof and payment therefor such officers whose signatures appear thereon shall have ceased to be officers of the authority. Pending the preparation of the definitive bonds, interim receipts, in such form and with such provisions as the authority may determine, may be issued to the purchasers of bonds to be issued under this article.

(e) Any bond resolution authorizing the issuance of bonds and any indenture or trust agreement entered into under this article to finance in whole or in part the acquisition, construction, reconstruction, improvement, equipment, alteration, repair, or extension of any project may contain covenants as to:

(1) The rates, fees, tolls, or charges to be charged for the services, facilities, and commodities of the project or system;

(2) The use and disposition of the revenue to be derived from the project or system;

(3) The creation and maintenance of reserves or sinking funds and the regulation, use, and disposition thereof, including debt service reserve; renewal and replacement or other capital improvement reserve, including reserves for the provision of fuel; and such other reserves as may be reasonably required by the authority for the operation of its projects and as may be authorized by the bond resolution or trust agreement or indenture pursuant to which the issuance of such bonds may be authorized;

(4) The purposes to which the proceeds of the sale of said bonds may be applied, and the use and disposition of such proceeds;

(5) Events of default and the rights and liabilities arising thereupon, the terms and conditions upon which bonds issued under this article shall become or may be declared due before maturity, and the terms and conditions upon which such declaration and its consequences may be waived;

(6) The issuance of other additional bonds or instruments payable from or a charge against the revenue of such project or system;

(7) The insurance to be carried thereon and the use and disposition of insurance proceeds;

(8) Books of account and inspection and audit thereof;

(9) Limitations or restrictions on the power to lease or otherwise dispose of the project while any of the bonds or interest thereon remains outstanding and unpaid; and

(10) The operation and maintenance of the project or system, and of the authority.

(f) The provisions of this article and of any bond resolution, indenture, or trust agreement entered into pursuant to this article shall be a contract with every holder of the bonds; and the duties of the authority under this article and under any such bond resolution, indenture, or trust agreement shall be enforceable by any bondholder by mandamus or other appropriate action or proceeding at law or in equity.

(g) The authority shall give notice to the district attorney of the Atlanta Judicial Circuit of its intention to issue its revenue bonds, setting forth the fact of service of such notice, the principal amount of bonds to be issued, the purpose for which the same are to be issued, whether the bonds are to be issued in separate series or installments from time to time, the interest rate or rates which such bonds are to bear, the amount of principal to be paid in each year during the life of the bonds or the method or formula by which such amounts shall be determined, the date by which all bonds are to be paid in full, and the security to be pledged to the payment of the bond; provided, however, that such notice, in the discretion of the authority, in lieu of specifying the rate or rates of interest which the bonds are to bear, may state that the bonds when issued will bear interest at a rate not exceeding a maximum per annum rate of interest specified in the notice or the maximum rate permitted, at any time, by law, or, in the event the bonds, or any series or installment thereof, are to bear different rates of interest for different maturity dates, may state that none of such rates will exceed the maximum rate specified in the notice; provided, further, that nothing in this subsection shall be construed as prohibiting or restricting the right of the authority to sell the bonds at a discount, even if in so doing the effective interest cost resulting therefrom would exceed the maximum per annum interest rate specified in the notice to the district attorney. Such notice shall be signed by the chairman, vice chairman, or secretary-treasurer.

(h) Within 20 days after the date of service of the required notice, the district attorney shall prepare and file in the office of the clerk of the Superior Court of Fulton County a complaint directed to the Superior Court of Fulton County in the name of the state and against the authority, setting forth the fact of service of such notice, the amount of the bonds to be issued, for what purpose they are to be issued, whether the bonds are to be issued in separate series or installments from time to time, the interest rate or rates they are to bear or the maximum rate or rates of interest, the amount of principal and interest to be paid annually or the method or formula by which the amount of such payments shall be determined, and the date by which all bonds are to be paid in full. In addition, the district attorney shall obtain from the judge of the court an order requiring the authority by its proper officers to appear at such time and place as the judge may direct, either during a session of court or in chambers, within 20 days after the filing of the complaint, and show cause, if any, why the bonds should not be confirmed and validated. Such complaint and order shall be served upon the authority in the manner provided by law; and to such

complaint the authority shall make sworn answer at or before the date set in the order for the hearing.

(i) Prior to the hearing of the cause, the clerk of the Superior Court of Fulton County shall publish in the official organ of Fulton County once during each of the two weeks immediately preceding the week in which the hearing is to be held a notice to the public that, on the day specified in the order providing for the hearing of the cause, the same will be heard.

(j) Within the time prescribed in the order or at such other time as he may fix, the judge of the superior court shall proceed to hear and determine all questions of law and of fact in the cause, including the question of whether the contractual obligations which are made a condition precedent to the issuance of such bonds by subsection (a) of this Code section have been properly incurred; and the judge shall render judgment on the cause. Any citizen of this state may become a party to the proceedings at or before the time set for the hearing. Any party who is dissatisfied with the judgment of the court confirming and validating the issuance of the bonds and the security therefor or refusing to confirm and validate the issuance of the bonds and the security therefor may appeal from the judgment under the procedure provided by Article 2 of Chapter 6 of Title 5. No appeal may be taken by any person who was not a party at the time the judgment appealed from was rendered.

(k) In the event no appeal is filed within 30 days after the date of the judgment of validation, or, if an appeal is filed, in the event the judgment is affirmed on appeal, the judgment of the superior court so confirming and validating the issuance of the bonds and the security therefor shall be forever conclusive upon the validity of the bonds and the security therefor.

(l) Bonds issued under this article shall bear a certificate of validation signed with the facsimile or manually executed signature of the clerk of the Superior Court of Fulton County stating the date on which the bonds were validated as provided in this Code section; and such entry shall be original evidence of the fact of judgment and shall be received as original evidence in any court in this state.

(m) The authority shall reimburse the district attorney for his actual costs of the case, if any. For every \$5,000.00 in principal amount of bonds or portion thereof, there shall be payable to the clerk of the Superior Court of Fulton County the following fees for validation and confirmation:

First \$500,000.00	\$1.00
\$501,000.00 — \$2,500,000.0025
All over \$2,500,000.0010

(n) Any other law to the contrary notwithstanding, this article shall govern all civil claims, proceedings, and actions respecting debt of the authority evidenced by revenue bonds.

(o) Nothing in this article shall prohibit the authority from issuing bonds, the interest on which is includable in gross income of the owners thereof for federal income tax purposes. (Code 1981, § 46-4-101, enacted by Ga. L. 1987, p. 745, § 1; Ga. L. 1992, p. 6, § 46.)

Code Commission notes. — Pursuant to § 28-9-5, in 1987, “obligations” was substituted for “obligation” near the beginning of the fourth sentence in subsection (b); and, in subsection (c), “exchangeability” was substituted for “exchangibility” in the first sentence and commas were inserted following

“to purchase” in the third sentence and “rates of interest” in the last sentence.

Pursuant to § 28-9-5, in 1988, “bondholder” was substituted for “bond holder” near the end of subsection (f) and “the” was added preceding “two weeks” near the middle of subsection (i).

46-4-102. Necessary parties to revenue bonds validation petition; intervention by citizens; adjudication.

(a) When payments which are made by political subdivisions pursuant to contracts entered into under subsection (a) of Code Section 46-4-99 are pledged as security for the payment of bonds sought to be validated, the petition for validation shall make party defendant the authority and shall also make parties defendant to such action every political subdivision which has contracted with the authority for the use of the facilities, commodities, and services of the project, if any, for which bonds shall be sought to be validated and issued. In addition, where the bonds are to be issued to finance a project, every other party, whether public or private, contracting with the authority in any manner with relation to the operation of such project, and particularly with relation to any common ownership of such project or to the supplying of gas to the authority or the taking or purchasing of gas from the project, shall be made parties defendant.

(b) All such parties defendant shall be served and shall be required to show cause, if any exists, why such contracts and the terms and conditions thereof should not be inquired into by the court and the validity of the terms thereof determined and the matters and conditions imposed on the parties to such contracts and all such undertakings thereof adjudicated to be valid and binding on the parties thereto.

(c) Notice of such proceedings shall be included in the notice of validation hearing required by subsection (i) of Code Section 46-4-101 to be issued and published by the clerk of the Superior Court of Fulton County. In addition to such notice required to be published in Fulton County, such notice shall also be published in a newspaper or newspapers of general circulation in the State of Georgia, once a week during each of the two weeks immediately preceding the week of the hearing.

(d) Any citizen resident of this state may, at or before the time set for the validation hearing, intervene in the validation proceedings conducted in the Superior Court of Fulton County pursuant to Code Section 46-4-101 and may assert any ground or objection to the validity and binding effect of such

contract on his own behalf and on behalf of any political subdivision and of all citizens, residents, and property owners of the state.

(e) No appeal may be taken by any person who was not a party at the time the judgment appealed from was rendered.

(f) An adjudication as to the validity of any such contract which adjudication is unexcepted to within 30 days after the date of the judgment of validation or, if an appeal is filed, which adjudication is confirmed on appeal shall be forever conclusive and binding upon such political subdivisions and the resident citizens and property owners of this state. (Code 1981, § 46-4-102, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-103. Failure of district attorney to file revenue bonds validation petition.

In all cases where the authority has adopted a resolution for the issuance of revenue bonds, and where notice has been duly served upon the district attorney for the purpose of securing a judicial validation of such bonds and the security therefor, and where, in such case, there has been a failure on the part of such district attorney or other officer to proceed within the time prescribed by this article, it shall be competent for the authority to represent such facts in writing to the court and to represent further that such failure has been without fault on the part of the authority. In such case, the Superior Court of Fulton County shall have power and authority to inquire into the facts; and, upon being satisfied that such failure has not arisen from any fault or neglect on the part of the authority, it shall be the duty of the court to pass an order directing such district attorney to proceed within ten days to file a complaint as authorized by this article. Thereafter, the proceedings shall be held in the same manner as would have been followed had such petition been duly and promptly filed in the first instance. (Code 1981, § 46-4-103, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-104. Bonds as legal investments.

The bonds authorized by this article shall be securities in which:

- (1) All public officers and bodies of this state;
- (2) All political subdivisions of this state;
- (3) All insurance companies and associations, and other persons carrying on an insurance business;
- (4) All banks, bankers, trust companies, savings banks, and savings associations, including savings and loan associations, building and loan associations, investment companies, and other persons carrying on a banking business;

(5) All administrators, guardians, executors, trustees, and other fiduciaries; and

(6) All other persons whatsoever who are authorized to invest in bonds or other obligations of the state

may properly and legally invest funds, including capital in their control or belonging to them. Such bonds shall also be securities which may be deposited with and shall be received by all public officers and bodies of this state and its political subdivisions for any purpose for which deposit of the bonds or other obligations of this state is authorized. (Code 1981, § 46-4-104, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-105. Pledge of revenue to retire bonds.

(a) All or any part of the gross or net revenues and earnings derived from any particular project or system and any and all revenues and earnings received by the authority, regardless of whether such revenues and earnings were produced by a particular project for which bonds have been issued, may be pledged by the authority to the payment of the principal of and interest on revenue bonds of the authority as may be provided in any resolution authorizing the issuance of such bonds or in any trust instrument pertaining to such bonds.

(b) Such funds so pledged, from whatever source received, may include funds received from one or more or all sources and may be set aside at regular intervals into sinking funds for which provision may be made in any such resolution or trust instrument, which sinking funds may be pledged to and charged with the payment of:

(1) The interest upon such revenue bonds as such interest shall become due;

(2) The principal of the bonds as the same shall mature;

(3) The necessary charges of any trustee, paying agent, or registrar for such bonds; and

(4) Any premium upon bonds retired upon call or purchase.

(c) The use and disposition of any sinking fund may be subject to regulations for which provision may be made in the resolution authorizing the issuance of the bonds or in the trust instrument or indenture securing the payment of the same. (Code 1981, § 46-4-105, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-106. Trust agreement or indenture to secure bonds.

(a) In the discretion of the authority, any issue of revenue bonds may be secured by a trust agreement or indenture made by the authority with a

corporate trustee, which may be any trust company or bank having the powers of a trust company inside or outside this state. Such trust agreement or indenture may pledge or assign any or all revenue, receipts, and earnings to be received by the authority and any proceeds which may be derived from the disposition of any real or personal property of the authority or proceeds of insurance carried thereon.

(b) The resolution providing for the issuance of revenue bonds and such trust agreement or indenture may contain provisions for protecting and enforcing the rights and remedies of the bond owners, including the right of appointment of a receiver upon default in the payment of any principal or interest obligation and the right of any receiver or trustee to enforce collection of any rates, fees, tolls, charges, or revenues for the use of the services or facilities of the project or system necessary to pay all costs of operation and all reserves provided for, the principal of and interest on all bonds in the issue, all costs of collection, and all other costs reasonably necessary to accomplish the collection of such sums in the event of any default of the authority.

(c) Such resolution, trust agreement, or indenture may include covenants setting forth the duties of the authority regarding the acquisition of property for and the construction of the project and regarding the custody, safeguarding, and application of all funds of the authority, including any proceeds derived from the disposition of any real or personal property of the authority or proceeds of insurance carried thereon. In addition, such resolution, trust agreement, or indenture may include covenants providing for the operation, maintenance, repair, and insurance of the project and may contain provisions concerning the conditions, if any, upon which additional bonds may be issued.

(d) Such resolution, trust agreement, or indenture may set forth the rights and remedies of the bond owners and of the trustee; may restrict the individual right of action of any bond owner in such manner as is customary in securing bonds and debentures of corporations; and may contain such other provisions as the authority may deem reasonable and proper for the security of the bond owners.

(e) All expenses incurred in carrying out any trust agreement or indenture under this Code section may be treated as a part of the cost of maintenance, operation, and repair of the project affected by such trust agreement or indenture. (Code 1981, § 46-4-106, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-107. Proceeds of bonds.

(a) Proceeds of the bonds issued under authority of this article shall be used solely for the purpose of financing corporate purposes of the authority, including the payment of the cost of projects and the loaning of

proceeds to political subdivisions, and shall be disbursed upon requisition or order of such person and under such restrictions as the resolution authorizing the issuance of such bonds or the trust agreement or indenture may provide.

(b) If the proceeds of such bonds, including all series or installments of such issue, by error of calculation or otherwise, are less than the cost of projects or the cost of other purposes financed thereby, then, unless otherwise provided in the resolution authorizing the issuance of the bonds or in the trust agreement or indenture, additional bonds may in like manner be issued, subject to the requirements of subsection (a) of Code Section 46-4-101 to provide the amount of such deficit. Unless otherwise provided in the resolution authorizing the issuance of the bonds or in the trust agreement or indenture, such additional bonds shall be deemed to be of the same issue and shall be entitled to payment from the same fund, without preference or priority, as the bonds first issued for the same purpose.

(c) If the proceeds of the bonds of any issue exceed the amount required for the purpose for which such bonds are issued, the surplus shall be paid into the fund provided for the payment of principal and interest of such bonds.

(d) In the discretion of the authority, revenue bonds of a single issue or series or installment of such issue may be issued for the purpose of paying the cost of any one or more projects. (Code 1981, § 46-4-107, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-108. Lost, stolen, or mutilated bond certificates.

(a) If any bond becomes mutilated or is lost, stolen, or destroyed, the authority may execute and deliver, and the trustee may authenticate, a new bond of like date of issue, maturity date, principal amount, and interest rate per annum as the bond so mutilated, lost, stolen, or destroyed; which new bond shall have the same provisions in all respects as those on the bond mutilated, lost, stolen, or destroyed, provided that:

(1) In the case of any mutilated bond, such bond is first surrendered to the authority or to the trustee;

(2) In the case of any lost, stolen, or destroyed bond, there is first furnished evidence of such loss, theft, or destruction satisfactory to the authority and the trustee, together with indemnity satisfactory to the authority and the trustee;

(3) All other reasonable requirements of the authority and the trustee are complied with; and

(4) Expenses in connection with such transaction are paid.

(b) Any bonds surrendered for exchange shall be canceled.

(c) The authority shall be authorized to print the new bond with the validation certificate bearing the facsimile signature of the clerk of the superior court then in office, and such certificate shall have the same force and effect as in the first instance. All responsibility with respect to the issuance of any such new bonds shall be with the authority and not with such clerk; and such clerk shall have no liability in the event an overissuance occurs. (Code 1981, § 46-4-108, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-109. Interest on bonds after due date.

Interest shall cease to accrue on any bond on the date that such bond becomes due for payment if said payment is made or duly provided for, but liability for such bond and for the accrued interest thereon shall continue until such bond is 20 years overdue for payment. At that time, unless demand for payment has been made, such obligation shall be extinguished and shall be deemed no longer outstanding. (Code 1981, § 46-4-109, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-110. Cancellation or destruction of retired bonds.

Unless otherwise directed by the authority, every evidence of indebtedness and interest coupon paid or otherwise retired shall forthwith be marked "canceled" and shall be delivered by the paying agent making payment thereof to the authority, whereupon the evidence of indebtedness or the interest coupon shall be destroyed and a certificate of destruction shall be filed in the records of the authority. (Code 1981, § 46-4-110, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-111. Records of bond and note transactions required.

The fiscal officer of the authority or his agent shall maintain records containing a full and correct description of each evidence of indebtedness issued, identifying it and showing its date, issue, amount, interest rate, payment dates, payments made, registration, cancellation, destruction, and every other relevant transaction. (Code 1981, § 46-4-111, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-112. Paying agents.

The authority may appoint one or more paying agents for each issue or series or installment of bonds. Every such paying agent shall be an incorporated bank or trust company authorized by the laws of the United States or of the state in which it is located to do a banking or trust business. The authority may make such provisions respecting paying agents as it

deems necessary or useful and may enter into a contract with any paying agents containing such terms, including its compensation, and such conditions in regard to the paying agents as the authority deems necessary or useful. (Code 1981, § 46-4-112, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-113. Bond anticipation notes.

(a) The authority shall have the power and is authorized, whenever revenue bonds of the authority have been validated as provided in Code Section 46-4-101, to issue from time to time its negotiable notes in anticipation of the issuance of such bonds as validated and to renew from time to time any such notes by the issuance of new notes, regardless of whether the notes to be renewed have matured. The authority may issue notes only to provide funds which would otherwise be provided by the issuance of the bonds as validated. The notes may be authorized, sold, executed, and delivered in the same manner as bonds.

(b) Any resolution authorizing notes of the authority or any issue thereof may contain any provisions which the authority is authorized to include in any resolution authorizing bonds of the authority or any issue thereof; and the authority may include in any notes any terms, covenants, or conditions which it is authorized to include in any bonds.

(c) All notes shall be general obligations of the authority, payable out of any of its funds or revenues, subject only to any contractual rights of the holders of any of its notes or other obligations then outstanding, provided that there may be specially pledged to the payment of such notes the proceeds to be derived from the issuance of the validated bonds in anticipation of the issuance of which the notes have been issued.

(d) Validation of such bonds shall be a condition precedent to the issuance of such notes, but it shall not be required that such notes be judicially validated.

(e) Bond anticipation notes shall not be issued in an amount exceeding the par value of the bonds in anticipation of which they are to be issued. (Code 1981, § 46-4-113, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-114. Negotiability of bonds.

Notwithstanding any other law to the contrary, every evidence of indebtedness issued under this article shall have all the rights and incidences of negotiable instruments, subject to provisions for registration. (Code 1981, § 46-4-114, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-115. Liability of authority members, political subdivisions, and state.

(a) Neither the members of the authority nor any person executing bonds or notes on behalf of the authority shall be personally liable thereon by reason of the issuance thereof.

(b) Neither the revenue bonds or notes issued under this article nor the instruments evidencing the obligations which constitute the security therefor shall constitute a debt of, a loan by, or a pledge of the faith and credit of the State of Georgia or of any political subdivision thereof. Rather, such bonds and notes shall be payable from the revenues of the authority as provided in the resolutions, trust agreements, or indentures authorizing or securing the issuance and payment of such bonds or notes. The issuance of such bonds or notes shall not obligate the state or any political subdivision thereof to levy or pledge any form of taxation whatever for the payment thereof. No owner of any such bond or note, and no receiver or trustee in connection therewith, shall have the right to enforce the payment of the bond or note against any property of the state or of any political subdivision thereof; nor shall any such bond or note constitute a charge, lien, or encumbrance, whether legal or equitable, upon any such property.

(c) All such bonds and notes shall contain on their face a recital setting forth the complete immunity of the state and any political subdivisions from liability thereon, which recital shall contain substantially the foregoing provisions of this Code section. (Code 1981, § 46-4-115, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-116. Impairment of contracts.

While any of the bonds or notes issued by the authority remain outstanding, the powers, duties, or existence of the authority or of its officers, employees, or agents shall not be diminished, impaired, or affected in any manner which will affect adversely the interest and rights of the owners of such bonds or notes; and no other authority, instrumentality, or body will be created or empowered to compete with the authority so as to affect adversely the interests and rights of the owners of such bonds or notes; nor will the state itself so compete with the authority. This article shall be for the benefit of the state, the authority, and every owner of the authority's bonds and notes and, upon and after the issuance of bonds or notes under this article, shall constitute an irrevocable contract by the state with the owners of such bonds and notes. (Code 1981, § 46-4-116, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-117. Appointment of receiver upon default.

(a) If the authority defaults on the payment of the principal or interest on any of the revenue bonds after the same become due, whether at maturity or upon call for redemption, and such default continues for a period of 30 days, or if the authority or its officers, agents, or employees fail or refuse to comply with the essential provisions of this article or default in any material respect on any agreement made with the holders of the revenue bonds, any holders of revenue bonds or a trustee therefor shall

have the right to apply in an appropriate judicial proceeding to the Superior Court of Fulton County for the appointment of a receiver of the undertaking, regardless of whether all revenue bonds have been declared due and payable, and regardless of whether such holder or trustee therefor is seeking or has sought to enforce any other right or exercise any remedy in connection with such revenue bonds. Upon such application, the court, if it deems such action necessary for the protection of the bondholders, may appoint a receiver for the undertaking, provided that such appointment shall be mandatory if the application is made by the holders of 25 percent in principal amount of such revenue bonds then outstanding, or by any trustee for holders of such revenue bonds in such principal amount.

(b) A receiver appointed pursuant to subsection (a) of this Code section shall forthwith, directly or by his agents and attorneys, enter into and upon and take possession of the project or of such portion thereof or interest therein as is owned by the authority. If the court so directs, the receiver may wholly exclude from the project the authority, its officers, agents, and employees, and all persons claiming under them. Upon taking possession of the project, the receiver shall have, hold, use, operate, manage, and control the same and each and every part thereof and, in the name of the authority or otherwise, as the receiver may deem best, shall exercise all of the rights and powers of the authority with respect to the undertaking as the authority itself might do. The receiver shall maintain, restore, insure, and keep insured the project or such portion or interest therein as is owned by the authority; from time to time shall make all such necessary or proper repairs as the receiver may deem expedient; shall establish and maintain rates and collect such fees, tolls, and other charges in connection with the project as the receiver may deem necessary or proper and reasonable; and shall collect and receive all revenues, shall deposit the same in a separate account, and shall apply such revenues so collected and received in such manner as the court shall direct, provided that the duties of the receiver as described in this subsection shall be performed in a manner consistent with any and all existing contractual arrangements to which the authority may be a party; and the powers of the receiver shall be no greater than the powers of the authority.

(c) Whenever all amounts due upon the revenue bonds and interest thereon have been cured and made good; and whenever a similar cure and making good has been effected in regard to any other notes, bonds, or other obligations, and interest thereon, which constitute a charge, lien, or encumbrance on the revenues of the project under any of the terms of any covenants or agreements with holders of revenue bonds; then, if it appears to the court that no default is imminent, the court shall direct the receiver to surrender possession of the project to the authority, provided that the same right of the holders of the revenue bonds to secure the appointment of a receiver as is provided in subsection (a) of this Code section shall exist upon any subsequent default.

(d) A receiver shall, in the performance of the powers conferred upon him by this Code section, act under the direction and supervision of the court making such appointment, shall at all times be subject to the orders and decrees of such court, and may be removed thereby. Nothing contained in this Code section shall limit or restrict the jurisdiction of such court to enter such other and further orders and decrees as the court may deem necessary or appropriate for the exercise by the receiver of any functions specifically set forth in this Code section. (Code 1981, § 46-4-117, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-118. Charges for use of facilities or services.

(a) For the purpose of earning sufficient revenue to make possible the financing with revenue bonds of the construction of the projects of the authority or the accomplishment of its corporate purposes, the authority is authorized to fix and revise rates and collect fees, tolls, and charges on each project which it causes to be acquired or constructed or on the systems. Such rates, fees, tolls, and charges to be paid for the use of the facilities or services of such projects or systems shall be so fixed and adjusted from time to time as to provide a fund which, together with other revenue, if any, of such projects or of the authority, will be sufficient:

(1) To pay:

(A) The costs of operating, maintaining, repairing, and disposing of the projects, including reserves for insurance and extraordinary repairs, reserves required by the resolution, or other reasonable reserves established by the authority trust agreement, or indenture pertaining to such bonds and the issuance thereof, unless such costs shall be otherwise provided for;

(B) The costs of operating and conducting the business of the authority, including salaries; fees for professional services, including legal, engineering, and others; and all expenses properly relating to the conduct of the affairs of the authority;

(C) The costs of gas, whether produced by the authority or acquired from others; and

(D) All other costs associated with the operation and maintenance of the authority and its projects and facilities;

(2) To pay the principal of and interest on such revenue bonds as the same become due, including all premiums, if any, the proceeds of which shall have been or will be used to pay the cost of such projects, which cost shall include all elements of cost authorized by this article, including acquisition of property, whether real or personal, and any interest in property; clearing and preparing land for the purposes of this article; architectural, engineering, financial, and legal services; construction of

projects authorized by this article; administrative expenses; funds for initiating the operation of the project; and interest prior to and during construction and during such period of time thereafter as may be determined by the authority;

(3) To comply with any sinking fund requirements contained in the resolution, trust agreement, or indenture pertaining to the issuance of and security for such bonds;

(4) To perform fully all provisions of such resolution, trust agreement, or indenture relating to the issuance of or security for such bonds to the payment of which such revenue is pledged;

(5) To accumulate any excess income which may be required by the purchasers of such bonds or may be dictated by the requirements of such resolution, trust agreement, or indenture or by the requirements of achieving ready marketability of and low interest rates on such bonds; and

(6) To pay expenses in connection with such bond issue or such projects, including, but not limited to, trustees and fiscal fees.

(b) The rates, fees, tolls, and charges authorized by subsection (a) of this Code section shall be payable at such intervals as may be agreed upon and set forth in the contract providing therefor. Any such contract may provide for the commencement of payments, not necessarily based directly on rates, to the authority prior to the completion of the undertaking by the authority of any such project and may require payments for the establishment of reserves for rate stabilization purposes; may provide for the making of payments during such times as such projects may be partially or wholly not in use, whether or not any such project has been completed, is then operable, or is operating; and may provide that such payments shall not be subject to any reduction, by offset or otherwise, and shall not be conditioned upon the performance or nonperformance by any party of any agreement.

(c) Such contract may obligate the political subdivision to indemnify and save harmless the authority from any and all damage to persons and property occurring on or by reason of the project, and may also obligate the political subdivision to undertake, at the expense of the political subdivision, the defense of any action brought against the authority by reason of injury or damages to persons or property occurring on or by reason of the project.

(d) In the event of any failure or refusal on the part of the political subdivision to perform punctually any covenant or obligation contained in any such contract, the authority may enforce performance by any legal or equitable process, including specific performance.

(e) Any payments due or to become due to the authority pursuant to any such contract may be assigned by the authority to a trustee or paying agent

as may be required by the terms of the resolution, trust agreement, or indenture relating to the issuance of and security for such bonds.

(f) The use and disposition of the authority's revenue shall be subject to the provisions of the resolution authorizing the issuance of such bonds or of the trust agreement or indenture, if any, securing the same. (Code 1981, § 46-4-118, enacted by Ga. L. 1987, p. 745, § 1; Ga. L. 1992, p. 6, § 46.)

46-4-119. Revenues held in trust for bondholders.

All funds received pursuant to authority of this article, whether as proceeds from the sale of revenue bonds or as revenues, fees, tolls, charges, or other earnings or as gifts, grants, or other contributions, shall be deemed to be trust funds to be held and applied solely as provided in this article. The bond owners entitled to receive the benefits of such funds shall have a lien on all such funds until applied as provided in any such resolution, trust agreement, or indenture of the authority. (Code 1981, § 46-4-119, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-120. Annual audit.

The authority, together with all funds established in connection with its debt, shall be audited no less frequently than annually by an independent certified public accountant to be selected by the authority. Copies of such audit shall be available upon request to interested parties, including, but without limitation, the holders of the authority's bonds and all parties contracting with the authority. (Code 1981, § 46-4-120, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-121. Jurisdiction for rights protection or enforcement actions.

(a) Except as provided in subsection (b) of this Code section, any action to protect or enforce any rights under this article brought in the courts of this state shall be brought in the superior court of the county in which the principal office of the authority is located.

(b) Any action pertaining to validation of the bonds issued under this article and pertaining to validation of the contracts constituting security for bonds shall be brought in the Superior Court of Fulton County. That court shall have exclusive original jurisdiction of any such action. (Code 1981, § 46-4-121, enacted by Ga. L. 1987, p. 745, § 1; Ga. L. 1989, p. 471, § 2.)

46-4-122. Exemption from regulation by Public Service Commission.

(a) The rates, services, and practices relating to the exploration, manufacture, development, storage, production, transmission, and sale by the authority of gas as authorized by this article shall not be subject to the provisions of the Georgia Public Service Commission law nor to regulation.

(b) The provisions of this article do not, and are not intended to, increase or diminish the authority and jurisdiction of the Public Service Commission with respect to the distribution, sale, or transmission of gas by any county, municipal corporation, or other political subdivision of this state. (Code 1981, § 46-4-122, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-123. Conduct of meetings; records.

Meetings of the authority shall be subject to Chapter 14 of Title 50. All records of the authority shall be subject to Article 4 of Chapter 18 of Title 50. (Code 1981, § 46-4-123, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-124. Effect of other laws.

The provisions of this article shall be regarded as supplementary and additional to and cumulative of powers conferred by other laws and shall not be regarded as being in derogation of any powers conferred by any other law. (Code 1981, § 46-4-124, enacted by Ga. L. 1987, p. 745, § 1.)

46-4-125. Liberal construction.

This article, being for the welfare of the state and its inhabitants, shall be liberally construed to effect the purposes hereof. (Code 1981, § 46-4-125, enacted by Ga. L. 1987, p. 745, § 1.)

ARTICLE 5

NATURAL GAS COMPETITION AND DEREGULATION

Administrative rules and regulations. — Marketer's Certificates of Authority, Official Compilation of Rules and Regulations of State of Georgia, Georgia Public Service Commission, Gas, Utilities, Chapter 515-7-3.

Law reviews. — For article commenting on the enactment of this article, see 14 Georgia St. U.L. Rev. 264 (1997).

46-4-150. Short title.

This article shall be known and may be cited as the "Natural Gas Competition and Deregulation Act." (Code 1981, § 46-4-150, enacted by Ga. L. 1997, p. 798, § 4.)

Law reviews. — For note on the 2002 enactment of this chapter, see 19 Ga. St. U.L. Rev. 285 (2002).

46-4-151. Legislative findings and intent; bill of rights for consumers.

(a) The General Assembly finds:

(1) It is in the public interest to establish a new regulatory model for

the natural gas industry in Georgia to reflect the transition to a reliance on market based competition as the best mechanism for the selection and provision of natural gas services at the most efficient pricing;

(2) In order to ensure the implementation of this new reliance on market based competition, any regulatory impediments, whether statutory or administrative, to competition for natural gas services must be removed in those areas of the natural gas industry where competition actually exists;

(3) All consumers deserve to receive natural gas service on reasonable terms and at reasonable prices; and

(4) That protecting natural gas consumers in this new reliance on market based competition is the most important factor to consider in any decisions to be made in accordance with this article.

(b) It is the intent of this article to:

(1) Promote competition in the natural gas industry;

(2) Protect the consumer during and after the transition to a competitive natural gas market;

(3) Maintain and encourage safe and reliable natural gas service;

(4) Deregulate those components of the natural gas industry subject to actual competition;

(5) Continue to regulate those natural gas services subject to monopoly power;

(6) Promote an orderly and expeditious transition of the natural gas industry toward fully developed competition;

(7) Provide for rate-making methods which the General Assembly finds appropriate for the provision of natural gas services, including without limitation the use of straight fixed variable rate design, the recovery of certain stranded costs, and the use of alternative forms of rate regulation;

(8) Allow gas companies the opportunity to compete effectively in a competitive marketplace;

(9) Provide a bill of rights for consumers as follows:

(A) All consumers must have access to reliable, safe, and affordable gas service, including high quality customer service;

(B) All consumers must have the right to receive accurate, easily understood information about gas marketers, services, plans, terms and conditions, and rights and remedies. The information must be

unbiased, accurate, and understandable in a written form, which allows for comparison of prices and terms of service;

(C) All consumers must receive the benefits of new services, technological advances, improved efficiency, and competitive prices;

(D) Standards for protecting consumers in matters such as deposit and credit requirements, service denials and terminations, and deferred payment provisions must be applied fairly to all consumers;

(E) All consumers must be protected from unfair, deceptive, fraudulent, and anticompetitive practices, including, but not limited to, practices such as cramming, slamming, and providing deceptive information regarding billing terms and conditions of service;

(F) All consumers shall receive accurate and timely bills from their marketers;

(G) All consumers are entitled to protection of their privacy and must be protected from improper use of their customer records or payment histories without their express consent;

(H) All consumers must be protected from price increases resulting from inequitable price shifting; and

(I) All consumers have the right to a fair and efficient process for resolving differences with marketers, including a system of internal review and an independent system of external review; and

(10) Provide that, in the event of any conflict between paragraph (9) of this subsection and any other paragraph of this subsection, the provisions of paragraph (9) shall override such other paragraph or paragraphs. (Code 1981, § 46-4-151, enacted by Ga. L. 1997, p. 798, § 4; Ga. L. 2002, p. 475, § 6.)

The 2002 amendment, effective April 25, 2002, in subsection (a), deleted “and” at the end of paragraph (a)(1), substituted a semicolon for a period at the end of paragraph (a)(2), and added paragraphs (a)(3) and (a)(4); in subsection (b), deleted “and” at the end of paragraph (b)(7), substituted a semicolon for a period at the end of para-

graph (b)(8), and added paragraphs (b)(9) and (b)(10).

Editor’s notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Natural Gas Consumers’ Relief Act.’”

46-4-152. Definitions.

As used in this article, the term:

(1) “Adequate market conditions” means the existence of market conditions in relation to distribution service within a particular delivery group that have been determined pursuant to subsection (b) of Code Section 46-4-156 to warrant customer assignment.

(2) “Affiliate” means another person which controls, is controlled by, or is under common control with such person.

(3) “Ancillary service” means a service that is ancillary to the receipt or delivery of natural gas, including without limitation storage, balancing, peaking, and customer services.

(4) “Commodity sales service” means the sale of natural gas exclusive of any distribution or ancillary service.

(4.1) “Consumer” means a retail customer of commodity sales service or of firm distribution service who uses such service or services primarily for personal, family, or household purposes.

(5) “Control” includes without limitation the possession, directly or indirectly and whether acting alone or in conjunction with others, of the authority to direct or cause the direction of the management or policies of a person. A voting interest of 10 percent or more creates a rebuttable presumption of control. A voting interest of 25 percent or more is deemed to constitute control. The term control includes the terms controlling, controlled by, and under control with.

(5.1) “Cramming” means billing for goods or services not requested or authorized by a consumer.

(6) “Customer assignment” means the process described in subsection (e) of Code Section 46-4-156 whereby retail customers within a particular distribution group who are not under contract for distribution service from a marketer are randomly assigned to certificated marketers.

(7) “Customer service” means a function related to serving a retail customer including without limitation billing, meter reading, turn-on service, and turn-off service. Notwithstanding any provision of law to the contrary, any person may perform one or more customer services without first becoming certificated in accordance with Code Section 46-4-153; provided, however, that such service may only be performed in compliance with all state and federal laws pertaining to the safety of natural gas pipelines and distribution systems and any other applicable safety standards.

(8) “Delivery group” means a set of individual delivery points on one or more interstate pipeline suppliers to a gas company that may be aggregated and utilized for the distribution of gas to a particular set of retail customers.

(9) “Distribution service” means the delivery of natural gas by and through the intrastate instrumentalities and facilities of a gas company or of a marketer certificated pursuant to Code Section 46-4-153, regardless of the party having title to the natural gas.

(10) "Electing distribution company" means a gas company which elects to become subject to the provisions of this article and satisfies the requirements of Code Section 46-4-154.

(10.1) "Electric membership corporation" or "EMC" means any person defined in paragraph (3) or (5) of Code Section 46-3-171.

(10.2) "Electric utility" means any electric power company subject to the rate regulation of the commission in accordance with Code Sections 46-2-20 and 46-2-21.

(10.3) "Electricity activities" means all activities associated with the generation, transportation, marketing, and distribution of electricity.

(10.4) "EMC gas affiliate" means a separately organized person, the majority interest of which is owned or held by or, with respect to a cooperative, managed by one or more cooperatives or electric membership corporations and which applies to the commission for a certificate of authority pursuant to Code Section 46-4-153.

(11) "Firm" means a type of distribution service which ordinarily is not subject to interruption or curtailment.

(11.1) "Gas activities" means all activities associated with the transportation, marketing, and distribution of natural gas conducted by a person certificated pursuant to Code Section 46-4-153. Such term shall not mean the production, transportation, marketing, or distribution of liquefied petroleum gas.

(12) "Interruptible" means a type of distribution service which is subject to interruption or curtailment.

(12.1) "Low-income residential consumer" means any person who meets the definition of a person who is qualified for the Low Income Home Energy Assistance Program, as promulgated by the Department of Human Resources, pursuant to Code Section 46-1-5.

(12.2) "Majority interest" means the ownership of greater than 50 percent of:

- (A) The partnership interests in a general or limited partnership;
- (B) The membership interests of a limited liability company; or
- (C) The stock in a for profit corporation which entitles the shareholder to vote and share in common or preferred dividends.

(13) "Marketer" means any person certificated by the commission to provide commodity sales service or distribution services pursuant to Code Section 46-4-153 and ancillary services incident thereto.

(14) "Person" means any corporation, whether public or private; company; individual; firm; partnership; or association, including a cooperative or an electric membership corporation.

(14.1) “Regulated gas service” means gas service provided by a regulated provider of natural gas.

(14.2) “Regulated provider of natural gas” means the entity selected by the commission to provide to consumers natural gas commodity service and ancillary services incident thereto in accordance with Code Section 46-4-166.

(15) “Retail customer” or “retail purchaser” means a person who purchases commodity sales service or distribution service and such purchase is not for the purpose of resale.

(15.1) “Slamming” means changing or causing a change of a consumer’s service from one marketer or provider to another marketer or provider without request or authorization from the consumer.

(16) “Straight fixed variable” means a rate form in which the fixed costs of providing distribution service are recovered through one or more fixed components and the variable costs are recovered through one or more variable components.

(17) “Winter heating season” means the calendar days from October 1 of one year through March 31, inclusive, of the following year. (Code 1981, § 46-4-152, enacted by Ga. L. 1997, p. 798, § 4; Ga. L. 2002, p. 475, § 7.)

The 2002 amendment, effective April 25, 2002, added paragraphs (4.1), (5.1), (10.1), (10.2), (10.3), (10.4), (11.1), (12.1), (12.2), (14.1), (14.2), and (15.1), added the last sentence in paragraph (7), substituted “and ancillary” for “or ancillary” near the end of paragraph (13), and added “, including a

cooperative or an electric membership corporation” at the end of paragraph (14).

Editor’s notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Natural Gas Consumers’ Relief Act.’”

46-4-153. Certificates of authority.

(a)(1) No person other than a gas company or a regulated provider shall sell or offer to sell in intrastate commerce to any retail customer who receives primarily firm service within this state any commodity sales service or distribution service without first obtaining a certificate of authority from the commission covering the territory where such retail customer is located. Notwithstanding any provision of law to the contrary, any person selected by an electing distribution company, a certificated marketer, or a regulated provider may perform billing and meter reading services on behalf of such entity without first becoming certificated in accordance with the provisions of this Code section, provided that a certificated marketer or a regulated provider also submits the meter reading data so obtained to the electing distribution company in a timely manner.

(2) The commission shall have the authority to issue multiple certificates of authority with respect to a particular territory upon a showing that the applicant:

(A) Possesses satisfactory financial and technical capability to render the certificated service;

(B) Has a sufficient gas supply to meet the requirements of such service; and

(C) Will offer such service pursuant to rules and contract terms which the commission finds economically viable for the territory which the marketer proposes to serve.

(3) A showing of public convenience and necessity is not a condition for the issuance of a competing certificate of authority.

(4) A certificate of authority shall authorize the marketer to use intrastate capacity available to it from a gas company to provide interruptible distribution service when not required by the marketer to provide firm distribution service.

(b) A person who seeks a certificate of authority shall make an application to the commission which contains the information required by this Code section.

(c)(1) No later than December 31, 1997, the commission shall promulgate regulations describing the information to be included in an application for certification under this Code section and the criteria it will use in determining an applicant's financial and technical capability. Such criteria shall seek to ensure the reliability and high quality of gas service provided to consumers, while imposing no unnecessary barriers to entry, including without limitation administrative barriers to entry.

(2) No such application shall be filed with respect to territory covered by the certificate of public convenience and necessity of a gas company until such gas company has filed a notice of election pursuant to the provisions of subsection (a) of Code Section 46-4-154.

(3) Until the expiration of 15 days following the effective date of rates approved by the commission pursuant to Code Section 46-4-154 for an electing distribution company, the commission shall not approve or disapprove any complete application for a certificate of authority covering territory certificated to such electing distribution company which application is filed prior to such expiration date, and all applications for certificates of authority filed prior to such expiration date shall be considered by the commission simultaneously.

(4) Within 60 days following such expiration date, the commission shall conduct a public hearing or hearings on all complete applications filed prior to such expiration date. Within 90 days following such

expiration date, the commission shall issue its orders approving or disapproving each of such applications for a certificate of authority.

(5) The commission shall conduct a public hearing on any application for a certificate of authority filed subsequent to such expiration date within 60 days following the filing of such application; and within 90 days following such filing, the commission shall issue its order approving or disapproving such application.

(d) Any certificate of authority issued by the commission is subject to revocation, suspension, or adjustment where the commission finds upon complaint and hearing that a marketer has failed repeatedly or has failed willfully to meet obligations to its retail customers and consumers which are imposed by this article, regulations issued pursuant to this article, or the marketer's certificate of authority; has engaged in unfair competition; or has abused its market position.

(e) The commission may deny an application upon a showing that the applicant or anyone acting in concert with the applicant has a history of violations of laws, rules, or regulations designed to protect the public. The commission may revoke any certificate issued pursuant to this Code section where it finds that the marketer or anyone acting in concert with the marketer has such a history, that any information on the application was falsified or forged, that the marketer has acted unlawfully to the detriment of the public while certificated, or for any other good and valid reason where activities of the marketer are serving or could serve to mislead, deceive, or work a fraud upon members of the public. The commission shall be authorized to adopt rules and regulations to implement this subsection. In any case where it is asserted in good faith that the marketer is, has been, or may be about to become involved in activities described in this subsection, any deadline imposed under this Code section regarding the granting of certification shall be null and void until such time as such assertions can be addressed.

(f) All gas marketers are required to continue to possess financial and technical capability to render service and offer service pursuant to contractual terms and conditions the commission from time to time finds economically viable for delivery groups served. This is a continuing obligation and may be reviewed by the commission at any time. (Code 1981, § 46-4-153, enacted by Ga. L. 1997, p. 798, § 4; Ga. L. 2002, p. 475, § 8.)

The 2002 amendment, effective April 25, 2002, in subsection (a)(1), inserted "or a regulated provider" and added the last sentence; inserted "and consumers" in the middle of subsection (d); and added subsection (f).

Editor's notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Natural Gas Consumers' Relief Act.'"

46-4-153.1. Certificates of authority for EMC gas affiliates; terms and conditions; requirements.

(a) Notwithstanding any other provision of this article or Article 4 of Chapter 3 of this title, the commission shall have authority to issue certificates of authority to an EMC gas affiliate but shall not have authority to issue certificates of authority to an electric membership corporation. The commission's order granting a certificate of authority to an EMC gas affiliate shall include terms and conditions to govern the relationship between the electric membership corporation and its EMC gas affiliate. The terms and conditions shall be designed to prevent cross-subsidization between the provision of electricity and the provision of natural gas services, to encourage and promote fair competition in the overall retail natural gas market, and to protect the privacy of both electric and natural gas consumers.

(b) The order by the commission pursuant to this Code section shall include the requirements set forth in this subsection, as well as such other rules as the commission shall determine are necessary to protect electric and natural gas consumers and promote competition:

(1) To ensure that cross-subsidizations do not occur between the electricity services of an electric membership corporation and the gas activities of its gas affiliate, the terms and conditions ordered by the commission shall provide that each electric membership corporation having a gas affiliate shall:

(A) Fully allocate all electricity activities costs and gas activities costs, including costs for any shared services, between the electric membership corporation's electricity activities and the gas activities of its gas affiliate, in accordance with the applicable uniform system of accounts and generally accepted accounting principles, as applicable;

(B) Develop and maintain a cost allocation manual, approved by the commission, describing the electric membership corporation's methods of cost allocation and such other information and policies reasonably required by the commission to ensure compliance with this article and the terms and conditions ordered by the commission. Such manual shall:

(i) Establish rules for the pricing of transactions between an electric membership corporation and its gas affiliate, including the transfer of assets between the two;

(ii) Provide that any loans from the electric membership corporation to its gas affiliate shall be at market rates, shall not reflect rates which are generally available through the use of any tax exempt financing, and may not be tied to any loans from the federal or state government;

(iii) Require the electric membership corporation and its gas affiliate to maintain separate books of accounts and records which shall, subject to the commission's rules for treatment of trade secrets, be subject to production and inspection by the commission for the sole purpose of confirming compliance with this article, the cost allocation manual, and the terms and conditions of the gas affiliate's certificate; and

(iv) Require the annual filing of a statement with the commission certifying the compliance by the electric membership corporation and its gas affiliate with the approved cost allocation manual; and

(C) Not charge any costs of the gas affiliate to the electricity customers of the electric membership corporation; and

(2) To protect customer privacy and prevent the misuse of customer information, the terms and conditions ordered by the commission shall provide that no electric membership corporation shall release any proprietary customer information to its gas affiliate without obtaining prior verifiable authorization from the customer, as determined in accordance with rules established by the commission.

(c) The commission may require that any customer service that an electric membership corporation provides to its gas affiliate be offered to all marketers at the same rate and on the same terms and conditions as provided to the gas affiliate. Any such services provided to the gas affiliate or marketers must be on a strictly confidential basis, such that the electric membership corporation does not share information regarding one marketer with any other marketer, including an EMC gas affiliate.

(d) The terms and conditions shall accommodate the organizational structures of electric membership corporations.

(e) To assure separate but coordinating governance of an electric membership corporation and its gas affiliate, the terms and conditions shall prohibit more than one-half of the persons serving as members of the board of directors of a gas affiliate from at the same time serving on the board of directors of an electric membership corporation.

(f) Notwithstanding anything to the contrary contained in this Code section, the commission shall make accommodation for the specific legal requirements imposed by state or federal laws applicable to electric membership corporations and other cooperatives. (Code 1981, § 46-4-153.1, enacted by Ga. L. 2002, p. 475, § 9.)

Effective date. — This Code section became effective April 25, 2002.

Editor's notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, pro-

vides that: "This Act shall be known and may be cited as the 'Natural Gas Consumers' Relief Act.'"

46-4-154. Notice of election; unbundling; rates; application requirements; surcharge on interruptibles.

(a) A gas company may elect to become subject to the provisions of this article by filing a notice of election with the commission and by filing an application to establish just and reasonable rates, including separate rates for unbundled services. Pursuant to such application, the commission shall:

(1) Maintain rates for interruptible distribution service at the levels set forth in the rate schedules approved by the commission and in effect on the day the gas company files a notice of election as provided for in this Code section;

(2) After notice and hearing, establish rates for firm distribution service using a reasonable method of rate design, which may, at the commission's discretion, include a straight fixed variable method of rate design; provided, however, that a consumer shall not be required to pay a fee for distribution service during any billing period when the consumer's meter is turned off; and provided, further, that the method of rate design selected by the commission shall provide for recovery of the revenue requirements of the electing distribution company;

(3) Establish separate rates and charges, which may be based on market value, for each type of ancillary service which is classified separately;

(4) Provide for the recovery in rates of those costs which the commission determines are prudently incurred and used and useful in providing utility service; and

(5) Provide for recovery of costs found by the commission to be stranded and necessary to provide a reasonable return, provided that only prudently incurred stranded costs that cannot be mitigated may be recovered.

(b) In any proceeding before the commission to establish rates as provided in subsection (a) of this Code section, the commission shall prescribe rates for the services and cost recovery purposes specified in paragraphs (2), (3), (4), and (5) of subsection (a) of this Code section at levels which are designed to recover the costs of service of the electing distribution company as established by the commission in such proceeding. In such proceeding, the commission shall also prescribe a mechanism by which 95 percent of the revenues to the electing distribution company from rates for interruptible distribution service shall be credited to the universal service fund established for that electing distribution company pursuant to Code Section 46-4-161. Each electing distribution company is authorized to retain for the benefit of its shareholders or owners 5 percent of the revenues the electing distribution company received from rates for interruptible service. Each electing distribution company which retains 5 percent of such

revenues shall make a report to the commission annually describing the benefits resulting to firm retail customers from interruptible distribution service revenues.

(c) In addition to any other applicable filing requirements, any such application by a gas company shall include the following:

(1) An identification of each component of natural gas service, including but not limited to commodity sales service, distribution service, and ancillary services, which are to be unbundled and offered under separate rates, together with the total costs to provide each such service by the electing distribution company including a return on investment;

(2) Provisions for offering each unbundled service on an equal access, nondiscriminatory basis;

(3) A description of the method by which the electing distribution company proposes to allocate its intrastate capacity for firm distribution service to a marketer based upon the peak requirements of the firm retail customers served by the marketer;

(4) A description of the method by which the electing distribution company proposes to allocate its rights to interstate pipeline and underground storage to a marketer based upon the peak requirements of the firm retail customers served by the marketer; and

(5) A plan for establishing and operating an electronic bulletin board by which the electing distribution company will provide marketers with equal and timely access to information relevant to the availability of firm distribution service.

(d) Notwithstanding any other provision of this title, the commission shall hold a hearing regarding an application filed pursuant to this Code section and may suspend the operation of the proposed schedules and defer the use of the proposed rates, charges, classifications, or services for a period of not longer than six months.

(e) The commission shall establish a surcharge on all customers receiving interruptible service over the electing distribution company's distribution system sufficient to ensure that such customers will pay an equitable share of the cost of the distribution system over which such customers receive service. The commission is authorized to direct the electing distribution company or the marketers to collect such surcharge directly from the customers. Such surcharge shall be paid promptly upon receipt into the universal service fund. This surcharge shall not be applied to any hospital that has a medicare and Medicaid payor mix of at least 30 percent and has uncompensated writeoffs for the provision of charity, indigent, and free health care services of not less than 5 percent of such hospital's annual operating expenses based on the annual hospital surveys by the Division of Health Planning of the Department of Community Health. This surcharge

shall not be applied to any institution or property enumerated in Code Section 50-16-3, or administered or regulated under authority granted by Code Section 42-2-5 or 49-4A-6 or by Chapter 9 of Title 50. (Code 1981, § 46-4-154, enacted by Ga. L. 1997, p. 798, § 4; Ga. L. 2002, p. 475, § 10.)

The 2002 amendment, effective April 25, 2002, substituted the present provisions of paragraph (a)(2) for the former provisions which read: "Establish rates for firm distribution service using the straight fixed variable method of rate design, subject to the provisions of subsection (b) of this Code section;"; deleted former subsection (b) which read: "(b) If the commission determines that inefficiencies in the rate design or other causes in existence immediately preceding the implementation of the straight fixed variable rate design will result in a material fluctuation of rates for firm distribution service to a group of retail customers upon implementation of straight fixed variable rate design, the commission may make such adjustments to the rates for firm distribution service as it deems appropriate to phase in the straight fixed variable rate design for firm distribution service:

"(b)(1) Over a 12 month period from the date the rates filed by the electing distribution company would otherwise be effective if such material fluctuation will be less than 10 percent of the total gas charges for a group of retail customers; or

"(b)(2) Over a 24 month period from the

date the rates filed by the electing distribution company would otherwise be effective if such material fluctuation will be equal to or greater than 10 percent of the total gas charges for a group of retail customers.

"However, in no event shall any such adjustment be made if the adjustment results in cross-subsidization between retail customers receiving firm distribution service and retail customers receiving interruptible distribution service or if the adjustment reduces the revenues to the electing distribution company for firm distribution service below those that would be recovered by the electing distribution company under the straight fixed variable rate without such adjustment."; redesignated former subsections (c) through (e) as present subsections (b) through (d), respectively; in subsection (b), substituted "95 percent" for "90 percent" in the second sentence and substituted "5 percent" for "10 percent" in the last two sentences; and added subsection (e).

Editor's notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Natural Gas Consumers' Relief Act.'"

46-4-155. Regulation of unbundled services; peaking service; customer services; interstate capacity assets.

(a) Except as otherwise provided by this article, an electing distribution company which offers firm distribution service remains subject to the jurisdiction of the commission under this title. Without limiting the generality of the foregoing, the commission shall have general supervision of such company pursuant to Code Section 46-2-20, and the rates of an electing distribution company for firm distribution service and the ancillary services which are subject to the rate jurisdiction of the commission shall be established in accordance with the provisions of this article and Code Section 46-2-23.1.

(b) An electing distribution company shall offer liquefied natural gas peaking service to marketers at rates and on terms approved by the commission, subject however to the following:

(1) If a marketer which is not affiliated with an electing distribution company obtains a peaking service in a delivery group from a person

other than the electing distribution company, the rate for liquefied natural gas peaking service by the electing distribution company in such delivery group shall not be subject to approval by the commission but shall be capped at 120 percent of the rate for such service previously established by the commission; and

(2) If the commission determines pursuant to a filing by the electing distribution company or otherwise, and based upon the factors listed in subsection (c) of this Code section, that reasonably available alternatives for such peaking services exist in the delivery group, the rate for such services in a delivery group shall not be subject to regulation by the commission and the plant and equipment of the electing distribution company which is used and useful for receiving gas for liquefaction, liquefying gas, storing liquefied natural gas, and re-gasifying liquefied natural gas, including the land upon which such plant and equipment is located, shall be removed from the rate base for rate-making purposes of the electing distribution company in an amount which is the lower of the fair market value or the depreciated book value of such facilities. In addition, the rates for firm distribution service of the electing distribution company shall be adjusted to eliminate any applicable recovery of the operation and maintenance expenses associated with such facilities and gas in storage in such facilities, as well as the return on investment attributable to the amount removed from the rate base. For purposes of such review and determination, the fact that such services have been obtained by a marketer which is not affiliated with the electing distribution company shall create a presumption that there are reasonably available alternatives for such peaking services in the delivery group.

(c) An electing distribution company shall offer each type of customer service to marketers at rates and on terms approved by the commission in accordance with this article and Code Section 46-2-23.1 until such time as the commission determines that marketers have reasonably available alternatives to purchasing such service from the electing distribution company. The commission shall make a separate determination for each type of service. In making such determinations, the commission shall consider the following factors:

- (1) The number and size of alternative providers of the service;
- (2) The extent to which the service is available from alternative providers in the relevant market;
- (3) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive prices, terms, and conditions; and
- (4) Other indicators of market power which may include market share, growth in market share, ease of entry, and the affiliation of providers of a service.

(d) For each delivery group for which the commission has not determined pursuant to Code Section 46-4-156 that adequate market conditions exist, and thus has not initiated customer assignment, an electing distribution company shall:

(1) Offer interruptible distribution service and balancing services at rates and on terms approved by the commission in accordance with the provisions of this article and Code Section 46-2-23.1 to retail customers and marketers, subject to the rules, regulations, and general terms and conditions of the electing distribution company as approved by the commission;

(2) Offer firm distribution service at rates and on terms approved by the commission in accordance with the provisions of this article and Code Section 46-2-23.1 to retail customers and marketers, subject to the rules, regulations, and general terms and conditions of the electing distribution company as approved by the commission; and

(3) Offer in conjunction with such firm distribution service a commodity sales service; provided, however, that the rates for such commodity sales service shall be established pursuant to the provisions of Code Section 46-2-26.5, relating to the filing and adoption of a gas supply plan; and provided, further, that the rates for such commodity sales service shall not be subject to the provisions of Code Section 46-2-26.5 nor subject to the approval of the commission if at least five marketers, excluding any marketer which is an affiliate of the electing distribution company, have been granted certificates of authority to serve in the delivery group.

(e)(1) As used in this subsection, the term "interstate capacity assets" means interstate transportation and out-of-state gas storage capacity.

(2) If, pursuant to the provisions of this article, the rates for commodity sales service of an electing distribution company within a delivery group or groups become no longer subject to the approval of the commission nor to the provisions of Code Section 46-2-26.5, the electing distribution company nevertheless shall continue to be responsible for acquiring and contracting for the interstate capacity assets necessary for gas to be made available on its system, whether directly or by assignment to marketers, for firm distribution service to retail customers within such delivery group or groups unless determined otherwise by the commission in accordance with this subsection.

(3) At least every third year following the date when the rates for commodity sales service within a delivery group or groups become no longer subject to commission approval nor to the provisions of Code Section 46-2-26.5, the electing distribution company shall file, on or before August 1 of such year, a capacity supply plan which designates the array of available interstate capacity assets selected by the electing

distribution company for the purpose of making gas available on its system for firm distribution service to retail customers in such delivery group or groups.

(4) Not less than ten days after any such filing by an electing distribution company, the commission shall conduct a public hearing on the filing. The electing distribution company's testimony shall be under oath and shall, with any corrections thereto, constitute the electing distribution company's affirmative case. At any hearing conducted pursuant to this subsection, the burden of proof to show that the proposed capacity supply plan is appropriate shall be upon the electing distribution company.

(5) Following such a hearing, the commission shall issue an order approving the capacity supply plan filed by the electing distribution company or adopting a capacity supply plan for the electing distribution company that the commission deems appropriate. Should the commission fail or refuse to issue an order by the ninetieth day after the electing distribution company's filing which either approves the capacity supply plan filed by the electing distribution company or adopts a different capacity supply plan for the electing distribution company, the capacity supply plan proposed by the electing distribution company shall thereupon be deemed approved by operation of law.

(6) Any capacity supply plan approved or adopted by the commission shall:

(A) Specify the range of the requirements to be supplied by interstate capacity assets;

(B) Describe the array of interstate capacity assets selected by the electing distribution company to meet such requirements;

(C) Describe the criteria of the electing distribution company for entering into contracts under such array of interstate capacity assets from time to time to meet such requirements; provided, however, that a capacity supply plan approved or adopted by the commission shall not prescribe the individual contracts to be executed by the electing distribution company in order to implement such plan; and

(D) Specify the portion of the interstate capacity assets which must be retained and utilized by the electing distribution company in order to manage and operate its system.

(7) When interstate capacity assets that are contained in a capacity supply plan approved or adopted by the commission are allocated by the electing distribution company to a marketer pursuant to the provisions of this article, all of the costs of the interstate capacity assets thus allocated shall be borne by such marketer.

(8) The provisions of law relating to parties, intervention, and discovery in proceedings before the commission shall apply with respect to proceedings under this subsection.

(9) All commission orders issued pursuant to this subsection shall contain the commission's findings of fact and conclusions of law upon which the commission's action is based. Any such order shall be deemed a final order subject to judicial review under Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(10) Prior to the approval or adoption of a capacity supply plan pursuant to this subsection, the interstate capacity assets of the electing distribution company in the most current gas supply plan of such company approved or adopted by the commission pursuant to the provisions of Code Section 46-2-26.5 shall be treated as a capacity supply plan that is approved or adopted by the commission for purposes of this subsection.

(11) After a capacity supply plan has become effective pursuant to provisions of this subsection as a result of a proceeding before the commission, the commission shall retain jurisdiction of the proceeding for the purposes set forth in this subsection. Upon application of the affected electing distribution company or the consumers' utility counsel division of the Governor's Office of Consumer Affairs or upon its own initiative, the commission may, after affording due notice and opportunity for hearing to the affected electing distribution company and the intervenors in the proceeding, amend the capacity supply plan of the affected electing distribution company. Any such amendment shall not adversely affect rights under any contract entered into pursuant to such plan without the consent of the parties to such contracts. If an amendment proceeding is initiated by the affected electing distribution company and the commission fails or refuses to issue an order by the ninetieth day after the electing distribution company's filing, the amended capacity supply plan proposed by the electing distribution company shall thereupon be deemed approved by operation of law.

(12) After an electing distribution company has no obligation to provide commodity sales service to retail customers pursuant to the provisions of Code Section 46-4-156 and upon the petition of any interested person and after notice and opportunity for hearing afforded to the electing distribution company, all parties to the most current proceeding establishing a capacity supply plan for such electing distribution company, the consumers' utility counsel division of the Governor's Office of Consumer Affairs, all marketers who have been issued a certificate of authority pursuant to Code Section 46-4-153, and all owners or operators of interstate gas pipelines that are a part of said capacity supply plan, the commission may issue an order eliminating the responsibility of the electing distribution company for acquiring and contracting

for interstate capacity assets necessary for gas to be made available on its system as well as the obligation of such electing distribution company to file any further capacity supply plans with the commission pursuant to the provisions of this subsection, if the commission determines that:

(A) Marketers can and will secure adequate and reliable interstate capacity assets necessary to make gas available on the system of the electing distribution company for service to firm retail customers;

(B) Adequate, reliable, and economical interstate capacity assets will not be diverted from use for service to retail customers in Georgia;

(C) There is a competitive, highly flexible, and reasonably accessible market for interstate capacity assets for service to retail customers in Georgia;

(D) Elimination of such responsibility on the part of the electing distribution company would not adversely affect competition for natural gas service to retail customers in Georgia; and

(E) Elimination of such responsibility on the part of the electing distribution company is otherwise in the public interest.

If the commission eliminates the responsibility of an electing distribution company for acquiring and contracting for interstate capacity assets and filing further capacity supply plans in accordance with this subsection, the commission shall annually review the assignment of interstate capacity assets.

(13) Notwithstanding any other provisions in this Code section to the contrary, no later than July 1, 2003, the commission shall, after notice afforded to the electing distribution company, the consumers' utility counsel division of the Governor's Office of Consumer Affairs, all marketers who have been issued a certificate of authority in accordance with Code Section 46-4-153, and all owners or operators of interstate gas pipelines that are a part of said capacity supply plan, hold a hearing regarding a plan for assignment of interstate assets. After such hearing, the commission may adopt a plan for assignment of interstate capacity assets held by the electing distribution company, except for those interstate capacity assets reasonably required for balancing. If adopted, the plan shall provide for interstate capacity assets to be assigned to certificated marketers who desire assignment and who are qualified technically and financially to manage interstate capacity assets. Marketers who accept assignment of interstate capacity assets shall be required by the commission to use such assets primarily to serve retail customers in Georgia and shall be permitted to use such assets outside Georgia so long as the reliability of the system is not compromised. Thereafter, the commission shall annually review the assignment of interstate capacity assets.

(14) Any order eliminating the responsibility of the electing distribution company for acquiring and contracting for interstate capacity assets pursuant to paragraph (12) of this subsection and any plan for assignment of interstate capacity assets pursuant to paragraph (13) of this subsection shall, at a minimum, ensure that:

(A) Shifts in market share are reflected in an orderly reassignment of interstate capacity assets;

(B) Marketers hold sufficient interstate capacity assets to meet the needs of retail customers;

(C) Before any such assignment is authorized, the assignee demonstrates to the commission that such assignment will result in financial benefits to firm retail customers;

(D) Before any marketer discontinues service in the Georgia market, it assigns its contractual rights for interstate capacity assets used to serve Georgia retail customers in a manner designated by the commission;

(E) In the event that the commission imposes temporary directives in accordance with Code Section 46-4-157, interstate capacity assets assigned to marketers are subject to reassignment by the commission to protect the interests of retail customers; and

(F) Any other requirement that the commission finds to be in the public interest is imposed upon assignees as a condition of the assignment of interstate capacity assets.

(15) After notice and an opportunity for hearing, the commission may authorize, subject to reasonable terms and conditions, an electing distribution company or its designee to utilize or monetize excess interstate capacity assets available to the electing distribution company. (Code 1981, § 46-4-155, enacted by Ga. L. 1997, p. 798, § 4; Ga. L. 2002, p. 475, § 11.)

The 2002 amendment, effective April 25, 2002, in subsection (e), added “unless determined otherwise by the commission in accordance with this subsection” at the end of paragraph (e)(2), substituted “ninetieth day” for “forty fifth day” in the last sentence of paragraphs (e)(5) and (e)(11), in paragraph (e)(12), in the first sentence, deleted “and” preceding “all marketers” and inserted “and all owners or operators of inter-

state gas pipelines that are a part of said capacity supply plan,” and added the last undesignated paragraph, and added paragraphs (e)(13) through (e)(15).

Editor’s notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Natural Gas Consumers’ Relief Act.’”

46-4-156. Customer assignment methodology; commission determination of adequate market conditions and effect of such determination; lost and unaccounted for gas; notice to customers; petition proceedings; change of marketers; deposit.

(a) No later than December 31, 1997, the commission shall promulgate regulations which prescribe a methodology for the random assignment to each marketer certificated within a delivery group of each firm retail customer who has not contracted for distribution service from a marketer. This methodology shall further provide that the percentage of such firm retail customers assigned to a given marketer shall be based upon the percentage at the time of such assignment of all firm retail customers within the delivery group served by such marketer.

(b) Any person may file a petition requesting that the commission determine, or the commission on its own motion may determine, that adequate market conditions exist for a particular delivery group. If, after a proceeding on such petition or motion, the commission makes such a determination, the procedures that precede customer assignment shall begin. The commission shall enter a decision as to whether adequate market conditions exist within the earlier of 120 days after the close of the record in the proceeding on such petition or motion or 180 days from the filing of such petition or the making of such motion under this subsection. The commission shall determine that adequate market conditions exist within a specific delivery group based upon consideration of the following factors:

(1) The number and size of alternative providers of the distribution service;

(2) The extent to which the distribution service is available from alternative providers in the delivery group;

(3) Subject to subsection (d) of this Code section and provided that all initial assignments of rights to intrastate capacity for firm distribution service, interstate pipeline, and underground storage by an electing distribution company to marketers, as necessary for marketers to initiate service to all firm retail customers with which they have contracted or to which they have been assigned as provided for in this Code section, whether by allocation pursuant to a tariff approved under paragraph (3) or (4) of subsection (c) of Code Section 46-4-154 or by contract, are effective pursuant to the terms of such tariff or contract and, provided, further, that all initial assignments of rights under firm wellhead gas supply contracts by an electing distribution company to marketers, as necessary for marketers to initiate service to all firm retail customers with which they have contracted or to which they have been assigned as provided for in this Code section, by allocation pursuant to a tariff approved under Code Section 46-4-154 are effective pursuant to the

terms of such tariff, an electing distribution company has no obligation to provide commodity sales service to retail customers.

(4) Other indicators of market power which may include market share, growth in market share, ease of entry, and the affiliation of providers of a distribution service.

(c) If the commission issues an order pursuant to subsection (b) of this Code section determining that adequate market conditions exist, it shall prescribe in such order the contents of notices to be furnished pursuant to the provisions of subsection (e) of this Code section. Subject to the provisions of subsection (d) of this Code section, on the one hundred twentieth day following the issuance of an order for a particular delivery group:

(1) Except as otherwise provided in paragraph (4) of this subsection, the rates and terms of service of an electing distribution company for interruptible distribution service and balancing service shall not be subject to approval by the commission, provided that all firm retail customers have contracted with or have been assigned to marketers as provided for in this Code section;

(2) Except as otherwise provided in paragraph (4) of this subsection, rates and terms of service for commodity sales service provided by an electing distribution company to retail purchasers of firm distribution service shall not be subject to approval by the commission, provided that all firm retail customers have contracted with or have been assigned to marketers as provided for in this Code section;

(3) Subject to subsection (d) of this Code section and provided that all initial assignments of rights to intrastate capacity for firm distribution service, interstate pipeline, and underground storage by an electing distribution company to marketers, as necessary for marketers to initiate service to all firm retail customers with which they have contracted or to which they have been assigned as provided for in this Code section, whether by allocation pursuant to a tariff approved under paragraph (3) or (4) of subsection (d) of Code Section 46-4-154 or by contract, are effective pursuant to the terms of such tariff or contract and, provided, further, that all initial assignments of rights under firm wellhead gas supply contracts by an electing distribution company to marketers, as necessary for marketers to initiate service to all firm retail customers with which they have contracted or to which they have been assigned as provided for in this Code section, by allocation pursuant to a tariff approved under Code Section 46-4-154 are effective pursuant to the terms of such tariff, an electing distribution company has no obligation to provide commodity sales service to retail customers; and

(4) The commission is authorized to provide by order, after notice and hearing, for the allocation of the cost of lost and unaccounted for gas among interruptible and firm retail customers.

(d) If the one hundred twentieth day following the issuance of such order falls during a winter heating season, the provisions of subsection (c) of this Code section and customer assignment shall become effective on the day following the end of the winter heating season.

(e) Within 45 days following the issuance of an order pursuant to subsection (b) of this Code section, and again within 80 days following such an order, an electing distribution company shall send a notice regarding the commission's order to each of its retail customers receiving firm distribution service or commodity sales service within such delivery group. Such notices shall inform the retail customer in plain language that:

(1) The electing distribution company will not provide firm distribution service or commodity sales service to such customer, as of the date determined under subsection (c) or (d) of this Code section;

(2) Such customer may contract with a marketer certificated under Code Section 46-4-153 to furnish such services; and

(3) If the customer does not contract with a marketer within 100 days from the date of such order, the commission will assign, on a random basis, a marketer to furnish such services to said customer.

(f)(1) At any time that the electing distribution company determines that any deadline or the expiration of any time period prescribed by this article may result in an adverse impact upon the overall effective implementation of this article, upon the emergence of effective competition, or upon the public interest, it may petition the commission to extend such deadline or period for a time certain.

(2) If, in response to such a petition or on its own motion, the commission finds that strict enforcement of any deadline or time period prescribed by this article may result in an adverse impact upon the overall effective implementation of this article, upon the emergence of effective competition, or upon the public interest, it may extend such deadline or period for any period of time up to or equal to the time extension requested in the petition or proposed in the motion.

(g) Notwithstanding any other provision of this article, a consumer shall be authorized to change marketers at least once a year without incurring any service charge relating to such change to an alternative marketer. No marketer shall charge any consumer a service charge relating to a change to an alternative marketer if such consumer has not changed marketers within the previous 12 months. Except as otherwise provided in a legally binding contract between the marketer and the consumer, no marketer shall require a notice period from a consumer if a consumer elects to change service to an alternative marketer. The commission shall investigate methods to expedite the electing distribution company's processes for switching consumers to the consumers' preferred marketer and may enter appropriate orders to expedite switching consumers.

(h) A marketer may require a deposit, not to exceed \$150.00, from a consumer prior to providing gas distribution service to such consumer. A marketer is not authorized to require an increase in the deposit of a consumer if such consumer has paid all bills from the marketer in a timely manner for a period of three months. A marketer shall refund to any consumer who is not currently delinquent on payments to the marketer any deposit amount exceeding \$150.00 within 30 days following April 25, 2002. In any case where a marketer has required a deposit from a consumer and such consumer has paid all bills from the marketer in a timely manner for a period of six months, the marketer shall be required to refund the deposit to the consumer within 60 days. In any event, a deposit shall be refunded to a consumer within 60 days of the date that such consumer changes marketers or discontinues service, provided that such consumer has satisfied all of his or her outstanding financial obligations to the marketer. (Code 1981, § 46-4-156, enacted by Ga. L. 1997, p. 798, § 4; Ga. L. 1999, p. 153, § 1; Ga. L. 2001, p. 1084, § 1; Ga. L. 2001, p. 1206, § 1; Ga. L. 2002, p. 475, § 12.)

The 2002 amendment, effective April 25, 2002, substituted “subsection (c)” for “subsection (d)” near the middle of paragraph (b)(3); in subsection (c), substituted “Except as otherwise provided in paragraph (4) of this subsection, the” for “The” at the beginning of paragraph (c)(1), in paragraph (c)(2), substituted “Except as otherwise provided in paragraph (4) of this subsection,” for “The” at the beginning and deleted “and” from the end, substituted “; and” for a period at the end of paragraph (e)(3), and added paragraph (e)(4); in subsection (g), substituted “consumer” for “retail customer” in the first sentence and added the last three sentences; and in subsection (h), substituted “consumer” for “retail customer” throughout, in the first sentence, inserted “, not to exceed \$150.00,” and substituted “consumer” for “customer; provided, however, that such deposit cannot exceed 100 percent of the customer’s average monthly bill based on past customer usage and current marketer prices”, added the second and third sentences, substituted “consum-

er” for “customer” twice in the present fourth sentence, and, in the last sentence, substituted “such consumer” for “a retail customer” and substituted “that such consumer” for “the retail customer”.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2002, “April 25, 2002” was substituted for “the effective date of this subsection” at the end of the third sentence in subsection (h).

Editor’s notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Natural Gas Consumers’ Relief Act.’”

Administrative rules and regulations. — Natural Gas Marketers’ Terms of Service, Official Compilation of Rules and Regulations of State of Georgia Public Service Commission, Gas Utilities, Chapter 515-7-9.

Law reviews. — For note on the 2001 amendment to O.C.G.A. § 46-4-156, see 18 Ga. St. U.L. Rev. 273 (2001). For note on the 2001 amendment to O.C.G.A. § 46-4-156, see 18 Ga. St. U.L. Rev. 277 (2001).

46-4-157. Temporary directives.

(a) If, in an expedited hearing pursuant to the provisions of Chapter 13 of Title 50, the “Georgia Administrative Procedure Act”:

(1) The commission determines for a specific delivery group, as to which the commission has issued an order pursuant to subsection (b) of

Code Section 46-4-156, that the prices for natural gas paid by firm retail customers in such delivery group are not constrained by market forces and are significantly higher than such prices would be if they were constrained by market forces; or

(2) The commission determines for a specific delivery group, as to which the commission has not issued an order pursuant to subsection (b) of Code Section 46-4-156, that the prices charged by an electing distribution company to consumers for commodity sales services, which prices have not been approved by the commission pursuant to Code Section 46-2-26.5, are generally not constrained by market forces and are significantly higher than such prices would be if they were constrained by market forces,

then the commission, on an emergency basis, may by order temporarily impose such directives on gas companies subject to its jurisdiction as are required to protect the interests of firm retail customers in such delivery group including but not limited to price regulations and the imposition upon the electing distribution company of the obligation to serve retail customers in such delivery group under the same or similar conditions to those under which such customers were served prior to customer assignment in such delivery group. In no event shall such emergency directives extend beyond the first day of July immediately following the next full annual session of the General Assembly after the imposition of such directives. In its order the commission shall provide for recovery of all costs reasonably incurred by the electing distribution company in complying with the directives. Any such directives shall be drawn as narrowly as possible to accomplish the purpose of protecting the public on an interim basis. No such directive shall impose any condition upon the electing distribution company which unreasonably burdens the company. Such directives shall be immediately reviewable in the Superior Court of Fulton County in the same manner and subject to the same procedures as the review of any other contested case under the provisions of Code Section 50-13-19.

(b) If, in an expedited hearing pursuant to the provisions of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," the commission makes any of the determinations described in subsection (c) or (d) of this Code section, the commission may, on a temporary basis, by order impose on marketers such directives as are required to protect the interest of firm retail customers in a specific delivery group, including but not limited to price regulations. In no event shall such emergency directives extend beyond the first day of July in the year immediately following imposition of such directives. Any such directives shall be drawn as narrowly as possible to accomplish the purpose of protecting the public on an interim basis. Such directives shall be immediately reviewable in the Superior Court of Fulton County in the same manner and subject to the same procedures as the review of any other contested case under the provisions of Code Section 50-13-19.

(c) Upon determination by the commission that market conditions are no longer competitive, the commission may impose directives as described in subsection (b) of this Code section. For purposes of this subsection, there shall be a rebuttable presumption that market conditions are not competitive if more than 90 percent of firm retail customers in a specific delivery group are served by three or fewer marketers; provided, however, that marketers who are affiliates shall be deemed to be one marketer for purposes of this subsection.

(d) Upon determination by the commission, based upon a standard previously adopted by rule of the commission, that prices paid by firm retail customers for natural gas in a specific delivery group are not constrained by market forces and are significantly higher than such prices would be if they were constrained by market forces, the commission may impose directives as described in subsection (b) of this Code section. (Code 1981, § 46-4-157, enacted by Ga. L. 1997, p. 798, § 4; Ga. L. 2001, p. 1084, § 2; Ga. L. 2001, p. 1206, § 2; Ga. L. 2002, p. 475, § 13.)

The 2002 amendment, effective April 25, 2002, in subsection (a), inserted “firm” in the middle of paragraph (a)(1) and near the beginning of the last undesignated paragraph, substituted “consumers” for “residential customers” in the middle of paragraph (a)(2), and deleted the former last sentence of the last undesignated paragraph which read: “The provisions of this Code section shall not apply to a delivery group for which customer assignment occurred more than four years prior to the date of notice of the expedited hearing.”; substituted the present provisions of subsection (b) for the former provisions which read: “If, in an expedited hearing pursuant to the provisions of Chapter 13 of Title 50, the ‘Georgia Administrative Procedure Act,’ the commission determines that market conditions are no longer competitive, then the commission, on an emergency basis, may by order temporarily impose such directives on marketers as are required to protect the interests of retail customers in the state, including, but not limited to, price regulations on the marketers. For purposes of this subsection, market conditions shall be considered competitive as long as there are at least three marketers soliciting and providing distribution services to residential and small business customers in this state; provided, however, that, in any case where there are three or less marketers soliciting and providing distribution services to residential

and small business customers in this state, market conditions shall not be considered competitive if the commission upon clear and convincing evidence determines that as a result of collusion among such marketers, prices for natural gas paid by retail customers are not being adequately constrained by market forces and are significantly higher than such prices would be if they were constrained by market forces. In no event shall such emergency directives extend beyond the first day of July immediately following the next full annual session of the General Assembly after the imposition of such directives. Any such directives shall be drawn as narrowly as possible to accomplish the purpose of protecting the public on an interim basis. Such directives shall be immediately reviewable in the Superior Court of Fulton County in the same manner and subject to the same procedures as the review of any other contested case under the provisions of Code Section 50-13-19.”; and added subsections (c) and (d).

Code Commission notes. — The amendment of this Code section by Ga. L. 2001, p. 1084, § 2, irreconcilably conflicted with and was treated as superseded by Ga. L. 2001, p. 1206, § 2. See *County of Butts v. Strahan*, 151 Ga. 417 (1921).

Editor’s notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Natural Gas Consumers’ Relief Act.’”

Law reviews. — For note on the 2001 amendment to O.C.G.A. § 46-5-157, see 18 Ga. St. U.L. Rev. 273 (2001). For note on the 2001 amendment to O.C.G.A. § 46-4-157, see 18 Ga. St. U.L. Rev. 277 (2001).

46-4-158. Obligations of an electing distribution company; conditions.

(a) An electing distribution company which provides firm distribution service under this article must:

- (1) Offer an allocation of such distribution service to marketers separately from any commodity sales service or other service;
- (2) Provide such allocation of such distribution service to marketers without undue discrimination or preference, including undue discrimination or preference in the quality of service provided, the duration of service, the categories, prices, or volumes of natural gas to be distributed, customer classification, or other undue discrimination or preference of any kind;
- (3) Provide all marketers with equal and timely access to information relevant to the availability of such service, including without limitation the availability of capacity at delivery points, through the use of an electronic bulletin board; and
- (4) Cooperate with each certificated marketer and each regulated provider of natural gas to achieve the intentions of this article set out in subsection (b) of Code Section 46-4-151.

(b) An electing distribution company may impose reasonable operational conditions on any firm distribution service provided to marketers under this article. Such conditions must be filed by the electing firm distribution company as part of its firm distribution tariff.

(c) An electing distribution company which allocates firm distribution service to marketers under this article is not required to provide any requested firm distribution service for which capacity is not available or that would require the construction or acquisition of any new facilities. (Code 1981, § 46-4-158, enacted by Ga. L. 1997, p. 798, § 4; Ga. L. 2002, p. 475, § 14.)

The 2002 amendment, effective April 25, 2002, in subsection (a), deleted “and” from the end of paragraph (a)(2), substituted “; and” for a period at the end of paragraph (a)(3), and added paragraph (a)(4).

Editor’s notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Natural Gas Consumers’ Relief Act.’”

46-4-158.1. Rules and regulations; reporting on service quality; noncompliance with service quality standards; third party forecasting; independent auditors; gas held in storage for marketer.

(a)(1) Not later than September 1, 2002, the commission shall promulgate rules and regulations to establish service quality standards for each electing distribution company, including, but not limited to, minimum performance standards for posting data on the electronic bulletin board; meter reading; meter turn-ons and turn-offs; forecasting; call center response times; lost and unaccounted for natural gas; acquiring and managing interstate capacity assets, including retained storage; and any other service quality standards deemed necessary by the commission.

(2) Not later than September 1, 2002, the commission shall promulgate rules and regulations to establish service quality standards for each certificated marketer and regulated provider, which may include minimum performance standards for call center response times, billing, meter reading, and any other service quality standards deemed necessary by the commission. Each service quality standard adopted by the commission applicable to an electing distribution company shall also apply to each certificated marketer and each regulated provider to the extent that a certificated marketer or a regulated provider provides the same customer services.

(b) Each electing distribution company, certificated marketer, and regulated provider shall file reports with the commission showing its performance with regard to service quality standards established in accordance with this Code section. Such reports shall be filed at least quarterly, or on a more frequent basis if ordered by the commission.

(c) Failure to comply with service quality standards established in accordance with this Code section shall subject an electing distribution company, certificated marketer, or regulated provider to fines as determined by the commission.

(d) At least annually the commission shall conduct a proceeding to review compliance with the service quality standards by the electing distribution company, certificated marketer, and regulated provider.

(e) If the commission determines that an electing distribution company has failed to satisfactorily meet the performance standards for system forecasting, including setting the daily supply requirement and the marketer firm obligation, or has otherwise demonstrated an inability to perform such function properly, then the commission may enter an order relieving the electing distribution company of its system forecasting responsibilities and may establish a competitive request for proposal process to select an independent entity with the technical and financial ability to perform the role of system forecasting, including setting the daily supply

requirement and the marketer firm obligation. The agreement for system forecasting shall include standards for evaluating the performance of the forecaster and for awarding incentives for superior performance and imposing disincentives for unsatisfactory performance. The commission shall establish an appropriate mechanism to recover the cost of performing such functions.

(f) If the commission determines that the public interest would be served thereby, the commission may enter an order establishing a competitive request for proposal process to select an independent auditor or auditors for the purpose of examining:

(1) The daily, monthly, and annual accounting of transactions among each electing distribution company, its affiliated companies, and certificated marketers; and

(2) Compliance with the provisions of subsections (b) and (c) of Code Section 46-4-159.

(g) Any independent auditor selected in accordance with subsection (f) of this Code section shall prepare a semiannual audit report to the commission. Unless a written objection clearly specifying one or more errors or inaccuracies in the audit report is filed within ten days after the audit report is filed with the commission, the audit report shall be accepted by the commission. If an objection is filed, the commission shall conduct an expedited hearing within ten days after the objection is filed to determine whether to accept the audit report. A final decision shall be issued five days after such a hearing. An audit report, along with its status as accepted or not accepted by the commission, shall be admissible in any litigation relating to transactions described or evaluated in the audit report.

(h) Sale of gas held in storage for a certificated marketer to third parties by an electing distribution company shall be prohibited; provided, however, that use of gas held in storage for a certificated marketer by the electing distribution company to ensure system balancing and reliability shall not be prohibited. (Code 1981, § 46-4-158.1, enacted by Ga. L. 2002, p. 475, § 15.)

Effective date. — This Code section became effective April 25, 2002.

Editor's notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, pro-

vides that: "This Act shall be known and may be cited as the 'Natural Gas Consumers' Relief Act.'"

46-4-158.2. Rules governing marketer's terms of service.

The commission shall by September 1, 2002, adopt rules governing a marketer's terms of service for natural gas consumers. Such rules shall provide, without limitation, that:

(1) Each retail natural gas marketer shall establish policies and procedures for handling billing disputes and requests for payment arrangements, which must be approved by the commission;

(2) A marketer's advertised prices shall reflect the prices or the pricing methodology in disclosure statements and billed prices and shall be presented in the standard pricing unit of the electing distribution company;

(3) The consumer shall have a right to contact the commission and the consumers' utility counsel division of the Governor's Office of Consumer Affairs if he or she is not satisfied with the response of the marketer;

(4) Marketers shall provide all consumers with a three-day right of rescission following the receipt of the disclosure statement, which shall be provided to consumers at times specified in rules and regulations of the commission. Consumers may cancel an agreement in writing or electronically by contacting the marketer;

(5) Whenever a marketer offers a fixed term agreement and the expiration date of such agreement is approaching, or whenever a marketer proposes to change its terms of service under any type of agreement, the marketer shall provide written notification to the natural gas consumer, clearly explaining the consumer's options at that point, including, but not limited to, the option to seek another marketer;

(6) A marketer shall not charge cancellation fees to a low-income residential consumer seeking service for the first time from the regulated provider;

(7) Gas service to a consumer shall be disconnected only for failure to pay for service from the consumer's current marketer. A marketer may not request disconnection of service for nonpayment of a bill which was not sent to the consumer in a timely manner. Every marketer shall be required to offer at least one reasonable payment arrangement in writing to a consumer prior to requesting that such consumer be disconnected for failure to pay. Disconnection of service to a consumer is authorized no earlier than 15 days after a notice that service will be disconnected;

(8) Marketers shall be prohibited from sending estimated bills to natural gas consumers; provided, however, that when information from actual meter readings is not made available by the electing distribution company or any other party authorized to perform meter reading, marketers may send an estimated bill for not more than two consecutive months; and

(9) No marketer shall be authorized to prevent a consumer from obtaining distribution and commodity sales service from another mar-

keter or provider. (Code 1981, § 46-4-158.2, enacted by Ga. L. 2002, p. 475, § 15.)

Effective date. — This Code section became effective April 25, 2002.

Editor's notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Natural Gas Consumers' Relief Act.'"

Administrative rules and regulations. — Natural Gas Marketers' Terms of Service, Official Compilation of Rules and Regulations of State of Georgia Public Service Commission, Gas Utilities, Chapter 515-7-9.

46-4-158.3. Adequate and accurate consumer information disclosure statements; bills.

The commission shall, by September 1, 2002, adopt rules and regulations requiring marketers which provide firm distribution service under this article to provide adequate and accurate consumer information to enable consumers to make informed choices regarding the purchase of natural gas services. Such rules shall provide, without limitation, that:

(1) A disclosure statement shall be provided to consumers in an understandable format that enables such consumers to compare prices and services on a uniform basis. Rules adopted by the commission shall provide when disclosure statements shall be provided to consumers. Such disclosure statements shall include, but shall not be limited to, the following:

(A) For fixed rate charges for natural gas service, a clear disclosure of the components of the fixed rate, the actual prices charged by the marketer, presented in a single standard pricing unit which includes any charges imposed by the marketer or its agent, so that the consumer can compare rates among marketers. This disclosure shall not include state and local sales taxes. The standard pricing disclosure unit must include all recurring monthly charges;

(B) For variable rate charges for natural gas service, a clear and understandable explanation of the factors that will cause the price to vary and how often the price can change, the current price, and the ceiling price, if any, so that the consumer can compare rates among marketers. The current price and ceiling price, if applicable, shall be presented in a single standard pricing unit which includes any charges imposed by the marketer or its agent. This disclosure shall not include state and local sales taxes. The standard pricing disclosure unit must include all recurring monthly charges;

(C) A statement that the standard unit price does not include state and local taxes or charges imposed by the electing distribution company;

(D) The length of the agreement, including the starting date and expiration date, if applicable;

(E) The billing interval, the method by which monthly charges imposed by the electing distribution company will be billed to the consumer in the event the consumer commences or terminates service with the marketer during the billing interval, and any late payment, cancellation, or reconnection fees;

(F) The marketer's budget billing, payment, credit, deposit, cancellation, collection, and reconnection policies and procedures;

(G) How to contact the marketer for information or complaints;

(H) A statement of the natural gas consumer's right to contact the commission and the consumers' utility counsel division of the Governor's Office of Consumer Affairs if he or she is not satisfied with the response of the marketer, including the local and toll-free telephone numbers of these agencies;

(I) The division name and telephone number for information regarding heating assistance administered by the Department of Human Resources;

(J) The following statement:

"A consumer shall have a three-day right of rescission following the receipt of this disclosure at the time of initiating service or when informed of a change in terms or conditions. You, the consumer, may cancel in writing or electronically by contacting the marketer.";

(K) The following statement:

"If you have a fixed term agreement with us and it is approaching the expiration date, or whenever we propose to change our terms of service in any type of agreement, you will receive written notification from us prior to the date of expiration of or change to the agreement. We will explain your options to you in this advance notification.";

(L) A statement setting forth the requirements of paragraphs (6) through (9) of Code Section 46-4-158.2; and

(M) A statement that deposits shall not exceed \$150.00; and

(2) Natural gas consumers' bills shall be accurate and understandable and shall contain sufficient information for a consumer to compute and compare the total cost of competitive retail natural gas services. Such bills shall include, but not be limited to, the following:

(A) The consumer's name, billing address, service address, and natural gas company account number;

(B) The dates of service covered by the bill, an itemization of each type of competitive natural gas service covered by the bill, any related

billing components, the charge for each type of natural gas service, and any other information the consumer would need to recalculate the bill for accuracy;

(C) The applicable billing determinants, including beginning meter reading, ending meter reading, multipliers, and any other consumption adjustments;

(D) The amount billed for the current period, any unpaid amounts due from previous periods, any payments or credits applied to the consumer's account during the current period, any late payment charges or gross and net charges, if applicable, and the total amount due and payable;

(E) The due date for payment to keep the account current;

(F) The current balance of the account, if the natural gas consumer is billed according to a budget plan;

(G) Options and instructions on how the natural gas consumer can make a payment;

(H) A toll-free or local telephone number and address for consumer billing questions or complaints for any retail natural gas company whose charges appear on the bill;

(I) The applicable electing distribution company's 24 hour local or toll-free telephone number for reporting service emergencies; and

(J) An explanation of any codes and abbreviations used. (Code 1981, § 46-4-158.3, enacted by Ga. L. 2002, p. 475, § 15.)

Effective date. — This Code section became effective April 25, 2002.

Editor's notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, pro-

vides that: "This Act shall be known and may be cited as the 'Natural Gas Consumers' Relief Act.'"

46-4-158.4. Authority to establish minimum standards for nonresidential customers.

The commission shall by September 1, 2002, adopt rules establishing minimum standards for a marketer's terms and conditions of service for various classes of firm retail customers that are nonresidential and small businesses. In defining such classes, the commission may consider relevant factors, including but not limited to consumption history, estimated usage, and the size of the customer. (Code 1981, § 46-4-158.4, enacted by Ga. L. 2002, p. 475, § 15.)

Effective date. — This Code section became effective April 25, 2002.

Editor's notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, pro-

vides that: "This Act shall be known and may be cited as the 'Natural Gas Consumers' Relief Act.'"

46-4-158.5. Continuing review by commission.

The commission shall continually review marketers' compliance with rules promulgated in accordance with Code Sections 46-4-158.2, 46-4-158.3, and 46-4-158.4. (Code 1981, § 46-4-158.5, enacted by Ga. L. 2002, p. 475, § 15.)

Effective date. — This Code section became effective April 25, 2002.

Editor's notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Natural Gas Consumers' Relief Act.'"

Administrative rules and regulations. — Natural Gas Marketers' Terms of Service, Official Compilation of Rules and Regulations of State of Georgia Public Service Commission, Gas Utilities, Chapter 515-7-9.

46-4-159. Standards of conduct for electing distribution companies; response to complaints.

(a) As used in this Code section and notwithstanding any other provision of this article, the term:

(1) "Control" includes without limitation the possession, directly or indirectly and whether acting alone or in conjunction with others, of the authority to direct or cause the direction of the management or policies of a person. A voting interest of 10 percent or more creates a rebuttable presumption of control. The term control includes the terms controlling, controlled by, and under control with.

(2) "Electing distribution company" includes any agent of or consultant to the electing distribution company.

(3) "Marketer" means any person who engages in selling gas:

(A) To retail customers connected to the facilities of an electing distribution company; or

(B) To other marketers for resale to such customers; provided, however, that the term marketer shall not mean a person who only makes sales beyond the electing distribution company's system to other marketers for resale when the transportation capacity for the distribution of the gas to the electing distribution company's system is obtained from a person or entity which is not an affiliate of the electing distribution company.

(b) An electing distribution company must conduct its business to conform to the following standards, which are intended to prevent any advantage or disadvantage accruing to a marketer, including a marketer which is an affiliate of the electing distribution company, in relation to

other marketers and their customers and which standards shall be applied to accomplish this intent:

(1) An electing distribution company must apply the terms and conditions of its tariff and other tariff provisions related to the distribution of gas in the same manner to all marketers and to all customers without respect to their supplier;

(2) An electing distribution company must process all similar requests for service in the same manner to all marketers in a reasonably similar time period;

(3) An electing distribution company may not, through tariff or otherwise, give any marketer or its customers preference over any other marketer or similarly situated customers in matters relating to the movement or delivery of gas on its distribution facilities or the administration of contracts, including scheduling, nomination, balancing, metering, storage, standby service, curtailment policy, and billing and invoice questions and disputes;

(4) An electing distribution company shall apply the same tariff provisions relating to discounts, rebates, fee waivers, or penalty waivers to all similarly situated customers without respect to their marketer. Any discretionary right under a tariff provision shall be applied by the electing distribution company impartially to all similarly situated customers without respect to their marketer. Where not subject to tariff provisions, an electing distribution company must contemporaneously offer the same discounts, rebates, fee waivers, or penalty waivers to all similarly situated customers without respect to their marketer and effectuate such contemporaneous offers by making an appropriate posting on the general alert screen of its electronic bulletin board;

(5) An electing distribution company must not give preference to any marketer in the scheduling or allocation of capacity at a city gate station;

(6) An electing distribution company must not directly or indirectly give any marketer any form of preference over any other marketer in matters relating to allocation, assignment, release, or other transfer of the electing distribution company's capacity rights on interstate pipeline systems or in the sale of gas;

(7) Neither the electing distribution company nor any marketer which is an affiliate of the company nor any other marketer may represent that any advantage accrues to customers or others in the use of electing distribution company services as a result of that customer or others dealing with the marketer. Also, joint promotions between the electing distribution company and any marketer, such as inclusion of fliers for the marketer in utility bills, are prohibited unless such promotions are offered to all other marketers under the same terms and conditions;

(8) The electing distribution company must not preferentially provide sales leads to any marketer and must refrain from giving any appearance that the electing distribution company speaks on behalf of a marketer that is an affiliate of the company. If a customer requests information about marketers, to the extent the electing distribution company responds to the request, the electing distribution company should provide a list of all marketers on its system but shall not express any preferential recommendation for a marketer that is an affiliate of the company or for any other marketer;

(9) Joint solicitation calls on end users by personnel of the electing distribution company and any marketer are forbidden; however, joint meetings will be scheduled at a mutually agreeable time and location if specifically requested in writing by the customer;

(10) An electing distribution company must contemporaneously disclose information provided to any marketer related to the marketing or sale of natural gas to customers or identified potential customers or related to the delivery of natural gas to or on its system to all marketers on the system. The electing distribution company's disclosure of such information must be effectuated by posting the information on the general alert screen of its electronic bulletin board. However, an electing distribution company may, when requested in writing to do so by a customer of a marketer, disclose confidential information relating to the customer only to said marketer. Notwithstanding any other provisions of this paragraph, an electing distribution company may respond to general inquiries from marketers, customers, identified potential customers, or other third parties regarding general information including the company's terms and conditions, tariff provisions, location and description of facilities, or other similar information as required in the normal course of business by responding only to the requesting party;

(11) An electing distribution company may not knowingly disclose to any marketer any confidential information obtained in connection with providing distribution or related services to any other marketer or customer, a potential marketer or customer, any agent of such customer or potential marketer, or a marketer;

(12) Employees of the electing distribution company having direct responsibility for the day-to-day operations of the electing distribution company's operations, including without limitation employees involved in:

(A) Receiving distribution service requests or sales requests from retail customers;

(B) Scheduling gas deliveries on the electing distribution company's system;

(C) Making gas scheduling or allocation decisions;

(D) Purchasing gas or capacity; or

(E) Selling gas to retail customers

shall not be shared with, shall be physically separated from, and must function independently of a marketer which is an affiliate of the company;

(13) An electing distribution company must file with the commission procedures that will enable marketers and the commission to determine how the electing distribution company is complying with the standards set forth in this Code section; and

(14) An electing distribution company must maintain its books of account and records separately from those of a marketer which is an affiliate of the company.

(c) An electing distribution company must respond in writing within ten days to any informal complaint which is submitted in writing to the company and which relates to compliance with the standards set forth in this Code section. (Code 1981, § 46-4-159, enacted by Ga. L. 1997, p. 798, § 4.)

46-4-160. Commission's authority over certificated marketers; access to records; investigations and hearings; price summary; billing; violations; slamming.

(a) With respect to a marketer certificated pursuant to Code Section 46-4-153, the commission shall have authority to:

(1) Adopt reasonable rules and regulations governing the certification of a marketer;

(2) Grant, modify, impose conditions upon, or revoke a certificate;

(3) Adopt reasonable rules governing service quality. In promulgating consumer protection rules under this article, the commission shall, to the extent practicable, provide for rules with a self-executing mechanism to resolve such complaints in a timely manner. Such consumer protection rules shall encourage marketers to resolve complaints without recourse to the commission and shall expedite the handling of those complaints that do require action by the commission by providing for a minimum payment of \$100.00 to the consumer, plus penalties and fines as determined by the commission, for violations of such rules;

(4) Resolve complaints against a marketer regarding that marketer's service;

(5) Adopt reasonable rules and regulations relating to billing practices of marketers and information required on customers' bills. The commission shall require at a minimum that bills specify the gas consumption

amount, price per therm, distribution charges, and any service charges. The commission shall prescribe performance standards for marketer billing relating to accuracy and timeliness of customer bills;

(6) Adopt reasonable rules and regulations relating to minimum resources which marketers are required to have in this state for customer service purposes. The rules and regulations shall require a marketer to have and maintain the ability to process cash payments from customers in this state. The rules and regulations shall provide procedures relating to the handling and disposition of customer complaints; and

(7) Adopt reasonable rules and regulations requiring marketers to provide notification to retail customers of or include with customer bills information relating to where customers may obtain pricing information relative to gas marketers.

(b) Prior to the determination by the commission pursuant to Code Section 46-4-156 that adequate market conditions exist within a delivery group, each marketer must separately state on its bills to retail customers within the delivery group the charges for firm distribution service and for commodity sales.

(c) Except as otherwise provided by this article, the price at which a marketer sells gas shall not be regulated by the commission.

(d) The commission and the consumers' utility counsel division of the Governor's Office of Consumer Affairs shall have access to the books and records of marketers as may be necessary to ensure compliance with the provisions of this article and with the commission's rules and regulations promulgated under this article.

(e) Except as otherwise provided in this article, certification of a person as a marketer by the commission pursuant to Code Section 46-4-153 does not subject the person to the jurisdiction of the commission under this title, including without limitation the provisions of Article 2 of Chapter 2 of this title.

(f) The provisions of Article 3 of Chapter 2 of this title shall apply to an investigation or hearing regarding a marketer. The provisions of Articles 4 and 5 of Chapter 2 of this title shall apply to a marketer.

(g) The commission, subject to receiving state funds for such purpose, is required to have published at least quarterly in newspapers throughout the state a summary of the price per therm and any other amounts charged to retail customers by each marketer operating in this state and any additional information which the commission deems appropriate to assist customers in making decisions regarding choice of a marketer. In addition, the commission shall make such information available to Georgia Public Telecommunications (GPTV) under the jurisdiction of the Georgia Public Telecommu-

nications Commission which will provide such information to the general public at a designated time at least once a month.

(h) A marketer shall render a bill to retail customers for services within 30 days of the date following the monthly meter reading. A marketer's bill shall utilize the results of the actual meter reading subject to paragraph (8) of Code Section 46-4-158.2. The price for natural gas billed to a natural gas consumer shall not exceed the marketer's published price effective at the beginning of the consumer's billing cycle. A marketer shall allow the natural gas consumer a reasonable period of time to pay the bill from the date the consumer receives the bill, prior to the application of any late fees or penalties. Marketers shall not impose unreasonable late fees or penalties and in no event shall any such fees or penalties exceed \$10.00 or 1.5 percent of the past due balance, whichever is greater.

(i) Any marketer which willfully violates any provision of this Code section or any duly promulgated rules or regulations issued under this Code section, including but not limited to rules relating to false billing, or which fails, neglects, or refuses to comply with any order of the commission after notice thereof shall be liable for any penalties authorized under Code Section 46-2-91.

(j) As used in this subsection, the phrase "terms and conditions" does not include price. At least 30 days prior to the effective date of any changes in the terms and conditions for service authorized by the marketer's certificate of authority, a marketer shall file such changes with the commission. Such changes to the terms and conditions of service shall go into effect on the effective date proposed by the marketer; provided, however, that the commission shall be authorized to suspend the effective date of the proposed changes for up to 90 days if it appears to the commission that the proposed terms and conditions are unconscionable or are unfair, deceptive, misleading, or confusing to consumers. If the commission does not issue a final decision on the proposed terms and conditions of service within the 90 day suspension period, the proposed changes shall be deemed approved.

(k) Any consumer determined by the commission to be the victim of slamming shall be able to switch back to his or her desired marketer without any charge. No marketer responsible for slamming a consumer shall be entitled to any remuneration for services provided to that customer, and any refund owed to such a consumer by the marketer who switched the consumer without his or her consent shall be paid within 30 days of the date the commission determined the consumer was a victim of slamming. No marketer responsible for slamming a consumer who is determined to be a victim of slamming shall report to a credit reporting agency any moneys owed by such a consumer to such marketer; any marketer who violates the prohibition set out in this sentence shall be required by the commission to pay such a consumer \$1,000.00 for each such prohibited report. (Code 1981, § 46-4-160, enacted by Ga. L. 1997, p. 798, § 4; Ga. L. 2001, p. 1084, § 3; Ga. L. 2001, p. 1206, § 3; Ga. L. 2002, p. 475, § 16.)

The 2002 amendment, effective April 25, 2002, added the last two sentences in paragraph (a)(3); substituted the present provisions of subsection (c) for the former provisions which read: "A marketer shall not refuse to sell gas to a potential firm retail customer within the territory covered by the marketer's certificate of authority if the sale can be made by the marketer pursuant to the rules for service authorized by the marketer's certificate of authority and upon terms that will provide the marketer with just and adequate compensation. The price at which a marketer sells gas shall not be fixed by the commission."; deleted former subsection (g) which read: "The provisions of Part 2 of Article 15 of Chapter 1 of Title 10, the "Fair Business Practices Act of 1975, " shall apply to a marketer."; redesignated former subsections (h) through (j) as present subsections (g) through (i), respectively; in subsection (h), deleted "actual" preceding

"monthly" in the first sentence, deleted the former second sentence which read: "A 15 day grace period is permitted prior to the application of any penalty.", and added the last four sentences; inserted ", including but not limited to rules relating to false billing," in subsection (i); and added subsections (j) and (k).

Editor's notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Natural Gas Consumers' Relief Act.'"

Administrative rules and regulations. — Natural Gas Marketers' Terms of Service, Official Compilation of Rules and Regulations of State of Georgia Public Service Commission, Gas Utilities, Chapter 515-7-9.

Law reviews. — For note on the 2001 amendment to O.C.G.A. § 46-4-160, see 18 Ga. St. U.L. Rev. 277 (2001).

JUDICIAL DECISIONS

Right to set retail natural gas prices. — By statute and regulations, a certified gas marketer has the right to set retail natural gas prices in Georgia; however, a marketer, by its contracts, may voluntarily limit or surrender such rights to set rates under O.C.G.A.

§ 46-4-160, even if the Georgia Public Service Commission lacks such power. *Scana Energy Mktg., Inc. v. Cobb Energy Mgmt. Corp.*, 259 Ga. App. 216, 576 S.E.2d 548 (2002).

46-4-160.1. Dispute resolution between marketer and retail customer; reporting to credit bureaus.

In any case where there is a dispute between a marketer and a retail customer concerning the amount of a gas bill, the marketer shall be required to confer by telephone or some other verifiable means with the retail customer in an attempt to resolve such dispute. In case of any such dispute the marketer shall be prohibited from reporting the name of a retail customer to any consumer reporting agency as defined in Section 603(f) of the federal Fair Credit Reporting Act until the marketer has conferred with the retail customer and has complied in all respects with all applicable provisions of this article and the rules and regulations of the commission or has obtained a judgment against the retail customer. (Code 1981, § 46-4-160.1, enacted by Ga. L. 2001, p. 1084, § 4; Ga. L. 2001, p. 1206, § 4.)

Code Commission notes. — Ga. L. 2001, p. 1084, § 4, effective April 27, 2001, and Ga. L. 2001, p. 1206, § 4, effective April 28,

2001, enacted identical versions of this Code section.

Law reviews. — For note on the 2001

enactment of O.C.G.A. § 46-4-160.1, see 18 Ga. St. U.L. Rev. 273 (2001). For note on the 2001 enactment of O.C.G.A. § 46-4-160.1, see 18 Ga. St. U.L. Rev. 277 (2001).

46-4-160.2. Requirements of marketer for billing errors; requiring written request for credit or refund prohibited.

(a) Whenever a marketer discovers or has called to its attention a billing error or other mistake reported to or acknowledged by the marketer, the marketer shall have 30 days to correct the billing error from the date said error is reported to or acknowledged by the marketer. If the marketer does not correct the billing error, the burden of proof shall be on the marketer to show why the bill is correct. During the period the billing error is being disputed, the marketer shall neither impose a late fee or penalty on the disputed amount nor initiate an action to disconnect the customer's service or collect on the past due balance, if the disputed amount constitutes the total amount of the past due balance. In the event the billing error results in an overpayment by a retail customer of said marketer, such marketer shall be required automatically and immediately to provide:

(1) A credit of the amount of the overpayment to the account of the customer; or

(2) A refund of the amount of the overpayment to the customer.

(b) A marketer shall be prohibited from requiring a retail customer to whom it owes a credit or refund to submit in writing a request for such credit or refund before the marketer complies with the provisions of subsection (a) of this Code section. All credits to the account of the customer or refunds to the customer shall be made within 60 days after the overpayment has been acknowledged or admitted to by the marketer. (Code 1981, § 46-4-160.2, enacted by Ga. L. 2001, p. 1084, § 4; Ga. L. 2001, p. 1206, § 4; Ga. L. 2002, p. 475, § 17.)

The 2002 amendment, effective April 25, 2002, in subsection (a), in the first sentence, inserted "reported to or", deleted "or admitted to" preceding "by the marketer" and substituted ", the marketer shall have 30 days to correct the billing error from the date said error is reported to or acknowledged by the marketer" for "and resulting", added the second and third sentences, and added "In the event the billing error results" at the beginning of the fourth sentence.

Editor's notes. — Ga. L. 2001, p. 1084, § 4, effective April 27, 2001, and Ga. L.

2001, p. 1206, § 4, effective April 28, 2001, enacted identical versions of this Code section.

Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Natural Gas Consumers' Relief Act.'"

Law reviews. — For note on the 2001 enactment of O.C.G.A. § 46-4-160.2, see 18 Ga. St. U.L. Rev. 273 (2001). For note on the 2001 enactment of O.C.G.A. § 46-4-160.2, see 18 Ga. St. U.L. Rev. 277 (2001).

46-4-160.3. Voluntary contributions for low-income residential customers.

In order to assist low-income residential consumers, the commission may establish a system by which each marketer's customers may make voluntary contributions to assist low-income residential consumers. Contributions received by a marketer shall be deposited in the universal service fund to be used to assist low-income residential consumers. (Code 1981, § 46-4-160.3, enacted by Ga. L. 2002, p. 475, § 18.)

Effective date. — This Code section became effective April 25, 2002.

Editor's notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, pro-

vides that: "This Act shall be known and may be cited as the 'Natural Gas Consumers' Relief Act.'"

46-4-160.4. Natural Gas Consumer Education Advisory Board; membership; responsibilities.

(a) There is created the Natural Gas Consumer Education Advisory Board, whose duty it shall be to advise and make recommendations to the director of the consumers' utility counsel division of the Governor's Office of Consumer Affairs. The board shall consist of five members who shall be appointed by the Governor and shall include at least one representative for each of the following: marketers, natural gas consumers, and electing distribution companies. There shall be one member appointed from each commission electoral district. Board members shall serve at the pleasure of the Governor.

(b) The board shall elect its chairperson and shall convene upon the call of the administrator at a time and place specified in writing by the administrator. Each member of the board shall serve without pay but shall receive standard state per diem for expenses and receive standard travel allowance while attending meetings and while in the discharge of his or her responsibilities.

(c) The board shall assist the director in an advisory capacity only in carrying out the duties and functions of such official concerning policy matters relating to the development and implementation of state-wide education programs for natural gas consumers or consumers of any other utility that may be deregulated in the future. (Code 1981, § 46-4-160.4, enacted by Ga. L. 2002, p. 475, § 18.)

Effective date. — This Code section became effective April 25, 2002.

Editor's notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, pro-

vides that: "This Act shall be known and may be cited as the 'Natural Gas Consumers' Relief Act.'"

46-4-160.5. Retail customer recovery for violations.

(a) Any retail customer who is damaged by a marketer's violation of any provision of Code Section 46-4-160, any duly promulgated rules or regulations issued under such Code section, or any commission order shall be entitled to maintain a civil action and shall be entitled to recover actual damages sustained by the retail customer, as well as incidental damages, consequential damages, reasonable attorney's fees, and court costs.

(b) Any violation of Code Section 46-4-160 or any duly promulgated rules or regulations issued under such Code section is declared to be a violation of Part 2 of Article 15 of Chapter 1 of Title 10, the "Fair Business Practices Act of 1975." Any remedy available under such part shall be available to any retail customer and any action by the administrator that such part authorizes for a violation of such part shall be authorized for violation of Code Section 46-4-160 or any duly promulgated rules or regulations issued under such Code section. This subsection shall not be construed to provide that other violations of this article or rules promulgated under this article are not violations of such part.

(c) The provisions of this Code section shall apply to violations of subsections (g) and (h) of Code Section 46-4-156, Code Sections 46-4-158.2, 46-4-160.1, and 46-4-160.2, and substantial violations of Code Section 46-4-158.3. (Code 1981, § 46-4-160.5, enacted by Ga. L. 2002, p. 475, § 18; Ga. L. 2004, p. 631, § 46.)

Effective date. — This Code section became effective April 25, 2002.

The 2004 amendment, effective May 13, 2004, part of an Act to revise, modernize, and correct the Code, substituted "such part" for "such Act" throughout subsection (b).

Editor's notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Natural Gas Consumers' Relief Act.'"

46-4-161. Universal service fund.

(a) The commission shall create for each electing distribution company a universal service fund for the purpose of:

(1) Assuring that gas is available for sale by marketers to firm retail customers within the territory certificated to each such marketer;

(2) Enabling the electing distribution company to expand its facilities and service in the public interest; and

(3) Assisting low-income residential consumers in times of emergency as determined by the commission, and consumers of the regulated provider of natural gas in accordance with Code Section 46-4-166.

(b) The fund shall be administered by the commission under rules to be promulgated by the commission in accordance with the provisions of this

Code section. Prior to the beginning of each fiscal year of the electing distribution company, the commission shall determine the amount of the fund appropriate for such fiscal year, which amount shall not exceed \$25 million for that fiscal year. In making such determination, the commission shall consider the following:

(1) The amount required to provide sufficient contributions in aid of construction to permit the electing distribution company to extend and expand its facilities from time to time as the commission deems to be in the public interest; and

(2) The amount required to assist low-income residential consumers in times of emergency as determined by the commission and consumers of the regulated provider of natural gas in accordance with Code Section 46-4-166.

(c) The fund shall be created and maintained from time to time from the following sources:

(1) Rate refunds to the electing distribution company from its interstate pipeline suppliers;

(2) Any earnings allocable to ratepayers under performance based rates of the electing distribution company authorized by this article;

(3) A surcharge to the rates for firm distribution service of the electing distribution company authorized for such purpose by the commission from time to time;

(4) Surcharges on customers receiving interruptible service over the electing distribution company's distribution system imposed by the commission in accordance with Code Section 46-4-154;

(5) Refunds of deposits required by marketers as a condition for service, if such refunds have not been delivered to or claimed by the consumer within two years;

(6) Funds deposited by marketers in accordance with Code Section 46-4-160.3; and

(7) Any other payments to the fund provided by law.

(d) Any amounts remaining in such fund at the end of a fiscal year in excess of \$3 million shall be available for refund to retail customers in such manner as the commission shall deem equitable. The balance at fiscal year end, whether positive or negative, after such refund, if any, shall become the initial balance of the fund for the ensuing fiscal year.

(e) Moneys in the fund shall be deposited in a separate, interest-bearing escrow account maintained by the electing distribution company at any state or federally chartered bank, trust company, or savings and loan association located in this state. Upon application to the commission, the

commission shall order the distribution of an appropriate portion of such moneys on a quarterly basis and in accordance with the provisions of this Code section. Interest earned on moneys in the fund shall accrue to the benefit of the fund.

(f) Distributions to the regulated provider shall be made in accordance with Code Section 46-4-166.

(g)(1) In determining whether to grant the application of an electing distribution company for a distribution from the fund in whole or in part, the commission shall consider:

(A) The capital budget of the electing distribution company for the relevant fiscal year;

(B) The estimated total overall applicable cost of the proposed extension, including construction costs, financing costs, working capital requirements, and engineering and contracting fees, as well as all other costs that are necessary and reasonable;

(C) The projected initial service date of the new facilities, the estimated revenues to the electing distribution company during the first five fiscal years following the initial service date, and the estimated rate of return to the electing distribution company produced by such revenues during each such fiscal year;

(D) The amount of the contribution in aid of construction required for the revenues from the proposed new facility to produce a just and reasonable return to the electing distribution company; and

(E) Whether the proposed new facility is in the public interest.

(2) In no event shall the distribution to an electing distribution company from the fund for facilities and service expansion during any fiscal year exceed 5 percent of the capital budget of such company for such fiscal year.

(3) Any investment in new facilities financed from the universal service fund shall be accounted for as a contribution in aid of construction. (Code 1981, § 46-4-161, enacted by Ga. L. 1997, p. 798, § 4; Ga. L. 2001, p. 1084, § 5; Ga. L. 2001, p. 1206, § 5; Ga. L. 2002, p. 475, § 19.)

The 2002 amendment, effective April 25, 2002, rewrote this Code section.

Editor's notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Natural Gas Consumers' Relief Act.'"

Administrative rules and regulations. — Universal Service Fund, Official Compila-

tion of Rules and Regulations of State of Georgia Public Service Commission, Gas Utilities, Chapter 515-7-5.

Law reviews. — For note on the 2001 amendment to O.C.G.A. § 46-4-161, see 18 Ga. St. U.L. Rev. 273 (2001). For note on the 2001 amendment to O.C.G.A. § 46-4-161, see 18 Ga. St. U.L. Rev. 277 (2001).

46-4-162. Commission's authority to approve certain pilot programs.

Nothing in this article shall be construed to prohibit the commission from approving, upon application by a gas company, pilot programs which allow increased customer choice on such gas company's distribution system but which are not otherwise subject to the provisions of this article. (Code 1981, § 46-4-162, enacted by Ga. L. 1997, p. 798, § 4.)

46-4-163. Special or negotiated contracts valid.

Any special or negotiated contract between a gas company and a retail customer approved by the commission shall not be invalidated or modified by the provisions of this article. (Code 1981, § 46-4-163, enacted by Ga. L. 1997, p. 798, § 4.)

46-4-164. Construction of article; electric membership corporations and EMC gas affiliates; liquefied petroleum gas.

(a) Nothing in this article shall be deemed to apply or impose requirements not otherwise existing on gas distribution companies owned by any county, municipality, other political subdivision, or governmental authority of this state; nor are the provisions of this article intended to increase or decrease the authority and jurisdiction of the commission with respect to the distribution, sale, or transportation of gas by any county, municipality, other political subdivision, or governmental authority of this state. Nothing in this article shall be construed to limit or otherwise affect the existing powers of municipal corporations or other political subdivisions of this state relating to the granting of franchises or the levying or imposition of taxes, fees, or charges.

(b) Notwithstanding any provision of law to the contrary, including, without limitation, Article 4 of Chapter 3 of this title, an electric membership corporation may make and maintain investments in, lend funds to, and guarantee the debts and obligations of an EMC gas affiliate in total not to exceed 15 percent of such electric membership corporation's net utility plant, excluding electric generation and transmission assets as defined by the Federal Energy Regulatory Commission Uniform System of Accounts in effect at the time of such investment, loan, or guarantee, provided that any such investments or loans shall not reflect rates which are generally available through the use of any tax exempt financing and may not be tied to any loans from or guaranteed by the federal or state government; and an EMC gas affiliate of an electric membership corporation organized and operating pursuant to Article 4 of Chapter 3 of this title may apply for and be granted a certificate of authority to provide any service as authorized under this article. The creation, capitalization, or provision of management for:

(1) An EMC gas affiliate engaged in activities subject to the provisions of this article and the rules and regulations established by the commission; or

(2) Other persons providing customer services

shall be deemed to be among the purposes of an electric membership corporation as specified in paragraphs (2) and (3) of Code Section 46-3-200. Nothing in this article shall be deemed to increase or decrease the authority and jurisdiction of the commission with respect to such electric membership corporation except as to gas activities undertaken by the electric membership corporation or its EMC gas affiliate as authorized under this chapter.

(c) Nothing in this article shall be construed to allow or authorize an electing distribution company, a certificated marketer, or a regulated provider of natural gas to engage in the production, transportation, marketing, or distribution of liquefied petroleum gas; provided, however, that nothing in this article shall be construed to prohibit an electing distribution company from using liquefied petroleum gas to provide for system balancing and peaking services for its distribution system. (Code 1981, § 46-4-164, enacted by Ga. L. 1997, p. 798, § 4; Ga. L. 2002, p. 475, § 20.)

The 2002 amendment, effective April 25, 2002, designated the existing provisions as subsection (a) and added subsections (b) and (c).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2002, in subsection (b), a colon was added at the end of the introductory paragraph, “An” was substituted for “an” at the beginning of paragraph (b)(1), a semicolon was added follow-

ing “commission” at the end of paragraph (b)(1), and “Other” was substituted for “other” at the beginning of paragraph (b)(2).

Editor’s notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Natural Gas Consumers’ Relief Act.’”

46-4-165. Annual reports.

The commission shall report to the General Assembly annually through the year 2002 on the status of the transition to competitive markets for natural gas services in Georgia. (Code 1981, § 46-4-165, enacted by Ga. L. 1997, p. 798, § 4.)

46-4-166. Selection by proposal of regulated provider to service low-income residential consumers and certain firm natural gas consumers; rates; annual review.

(a) By July 1, 2002, the commission shall select a regulated provider of natural gas to serve:

(1) Group 1, low-income residential consumers; and

(2) Group 2, firm natural gas consumers:

(A) Who have been unable to obtain or maintain natural gas commodity service; or

(B) Whose utility payment history was cited by the regulated provider as reason for transfer from Group 1 to Group 2.

(b) The selection shall be made through a competitive request for proposal process. Certificated marketers shall be eligible to submit proposals. Selection criteria for the regulated provider shall include, but not be limited to, the following:

(1) Financial viability, as defined in Code Section 46-4-153;

(2) Technical expertise, as defined in Code Section 46-4-153;

(3) The amount of the proposed deposit requirements, proposed price structure, proposed customer charge, and cost recovery;

(4) The terms and conditions proposed for transfers of consumers from Group 1 to Group 2 and from Group 2 to Group 1; and

(5) The terms and conditions proposed for termination of service for Group 1 consumers and Group 2 consumers.

(c) If no acceptable proposals are filed with the commission to become the regulated provider of natural gas, the commission shall designate the electing distribution company or any other gas or electric utility holding a certificate of public convenience and necessity from the commission if it consents to serve as the regulated provider of natural gas. A regulated provider who is not a certificated marketer shall not be authorized to provide natural gas commodity service to any consumer not included in subsection (a) of this Code section.

(d) The regulated provider selected by the commission shall establish two rates for consumers served by the regulated provider of natural gas, which rates shall be approved by the commission as a part of the selection process for the regulated provider:

(1) The rate for a low-income residential consumer shall be based upon actual commodity cost, a reasonable rate of return, and an equitable share of the cost of the transportation and distribution system over which such consumer receives distribution. Any low-income residential consumer may transfer to the regulated provider without being required to pay in full any debt to a marketer for previous service and without termination in service due to failure to pay such a debt. The regulated provider shall have access to the universal service fund to recover bad debt arising from service to low-income residential consumers in accordance with rules and regulations promulgated by the commission and designed to encourage efficient debt collection practices by

the regulated provider. The electing distribution company shall waive any customer charge for each low-income residential consumer whose age exceeds 65 years. A low-income residential consumer served by the regulated provider at this rate shall be subject to transfer to Group 2 for failure to pay distribution or commodity charges under the terms and conditions specified in the proposal and accepted by the commission; and

(2) The rate for Group 2 consumers shall be set to incorporate risks associated with these customers. The regulated provider shall be authorized to terminate service to a Group 2 consumer for failure to pay for commodity or distribution service. The regulated provider shall not have access to the universal service fund to recover bad debt arising from service to such consumers. A Group 2 consumer shall be eligible to transfer to Group 1 if such a consumer is eligible by income for Group 1 and meets criteria specified in the proposal and accepted by the commission.

(e) The commission is authorized to promulgate rules and regulations to implement this Code section.

(f) The commission shall annually review the performance of the regulated provider. The commission shall utilize the process set forth in subsections (a) and (b) of this Code section to select a regulated provider of natural gas every two years. If the commission determines, in its discretion, that such an action is in the public interest, the commission may extend the service of a regulated provider for a third year, or may terminate the service of a regulated provider after one year. (Code 1981, § 46-4-166, enacted by Ga. L. 2002, p. 475, § 21.)

Effective date. — This Code section became effective April 25, 2002.

Editor's notes. — Ga. L. 2002, p. 475, § 1, not codified by the General Assembly, pro-

vides that: "This Act shall be known and may be cited as the 'Natural Gas Consumers' Relief Act.'"

CHAPTER 4A

**PROVISION OF ENERGY CONSERVATION ASSISTANCE
TO RESIDENTIAL CUSTOMERS BY ELECTRIC
AND GAS UTILITIES**

Sec.		Sec.	
46-4A-1.	Short title.		"Georgia Administrative Procedure Act."
46-4A-2.	Legislative findings; declaration of policy.	46-4A-9.	Judicial review.
46-4A-3.	Definitions.	46-4A-10.	Duty of Attorney General to represent director in actions.
46-4A-4.	Powers and duties of director generally.	46-4A-11.	Scope of director's authority to administer chapter relative to federal law.
46-4A-5.	Inspections and investigations by director; enforcement of chapter by director.	46-4A-12.	Construction of chapter.
46-4A-6.	Proceedings before the director.	46-4A-13.	Failure of covered utility to comply with chapter and rules and regulations.
46-4A-7.	Injunctions, restraining orders, and other orders.	46-4A-14.	Civil penalties; removal of contractor, supplier, or lender from master record.
46-4A-8.	Commencement and conducting of hearings in accordance with Chapter 13 of Title 50, the		

Cross references. — Adoption and continuation of Georgia State Energy Code for Buildings, § 8-2-21.

46-4A-1. Short title.

This chapter shall be known and may be cited as the "Residential Conservation Service Act of 1981." (Ga. L. 1981, p. 1258, § 1.)

46-4A-2. Legislative findings; declaration of policy.

The General Assembly finds that the rising cost and uncertain supply of energy resources require an active program of energy conservation assistance, especially for the residential sector, which often has limited access to expert advice on energy conservation. In response to this need and to the mandate of the National Energy Conservation Policy Act, P.L. 95-619, the former Office of Energy Resources, now the Division of Energy Resources of the Georgia Environmental Facilities Authority, on behalf of the Office of Planning and Budget, has developed the state plan for the Residential Conservation Service, which requires certain utilities to offer home energy audits and related services to residential customers. Further, the General Assembly finds that in order to ensure the implementation of the state plan for the Residential Conservation Service and avoid the imposition of the federal plan, adequate authority for state enforcement of the state plan

must be instituted. Therefore, in order to provide Georgia's regulated utilities and their customers with the most appropriate and flexible plan for carrying out the Residential Conservation Service, the General Assembly declares that the Office of Planning and Budget shall be authorized to promulgate regulations to establish the Residential Conservation Service and provide for its enforcement. (Ga. L. 1981, p. 1258, § 2; Ga. L. 1994, p. 1108, § 3.)

U.S. Code. — The federal National Energy Conservation Policy Act, referred to in this section, is codified principally at 42 U.S.C. § 8201 et seq.

46-4A-3. Definitions.

As used in this chapter, the term:

(1) "Covered utility" means a utility which is regulated in rate-making matters by the commission and which in any calendar year had retail sales of natural gas in excess of 10 billion cubic feet or of electricity in excess of 750 million kilowatt hours during the second preceding calendar year.

(2) "Director" means the director of the Office of Planning and Budget or his designee.

(3) "Person" means any individual, corporation, partnership, association, state, municipality, or political subdivision of a state; any agency, department, or instrumentality of the United States; or any other entity, and includes any officer, agent, or employee of any of the above.

(4) "Program" means the Residential Conservation Service program, established under the National Energy Conservation Policy Act (P.L. 95-619), as amended. (Ga. L. 1981, p. 1258, § 3; Ga. L. 1984, p. 22, § 46; Ga. L. 1985, p. 149, § 46.)

U.S. Code. — The federal National Energy Conservation Policy Act, referred to in paragraph (4) of this section, is codified principally at 42 U.S.C. § 8201 et seq.

46-4A-4. Powers and duties of director generally.

The director shall have and may exercise the following powers and duties:

(1) To adopt, modify, repeal, and promulgate, after consultation with all affected parties and due notice and public hearings held in accordance with and established pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," rules and regulations for the establishment and implementation of the Residential Conservation Service program. The initial proposed regulations shall be based upon the state plan for the Residential Conservation Service as approved by the United States Department of Energy and shall include provisions for:

(A) Identification of covered utilities;

(B) Utility responsibilities, such as:

- (i) Providing program information for customers;
- (ii) Performance of on-site energy audits;
- (iii) Arranging financing and installation;
- (iv) Distribution of lists of contractors, suppliers, and lenders;
- (v) Conducting inspections of installed measures;
- (vi) Determining qualifications of auditors and inspectors; and
- (vii) Establishing record keeping, financial accounting, and reporting requirements;

(C) Development and maintenance of master records of contractors, suppliers, and lenders;

(D) Consumer complaint mechanisms;

(E) Utility supply, installation, and financing of energy products;

(F) Coordination with affected agencies, especially the commission and the Office of Consumer Affairs;

(G) Compliance and enforcement procedures; and

(H) Other program elements required by federal law;

(2) To administer and enforce this chapter and all rules and regulations and orders promulgated hereunder;

(3) To receive and administer any federal funding available for the purposes of this chapter; and

(4) To amend the regulations promulgated under this chapter to conform to any future changes in the federal law and regulations governing the program. (Ga. L. 1981, p. 1258, § 4.)

46-4A-5. Inspections and investigations by director; enforcement of chapter by director.

(a) The director shall have the authority to investigate the activities of the covered utilities in order to ascertain whether they are in compliance with this chapter and the rules and regulations and orders promulgated hereunder. Such investigations may include routine inspections and inspections arising as a result of information indicating that a violation may have occurred.

(b) The director shall have the authority to take any action authorized by this chapter which he deems necessary to enforce this chapter. (Ga. L. 1981, p. 1258, § 7.)

46-4A-6. Proceedings before the director.

(a) Whenever the director has reason to believe that a violation of any provision of this chapter or any rule or regulation adopted pursuant to this chapter has occurred, he shall attempt to obtain a remedy with the violator or violators by conference, conciliation, or persuasion. When a remedy is obtained through conference, conciliation, or persuasion, such remedy may be set out in a written consent order and signed by both the director and the violator or violators. A written consent order shall be considered a final order.

(b) In the case of failure of such conference, conciliation, or persuasion to effect a remedy to such violation, the director may, after notice and hearing, issue a final order directed to such violator or violators, which order shall specify the provisions of the chapter or rule or regulation which have been violated and shall direct that necessary corrective action as prescribed in such order be taken within a reasonable time. (Ga. L. 1981, p. 1258, § 8.)

46-4A-7. Injunctions, restraining orders, and other orders.

Whenever, in the judgment of the director, any covered utility has engaged in or is about to engage in any act or practice which constitutes or will constitute a violation of this chapter, the director may make application to the superior court wherein the covered utility maintains its principal place of business, or, if a nonresident of the state, to the superior court of the county where such covered utility is engaged in or is about to engage in such act or practice, for an order restraining and enjoining such act or practice; and upon a showing by the director that such covered utility has engaged in or is about to engage in any such act or practice, a temporary or permanent injunction, restraining order, or other order shall be granted without the necessity of showing the lack of an adequate remedy at law. (Ga. L. 1981, p. 1258, § 10.)

46-4A-8. Commencement and conducting of hearings in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

All hearings under this chapter shall be commenced and conducted in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Ga. L. 1981, p. 1258, § 11.)

46-4A-9. Judicial review.

Any person who has exhausted all administrative remedies available before the director and who is aggrieved by a final order or action in a

contested case is entitled to judicial review under this chapter. All proceedings for judicial review shall be conducted in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act"; and any party to the proceeding may secure a review of the final judgment of the superior court by appeal in the manner and form provided by law for appeals from the superior courts to the appellate courts of this state. (Ga. L. 1981, p. 1258, § 12.)

46-4A-10. Duty of Attorney General to represent director in actions.

It shall be the duty of the Attorney General or his representative to represent the director in all actions in connection with this chapter. (Ga. L. 1981, p. 1258, § 13.)

46-4A-11. Scope of director's authority to administer chapter relative to federal law.

Nothing contained in this chapter shall authorize the director to establish or maintain the Residential Conservation Service program or otherwise administer this chapter except to the extent necessary to avoid the imposition of a federal program pursuant to the National Energy Conservation Policy Act (P.L. 95-619). (Ga. L. 1981, p. 1258, § 14.)

U.S. Code. — The federal National Energy Conservation Policy Act, referred to in this section, is codified principally at 42 U.S.C. § 8201 et seq.

46-4A-12. Construction of chapter.

No provision of this chapter or any rules or regulations or orders hereunder shall be construed to be a limitation:

- (1) On the activities of any privately or publicly owned utility which is not a covered utility;
- (2) On the activities of covered utilities, when such activities are not subject to this chapter;
- (3) On the activities of contractors, suppliers, or lenders, when such activities are not subject to this chapter;
- (4) On the activities of the Division of Energy Resources of the Georgia Environmental Facilities Authority in the enforcement or administration of any program or provision of law; and
- (5) On the power of any state or local agency in the enforcement or administration of any provision of law it is specifically permitted or required to enforce or administer, including, but not limited to, the Public Service Commission, the Office of Consumer Affairs, and the Construction Industry Licensing Board. (Ga. L. 1981, p. 1258, § 5; Ga. L. 1994, p. 1108, § 4.)

Cross references. — State Construction Industry Licensing Board generally, Ch. 14, T. 43. Division of Energy Resources generally, § 50-23-30 et seq.

46-4A-13. Failure of covered utility to comply with chapter and rules and regulations.

It shall be unlawful for any covered utility to fail to comply with this chapter and the rules and regulations and orders promulgated hereunder. (Ga. L. 1981, p. 1258, § 6.)

46-4A-14. Civil penalties; removal of contractor, supplier, or lender from master record.

(a) Any covered utility which intentionally or negligently violates any provision of this chapter or the rules and regulations promulgated hereunder or which fails or refuses to comply with any final order of the director issued as provided in this chapter shall be liable for a civil penalty not to exceed \$1,000.00 for such violation and an additional civil penalty not to exceed \$500.00 for each day such violation continues.

(b) The director, after notice and hearing, shall determine whether or not any covered utility has intentionally or negligently violated any provision of this chapter or has failed or refused to comply with any final order of the director and may, upon a proper finding, issue his order imposing such civil penalties as provided in this Code section. Any covered utility so penalized under this section is entitled to judicial review. All hearings and proceedings for judicial review under this Code section shall be in accordance with Chapter 13 of Title 50, the “Georgia Administrative Procedure Act,” as provided in this chapter. All penalties and interest recovered by the director, as provided in this Code section, together with the cost thereof, shall be paid into the state treasury to the credit of the general fund.

(c) Any contractor, supplier, or lender who is listed on the master record established by the Division of Energy Resources of the Georgia Environmental Facilities Authority and who violates any provision of this chapter or the rules or regulations promulgated hereunder is subject to removal from the applicable master record in accordance with the rules and regulations established pursuant to the Residential Conservation Service program. (Ga. L. 1981, p. 1258, § 9; Ga. L. 1994, p. 1108, § 5.)

CHAPTER 5

TELEPHONE AND TELEGRAPH SERVICE

Article 1		Sec.	
General Provisions			
Sec.			used telephone facilities; liability of telephone companies for complying with order of disconnection and removal.
46-5-1.	Exercise of power of eminent domain by telephone and telegraph companies; placement of posts and other fixtures; regulation of construction of fixtures, posts, and wires near railroad tracks; liability of telegraph and telephone companies for damages.	46-5-21.	Using telephone communications for obscene, threatening, or harassing purposes.
		46-5-22.	Using telephone communications for obscene comments, requests, or suggestions; injunction; recorded commercial message.
46-5-2.	Avoiding or attempting to avoid charges for use of telecommunication service; penalties; computation of damages.	46-5-23.	Use of automatic dialing and recorded message (ADAD) equipment.
		46-5-24.	Use of certain telephone numbers by ADAD equipment prohibited.
46-5-3.	Making, possessing, selling, allowing use of, or publishing assembly plans for devices, equipment, or apparatus for committing theft of telecommunications service, or for concealing origin or destination of any telecommunication; compensatory damages.	46-5-25.	Transmission of unsolicited commercial facsimile messages.
		46-5-26.	Access to live telephone operator.
		46-5-27.	Telephone solicitations to residential, mobile, or wireless subscribers; Public Service Commission to establish and maintain list of certain subscribers; authorization for imposition of administrative fees; confidential nature of data base; required identification.
46-5-4.	Seizure and disposal of devices, equipment, or any plan or instruction used for committing theft of telecommunications service.		
46-5-5.	Inclusion of local exchanges 495 and 567 in area code 404.		
46-5-6.	Exclusive power and authority of the Public Service Commission to prescribe rules and regulations regarding public pay telephones.		
46-5-7.	Plan to ensure confidentiality of family violence shelters' addresses and locations.		

Article 2

Telephone Service

PART 1

GENERAL PROVISIONS

46-5-20.	Judicial proceedings for disconnection and removal of illegally
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CONSTRUCTION AND OPERATION OF LINES, PLANTS, OR SYSTEMS GENERALLY

46-5-40.	"Person" defined.
46-5-41.	Obtaining of certificate of pub-

PART 1A

TELEPHONE SYSTEM FOR THE PHYSICALLY IMPAIRED

46-5-30.	Establishment, administration, and operation of state-wide dual party relay service.
46-5-31.	Rates and charges; surcharge not includable in gross receipts subject to franchise tax.

PART 2

Sec.		Sec.	
	lic convenience and necessity for construction, operation, acquisition, or extension of telephone lines, plants, or systems.		tificate and by required affidavits.
46-5-42.	Interference with existing telephone lines, plants, or systems by person constructing or extending a telephone line, plant, or system.	46-5-69.	Approval of articles by judicial order; application as constituting charter of cooperative.
46-5-43.	Prescription by commission of rules and regulations as to application for certificate of public convenience and necessity; giving notice of receipt of application.	46-5-70.	Filing of articles with clerk of court; payment of fee to clerk.
46-5-44.	Power of commission to issue or deny certificate.	46-5-71.	Submittal to clerk of publisher's affidavit.
46-5-45.	Filing complaints with commission regarding persons constructing, operating, or acquiring telephone line, plant, or system without certificate.	46-5-72.	Time of advertisement of articles; appearance of advertisements prior to granting of charter.
46-5-46.	Granting of certificates to persons engaged in construction or operation of telephone line, plant, or system as of February 17, 1950.	46-5-73.	Duty of clerk to deliver to applicants certified copies of articles and of order thereon.
PART 3		46-5-74.	Filing of copies of articles and order with Secretary of State; payment of fee.
RURAL TELEPHONE COOPERATIVES		46-5-75.	Certificate of Secretary of State.
46-5-60.	Short title.	46-5-76.	Certified copies of charter and Secretary of State's certificate as evidence of incorporation of cooperative and of nature and contents of charter.
46-5-61.	Declaration of purpose.	46-5-77.	Time of corporate existence of cooperative.
46-5-62.	Definitions.	46-5-78.	Bylaws of cooperative generally.
46-5-63.	Powers of cooperatives generally.	46-5-79.	Qualifications for membership in cooperative; certificate of membership; share certificates; payment for shares of stock.
46-5-64.	Power of superior court to create cooperatives, to approve amendments to their articles of incorporation, conversion, consolidation, merger, or dissolution.	46-5-80.	Meetings of members — Generally.
46-5-65.	Names of cooperatives.	46-5-81.	Meetings of members — Waiver of notice.
46-5-66.	Incorporators.	46-5-82.	Board of directors.
46-5-67.	Contents of articles of incorporation; signing and acknowledgment; recitation of purpose and powers; statements regarding issuance of nonvoting shares of stock.	46-5-83.	Division of service territory into districts; election of district delegates; boundaries of districts; voting by members at district meetings and by district delegates at any meeting.
46-5-68.	Presentation of articles of incorporation to superior court for approval; accompaniment of articles by Secretary of State's cer-	46-5-84.	Officers of cooperative.
		46-5-85.	Amendment of articles of incorporation.
		46-5-86.	Change of location of principal office.
		46-5-87.	Consolidation of cooperatives.
		46-5-88.	Merger of cooperatives.
		46-5-89.	Effect of consolidation or merger.
		46-5-90.	Conversion of telephone corporation into a cooperative; con-

Sec.		Sec.	
	solidation of telephone corporations into a cooperative.	46-5-122.	Definitions.
46-5-91.	Dissolution of cooperatives.	46-5-123.	Creation of "911" Advisory Committee; selection of members; filling of vacancies.
46-5-92.	Operation of cooperatives on nonprofit basis; contents of by-laws and of contracts with members and patrons regarding nonprofit operation.	46-5-124.	Guidelines for implementing state-wide emergency telephone number "911" system; training and equipment standards.
46-5-93.	Pledging or encumbering of property, assets, rights, and privileges of cooperative by board of directors to secure indebtedness to federal government; tax exemption for mortgages and deeds of trust; sale, pledge, or encumbrance of property.	46-5-124.1.	Service suppliers must register certain information with the director; notification of changes.
46-5-94.	Liability of members and shareholders for debts of cooperative.	46-5-125.	Formation of multijurisdictional and regional "911" systems.
46-5-95.	Effect of recordation of mortgage, deed of trust, or other instrument of real and personal property of cooperative.	46-5-126.	Cooperation by commission and telephone industry.
46-5-96.	Construction standards.	46-5-127.	Approval of "911" systems by agency.
46-5-97.	Limitation of actions.	46-5-128.	Cooperation by public agencies.
46-5-98.	Taking of acknowledgments by officers, trustees, members, or shareholders of cooperatives.	46-5-129.	Use of "911" emblem.
46-5-99.	Extension of telephone service into state by foreign nonprofit or cooperative corporations; Secretary of State as agent for foreign corporations; rights and powers of foreign corporations.	46-5-130.	Federal assistance.
46-5-100.	Fees.	46-5-131.	Exemptions from liability in operation of "911" system.
46-5-101.	Annual license fee; exemption of cooperatives from taxation.	46-5-132.	Fees by wireless service supplier.
46-5-102.	Interconnection of lines, facilities, or systems of cooperatives and other telephone companies.	46-5-133.	Authority of local government to adopt resolution to impose monthly "911" charge.
46-5-103.	Jurisdiction of commission.	46-5-134.	Billing of subscribers; liability of subscriber for service charge; taxes on service; establishment of Emergency Telephone System Fund; records; use of federal, state, municipal, or private funds.
46-5-104.	Applicability of Chapter 5 of Title 10.	46-5-134.1.	Counties where the governing authorities of more than one local government have adopted a resolution to impose an enhanced "911" charge.
46-5-105.	Construction of part.	46-5-135.	Liability of service supplier in civil action.
PART 4		46-5-136.	Authority of local government to create advisory board.
EMERGENCY TELEPHONE NUMBER		46-5-137.	Powers of Public Service Commission not affected.
"911" SYSTEM		46-5-138.	Joint authorities.
46-5-120.	Short title.	46-5-138.1.	Guidelines pertaining to additional charges on exchange access facilities involving contracts between two or more counties.
46-5-121.	Legislative intent.		

Sec.
46-5-139. Joint Study Committee on Wire-
less Enhanced "911" Charges.

Article 3

Telegraph Service

46-5-140. Definitions.
46-5-141. Petition for charter of tele-
graph company; qualified peti-
tioners; contents of petition.
46-5-142. Filing fee for petition for char-
ter; Public Service Commission
to review capitalization of pro-
posed company; issuance of li-
cense to open
stock-subscription books.
46-5-143. Call of organizational meeting
to elect directors; notice of
meeting; voting by subscribers
of capital stock; minimum num-
ber of Georgia residents as di-
rectors.
46-5-144. Filing report of organization
meeting with Secretary of State;
duplicate copy of report; issua-
nce and recording of certifi-
cate of organization; time limit
for organization of corpora-
tion.
46-5-145. Amendment of charter.
46-5-146. Powers of telegraph corpora-
tions generally.
46-5-147. Duty of telegraph companies to
receive dispatches and mes-
sages and to transmit and de-
liver them with impartiality,
good faith, and due diligence.
46-5-148. Territorial extent of telegraph
company's duty to deliver dis-
patches and messages.
46-5-149. Venue for actions against tele-
graph companies; service of
process.

Article 4

Telecommunications and Competition
Development

46-5-160. Short title.
46-5-161. Legislative findings; intent.
46-5-162. Definitions.
46-5-163. Certificates of authority.
46-5-164. Interconnection among certifi-
cated local exchange compa-
nies.

Sec.
46-5-165. Alternative regulation of rates,
terms, and conditions.
46-5-166. Rates for basic local exchange
services.
46-5-167. Universal Access Fund.
46-5-168. Jurisdiction and authority of
commission.
46-5-169. Company obligations associ-
ated with alternative regulation.
46-5-170. Access to local telephone num-
bering resources and assign-
ments.
46-5-171. Local call charges based on du-
ration or time of call prohib-
ited.
46-5-171.1. Written authorization required
by customer prior to being
charged for service initiated by
a third party.
46-5-172. Annual report of Tier 1 compa-
ny's investment commitment.
46-5-173. Unpublished telephone identi-
fication.
46-5-174. Commission's annual report to
General Assembly.

Article 5

Telecommunications Marketing Act of 1998

46-5-180. Short title.
46-5-181. Definitions.
46-5-182. Certification of telecommuni-
cations companies which bill
for or solicit intrastate telecom-
munications services.
46-5-183. Procedures for confirmation of
changes in selection of a pri-
mary local exchange or long
distance carrier generated by
telemarketing.
46-5-184. Contents of letter of agency.
46-5-185. Investigation and reporting re-
quirements.
46-5-186. Time limit on certain actions of
local exchange carrier.
46-5-187. Abusive telemarketing acts or
practices.
46-5-188. Forgery or falsification prohib-
ited.
46-5-189. Penalty for willful violation of
article.
46-5-190. Factual findings by Public Ser-
vice Commission.

Sec.

46-5-191. Cause of action for damages resulting from violations of this article.

Sec.

46-5-192. Construction.

Cross references. — Limitation on powers as to corporations, Ga. Const. 1983, Art. III, Sec. VI, Para. V and Ch. 4, T. 14. Penalty for refusal to relinquish telephone party line in emergency, § 16-11-42. Taxation of mobile telecommunications, §§ 48-8-6 and 48-8-113.

Administrative rules and regulations. — Regulation of telephone and telegraph services, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Public Service Commission, Chapters 515-5-1, 515-6-1, 515-8-1, 515-12-1.

RESEARCH REFERENCES

ALR. — Liability of telephone company for injury resulting from condition or location of telephone booth, 17 ALR4th 1308.

Liability of telephone company for mistakes in or omissions from its directory, 47 ALR4th 882.

Search and seizure of telephone company records pertaining to subscriber as violation of subscriber's constitutional rights, 76 ALR4th 536.

ARTICLE 1

GENERAL PROVISIONS

Law reviews. — For article, "Cable Theft: Legislation, and a Proposed Solution for The Problem, the Need for Useful State Georgia," see 35 Emory L.J. 643 (1986).

46-5-1. Exercise of power of eminent domain by telephone and telegraph companies; placement of posts and other fixtures; regulation of construction of fixtures, posts, and wires near railroad tracks; liability of telegraph and telephone companies for damages.

(a) Any telegraph or telephone company chartered by the laws of this or any other state shall have the right to construct, maintain, and operate its lines upon, under, along, and over the public highways of this state, with the approval of the county or municipal authorities in charge of such highways. Upon making due compensation, a telegraph or telephone company shall have the right to construct, maintain, and operate its lines through or over any lands of this state; on, along, and upon the right of way and structures of any railroads; and, where necessary, under or over any private lands; and, to that end, a telegraph or telephone company may have and exercise the right of eminent domain.

(b) Whenever a telegraph or telephone company exercises its powers under subsection (a) of this Code section, the posts, arms, insulators, and other fixtures of its lines must be erected, placed, and maintained so as not to obstruct or interfere with the ordinary use of such railroads or public highways, or with the convenience of any landowners, more than may be

unavoidable. Any lines constructed by a telegraph or telephone company on the right of way of any railroad company shall be subject to relocation so as to conform to any uses and needs of the railroad company for railroad purposes. Such fixtures, posts, and wires shall be erected at such distances from the tracks of said railroads as will prevent any and all damage to said railroad companies by the falling of said fixtures, posts, or wires upon said railroad tracks; and such telegraph or telephone companies shall be liable to said railroad companies for all damages resulting from a failure to comply with this Code section. (Ga. L. 1873, p. 69, § 2; Code 1873, § 3023; Code 1882, § 3023; Ga. L. 1889, p. 141, §§ 1, 2; Civil Code 1895, §§ 2346, 2347; Ga. L. 1905, p. 79, § 1; Civil Code 1910, §§ 2810, 2811; Code 1933, §§ 104-204, 104-205.)

Cross references. — Similar provisions regarding exercise of power of eminent domain for construction, maintenance, etc., of telegraph and telephone lines along railroad rights of way, § 22-3-1 et seq. Grants by State

Properties Commission of revocable license to encroach upon property under custody and control of State Properties Commission, § 50-16-42.

JUDICIAL DECISIONS

Editor's notes. — See *Blue Ridge Tel. Co. v. City of Blue Ridge*, 161 Ga. App. 452, 288 S.E.2d 705 (1982), which states that the dicta contained in *City of Macon v. Southern Bell Tel. & Tel. Co.*, 89 Ga. App. 252, 79 S.E.2d 265 (1953), stating that by virtue of this Code section a telephone company holds a right to use the streets of a municipality by virtue of a franchise from the state, was unnecessary to the opinion in that case, was unsupported by any citation of Georgia law, and was incorrect.

Construction of language. — The word "or" as used in former Code 1933, §§ 104-204 and 104-205 (see O.C.G.A. § 46-5-1) must be construed as having a conjunctive, and not a disjunctive, meaning. *Comer v. AT & T*, 176 Ga. 651, 168 S.E. 786 (1933).

Former Code 1933, §§ 104-204 and 104-205 (see O.C.G.A. § 46-5-1), to the effect that any telegraph or telephone company, in the exercise of power of eminent domain, shall have right to construct, maintain, and operate telegraph or telephone lines, or both, where necessary "under or over" any private lands in this state, must, upon a consideration of the entire section, be construed as authorizing the company to construct, maintain, and operate its lines both under and over such lands, where necessary for public use served by such

company. *Comer v. AT & T*, 176 Ga. 651, 168 S.E. 786 (1933).

Term "other fixtures" of telephone line includes telephone wires. *Southern Bell Tel. & Tel. Co. v. Scogin*, 136 Ga. App. 318, 221 S.E.2d 203 (1975).

Fact that cable company transmitted more than traditional voice communications did not take the cable company outside the realm of O.C.G.A. § 46-5-1(a). *Davis v. Williams Commun., Inc.*, 258 F. Supp. 2d 1348 (N.D. Ga. 2003).

City could not by contract override police power imposed on it. — Whatever construction could be placed on any contractual franchise right granted by the city to the telephone company, the city could not by contract or otherwise override the police power imposed in it. Neither could the state through former Code 1933, §§ 104-204 and 104-205 (see O.C.G.A. § 46-5-1) do away with its constitutional power to require the plaintiff telephone company to remove its underground conduit from a specific locality to another locality at its own expense, where such removal is necessitated for the safety, protection, welfare, and health of the citizens. *City of Macon v. Southern Bell Tel. & Tel. Co.*, 89 Ga. App. 252, 79 S.E.2d 265 (1953).

Municipality cannot divest itself of police powers conferred upon it by Legislature. —

The grant by a municipality to a public service company of the right to use streets does not divest the municipality of its police power over the grantee in relation to its use of such streets. Furthermore, it is well settled that it is not within the power of a municipality, in any franchise it may confer upon or contract with, a public utility company, to divest itself of its governmental police power, the exercise of which is necessary for the public welfare and the preservation of the public safety. Nor can a municipality grant away or limit the police powers conferred upon it by the legislature. *City of Macon v. Southern Bell Tel. & Tel. Co.*, 89 Ga. App. 252, 79 S.E.2d 265 (1953).

Right of telegraph or telephone company to use public roads of this state in order to construct its lines for transmission of interstate messages, granted by act of Congress, is to be enjoyed in subordination to public use and private rights, and subject to any lawful exercise of the police power belonging to the state or to its municipalities or counties. *City of Macon v. Southern Bell Tel. & Tel. Co.*, 89 Ga. App. 252, 79 S.E.2d 265 (1953).

Location of telephone cables beneath street subject to future regulation. — As far as the location of the telephone cables underneath the particular street is concerned, it is subject to such future regulation as might be required in the interest of the public health and welfare. *City of Macon v. Southern Bell Tel. & Tel. Co.*, 89 Ga. App. 252, 79 S.E.2d 265 (1953).

Fundamental common-law right applicable to franchise in streets is that a utility company must relocate its facilities in the public streets when changes are required by public necessity; and, although authorized to lay its pipes in the public streets, the company takes the risk of their location and is bound to make such changes as the public convenience and security require, at its own cost and charge. *City of Macon v. Southern Bell Tel. & Tel. Co.*, 89 Ga. App. 252, 79 S.E.2d 265 (1953).

City can require company to remove facilities from street at expense of company. — A city can require a public service company, to which it has granted a franchise to use the streets of the city, to remove its facilities from a portion of one street to another location, where it appears that the portion of the street whereon such facilities are located is

closed and dedicated to the use of the municipal hospital, it appearing that the public health and welfare require the use thereof for hospital purposes; and that the company and not the city must bear the cost of removal and relocation. *City of Macon v. Southern Bell Tel. & Tel. Co.*, 89 Ga. App. 252, 79 S.E.2d 265 (1953).

Telephone company acquires no indefeasible right to any street when granted franchise. — The telephone company, when a franchise to use the streets of a city for installing its telephone facilities is granted, acquires no indefeasible right to any particular street or part of a street and takes this grant subject to the right of the city to require a change of location of the telephone lines if good reasons exist therefor. *City of Macon v. Southern Bell Tel. & Tel. Co.*, 89 Ga. App. 252, 79 S.E.2d 265 (1953).

Telephone company acquires right to general use of streets for installation of facilities. — The telephone company acquires by virtue of former Code 1933, §§ 104-204 and 104-205 (see O.C.G.A. § 46-5-1) only the right to use generally the public streets of a city for the purpose of installing the facilities with which it furnishes telephone service to the public. *City of Macon v. Southern Bell Tel. & Tel. Co.*, 89 Ga. App. 252, 79 S.E.2d 265 (1953).

"Ordinary use" of public streets and highways contemplates use as provided by law. — When the public streets and highways are used in such a manner as to violate the law, such use is not "ordinary." *Southern Bell Tel. & Tel. Co. v. Scogin*, 136 Ga. App. 318, 221 S.E.2d 203 (1975).

Temporary obstruction by telephone company not violative of public right to use street for travel. — The temporary obstruction of the street by the telephone company is not a violation of any right of the public to use the same for travel. *Dekle v. Southern Bell Tel. & Tel. Co.*, 208 Ga. 254, 66 S.E.2d 218 (1951), overruled on other grounds, *Peachtree-Cain Co. v. McBee*, 254 Ga. 91, 327 S.E.2d 188 (1985).

Uncompensated obedience to regulation not taking or damaging of private property. — Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking or damaging without just compensation of private property, or of private property affected

with a public interest. *City of Macon v. Southern Bell Tel. & Tel. Co.*, 89 Ga. App. 252, 79 S.E.2d 265 (1953).

Power, telephone, and telegraph companies all have power of eminent domain, and could exercise that power to acquire the right to erect their lines upon the railroad's right of way. That they choose to acquire by contract such right, as against the railroad, does not render the railroad company liable for their alleged failure also to compensate the plaintiff for the taking or damaging of plaintiff's property by their erection of power and communication lines on the railroad's right of way. *Tompkins v. Atlantic Coast Line R.R.*, 89 Ga. App. 171, 79 S.E.2d 41 (1953).

Intent of former Code 1933, §§ 104-204 and 104-205 (see O.C.G.A. § 46-5-1) was that the owner of a telephone pole is not liable for its alleged negligent placement in a public road right of way where such pole was located with the approval of the county or municipal authorities and did not obstruct or interfere with the ordinary use of the public highway. This conclusion was further supported by former Code 1933, § 69-304 (see O.C.G.A. § 36-30-10). *Southern Bell Tel. & Tel. Co. v. Martin*, 229 Ga. 881, 194 S.E.2d 910 (1972).

Maintenance of poles in middle of street does not constitute negligence as matter of law. — Since the city can lawfully authorize the erection of the poles in the middle of the street, the acquiescence by the city in the maintenance of the poles in the middle of the street, although they had originally been erected there by the power company in violation of the restriction placed by the city on the manner of their erection, amounts to a waiver by the city of the restriction which it had imposed upon the power company, and the maintenance by the power company of the poles in the middle of the street, while acquiesced in by the city, and where otherwise not unlawful, does not, as to persons lawfully using the street, constitute negligence as a matter of law. *Southern Bell Tel. & Tel. Co. v. Martin*, 229 Ga. 881, 194 S.E.2d 910 (1972).

Municipality estopped by past actions from asserting that company without approval to use streets. — A municipality, by permitting the location and construction of the lines of a telephone or telegraph com-

pany along the streets and highways for a considerable length of time and dealing with the company so as to evince its approval of the occupancy of such streets and highways, may be estopped from asserting that the company has not procured its approval to use the streets. *City of Macon v. Southern Bell Tel. & Tel. Co.*, 89 Ga. App. 252, 79 S.E.2d 265 (1953).

City and company chargeable with any negligence resulting from condition. — Where the wires of a telephone company which were strung over the street of a city were lowered by the city and came into contact with highly electrically charged electric light wires and there remained, both the city, as creator of the condition, and the telephone company, by failing to discover the dangerous situation were chargeable with any negligence which arose by virtue of this condition of the telephone wire. *Bleckley v. Western Carolina Tel. Co.*, 42 Ga. App. 110, 155 S.E. 83 (1930).

Company not relieved of negligence created by placement of pole in dangerous situation. — The fact that a company has a legal right to place a pole within four inches of the paved portion of the highway insofar as the right to the use of the land occupied by the pole is concerned will not relieve it of negligence if the pole creates a dangerous situation. *Blunt v. Spears*, 93 Ga. App. 623, 92 S.E.2d 573, rev'd on other grounds sub nom. *Southern Bell Tel. & Tel. Co. v. Spears*, 212 Ga. 537, 93 S.E.2d 659 (1956).

Cable company can contract with railroad to construct line along railroad's right of way. — Cable company that possessed certificate of authorization from Georgia Public Service Commission that allowed it to exercise eminent domain under O.C.G.A. § 46-5-1(a) properly entered into contract with railroad, in lieu of eminent domain proceedings, to allow construction of communication lines along railroad's rights of way; under Georgia law, the railroad could not have been held liable for entering into this contract. *Davis v. Williams Commun., Inc.*, 258 F. Supp. 2d 1348 (N.D. Ga. 2003).

Cited in *Chestatee Pyrites Co. v. Cavenders Creek Gold Mining Co.*, 119 Ga. 354, 46 S.E. 422, 100 Am. St. R. 174 (1904); *Western Union Tel. Co. v. Western & A.R.R.*, 142 Ga. 532, 83 S.E. 135 (1914); *Georgia Power Co. v. Zimmerman*, 133 Ga. App. 786, 213 S.E.2d 12 (1975).

OPINIONS OF THE ATTORNEY GENERAL

Telegraph company must bear expense of moving. — Where a telegraph company occupies a railway right of way, it must bear the expense of moving if highway changes necessitate railway facility changes. 1958-59 Op. Att'y Gen. p. 190.

Power of placing and operating poles and lines conferred by this section. — The only power sought to be conferred by former Code 1933, §§ 104-204 and 104-205 (see O.C.G.A. § 46-5-1] was the power of placing and operating poles and lines along the public highways; it did not seek to vest the

power of operating telephone lines in telegraph companies, or vice versa. 1957 Op. Att'y Gen. p. 26.

Telegraph and telephone companies must secure permission to utilize state streambed properties. — Former Code 1933, §§ 104-204 and 104-205 (see O.C.G.A. § 46-5-1) did not authorize telegraph and telephone companies to utilize state-owned streambed properties without securing prior permission and making just compensation. 1970 Op. Att'y Gen. No. 70-169.

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, §§ 2, 5, 10, 11.

C.J.S. — 86 C.J.S., Telecommunications, §§ 33, 42, 54, 55, 56.

ALR. — Authority from public official as affecting responsibility of public service corporation for infringing property rights, 1 ALR 403.

Right and duty of telephone companies to make physical connection of exchanges or lines, 11 ALR 1204; 76 ALR 953.

Regulations or provisions upon requiring physical connection of telephone lines, 16 ALR 352.

Right to stretch overhead wires across street or highway, 54 ALR 480.

Duty to furnish telegraph or telephone service to privately wired or equipped building, 56 ALR 794.

Right of carrier to discriminate between telegraph or telephone companies, 60 ALR 1081.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.

Injury to traveler from collision with privately owned pole standing within boundaries of highway, 3 ALR2d 6.

Condemner's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 ALR2d 724.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 ALR2d 364.

Liability of electric power or telephone company for injury or damage by lightning transmitted on wires, 25 ALR2d 722.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

Liability of public utility to abutting owner for destruction or injury of trees in or near highway or street, 64 ALR2d 866.

Applicability of zoning regulations to projects of nongovernmental public utility as affected by utility's having power of eminent domain, 87 ALR3d 1265.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

Liability of telephone company for injury by noise or electric charge transmitted over line, 99 ALR3d 628.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 ALR4th 840.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific owner, 26 ALR4th 68.

Placement, maintenance, or design of standing utility pole as affecting private utility's liability for personal injury resulting from vehicle's collision with pole within or beside highway, 51 ALR4th 602.

46-5-2. Avoiding or attempting to avoid charges for use of telecommunication service; penalties; computation of damages.

(a) It shall be unlawful for any person to avoid or attempt to avoid or to cause another to avoid the lawful charges, in whole or in part, for any telecommunication service as defined in subsection (a) of Code Section 46-5-3 or for the transmission of a message, signal, or other communication by telephone or telegraph or over telecommunication or telegraph facilities by the use of any fraudulent scheme, means, or method, or by the use of any unlawful telecommunication device as defined in subsection (a) of Code Section 46-5-3 or other mechanical, electric, or electronic device; provided, however, that this Code section and Code Sections 46-5-3 and 46-5-4 shall not apply to amateur radio repeater operation involving a dial interconnect.

(b)(1) Except as otherwise provided in paragraph (2) of this subsection, any person who violates this Code section shall be guilty of a misdemeanor; provided, however, that upon conviction of a second or subsequent such offense under this Code section, the defendant commits a felony and shall be punished by a fine of not more than \$5,000.00 or imprisoned for not less than one nor more than five years, or both.

(2) Any person who violates this Code section by avoiding or causing another to avoid lawful charges for any telecommunication service which lawful charges are in an amount in excess of \$10,000.00 commits a felony and shall be punished by a fine of not more than \$5,000.00 or imprisoned for not less than one nor more than five years, or both.

(3) The court may, in addition to any other sentence authorized by law, order a person convicted under this Code section to make restitution for the offense.

(4) Any person, corporation, or other entity aggrieved by a violation of this Code section may, in a civil action in any court of competent jurisdiction, obtain appropriate relief, including preliminary and other equitable or declaratory relief, compensatory and punitive damages, reasonable investigation expenses, cost of suit, and reasonable attorney's fees.

(5) Compensatory damages awarded by a court in a civil action under this Code section shall be computed as one of the following:

(A) At any time prior to the entering of a final judgment, the complaining party may elect to recover the actual damages suffered by the complaining party as a result of the violation of this Code section;

(B) In any case where a violator commits more than one violation of this Code section, the complaining party, at any time before final

judgment is entered, may elect to recover, in lieu of actual damages, an award of statutory damages for all violations involved in the action in a sum not less than \$250.00 nor more than \$10,000.00 per violation. The amount of statutory damages shall be determined by the court as the court considers just;

(C) In any case where the court finds that any of the violations of this Code section were committed willfully and for the purposes of commercial advantage or financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, by an amount of not more than \$50,000.00; or

(D) Nothing in this paragraph shall prohibit the recovery of other types of damages otherwise authorized under paragraph (4) of this subsection. (Ga. L. 1975, p. 1534, §§ 1, 3; Ga. L. 1976, p. 1179, §§ 1, 3; Ga. L. 1977, p. 1170, § 1; Ga. L. 1984, p. 22, § 46; Ga. L. 1996, p. 1085, § 1; Ga. L. 2001, p. 848, § 1.)

Cross references. — Criminal penalty for theft of services generally, § 16-8-5. Criminal penalty for unauthorized reproduction and sale of recorded material, § 16-8-60. Publication of information regarding schemes, devices, means, or methods for theft of telecommunication services, § 16-9-39. Licensing and regulation of cable television systems by counties, Ch. 18, T. 36.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2001, “this paragraph” was substituted for “paragraph (5) of this subsection” in subparagraph (b)(5)(D).

Law reviews. — For review of 1996 public utilities and public transportation legislation, see 13 Ga. U.L. Rev. 290 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 188.

ALR. — Validity and construction of municipal ordinances regulating community antenna television service (CATV), 41 ALR3d 384.

Criminal prosecutions for use of “blue box” or similar device permitting user to make long-distance telephone calls without incurring charges, 78 ALR3d 449.

Criminal liability for unauthorized interference with or reception of radio or television transmission, 43 ALR4th 991.

State civil actions by subscription television business for use, or providing technical means of use, of transmission by nonsubscribers, 46 ALR4th 811.

Offense of obtaining telephone services by unauthorized use of another’s telephone number — state cases, 61 ALR4th 1197.

46-5-3. Making, possessing, selling, allowing use of, or publishing assembly plans for devices, equipment, or apparatus for committing theft of telecommunications service, or for concealing origin or destination of any telecommunication; compensatory damages.

(a) As used in this Code section, the term:

(1) “Telecommunication service” means any service provided for a charge or compensation to facilitate the origination, transmission, emission, or reception of signs, signals, data, writings, images, sounds, or

intelligence of any nature by telephone or telephone service, including public pay telephones, or cable television service (CATV), including cellular or other wireless telephones, wire, radio, electromagnetic, photoelectronic, or photo-optical system.

(2) "Telecommunication service provider" means a person, corporation, or other entity which provides telecommunication service, including public pay telephones and including a cellular, paging, or other wireless communications company or other person, corporation, or entity which, for a fee, supplies the facility, cell site, mobile telephone switching office, or other equipment or telecommunication service.

(3) "Unlawful telecommunication device" means any telecommunication device that is capable, or has been illegally altered, modified, or programmed or reprogrammed alone or in conjunction with another access device or other equipment so as to be capable, of acquiring or facilitating the acquisition of any electronic serial number, mobile identification number, personal identification number, or any telecommunication service without the consent of the telecommunication service provider or without the consent of the legally authorized user of the telecommunication device. The term includes telecommunications devices altered to obtain service without the consent of the telecommunication service provider, tumbler phones, counterfeit or clone microchips, scanning receivers of wireless telecommunication service of a telecommunication service provider, and other instruments capable of disguising their identity or location or of gaining access to a communications system operated by a telecommunication service provider. Such term shall not apply to any device operated by a law enforcement agency or telecommunication service provider in the normal course of its activities.

(b) It shall be unlawful for any person knowingly to:

(1) Make or possess any unlawful telecommunication device designed, adapted, or used:

(A) For commission of a theft of telecommunication service in violation of Code Section 46-5-2 or to acquire or facilitate the acquisition of telecommunications service without the consent of the telecommunication service provider; or

(B) To conceal, or to assist another to conceal, from any supplier of telecommunication service or from any lawful authority the existence or place of origin or of destination of any telecommunication;

(2) Sell, give, transport, or otherwise transfer to another, or offer or advertise for sale, any unlawful telecommunication device, or plans or instructions for making or assembling the same, under circumstances evincing an intent to use or employ such unlawful telecommunication device; or to allow such unlawful telecommunication device to be used or

employed for a purpose described in paragraph (1) of this subsection or knowing or having reason to believe that the same is intended to be so used or that the aforesaid plans or instructions are intended to be used for making or assembling such unlawful telecommunication device; or

(3) Publish plans or instructions for making or assembling or using any unlawful telecommunication device.

(c)(1) Any person who violates this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than \$1,000.00 or by imprisonment in the penitentiary for not less than one nor more than five years, or both; provided, however, that upon conviction of a second or subsequent such offense under this Code section, the defendant shall be punished by a fine of not more than \$5,000.00 or imprisoned for not less than three nor more than ten years, or both.

(2) The court may, in addition to any other sentence authorized by law, order a person convicted under this Code section to make restitution for the offense.

(3) Any person, corporation, or other entity aggrieved by a violation of this Code section may, in a civil action in any court of competent jurisdiction, obtain appropriate relief, including preliminary and other equitable or declaratory relief, compensatory and punitive damages, reasonable investigation expenses, cost of suit, and reasonable attorney's fees.

(4) Compensatory damages awarded by a court in a civil action under this Code section shall be computed as one of the following:

(A) At any time prior to the entering of a final judgment, the complaining party may elect to recover the actual damages suffered by the complaining party as a result of the violation of this Code section;

(B) In any case where a violator commits more than one violation of this Code section, the complaining party, at any time before final judgment is entered, may elect to recover, in lieu of actual damages, an award of statutory damages of not less than \$250.00 nor more than \$10,000.00 for each unlawful telecommunications device involved in the action. The amount of statutory damages shall be determined by the court as the court considers just;

(C) In any case where the court finds that any of the violations of this Code section were committed willfully and for the purposes of commercial advantage or financial gain, the court in its discretion may increase the award of statutory damages by an amount of not more than \$50,000.00 for each unlawful telecommunication device involved in the action; or

(D) Nothing in this paragraph shall prohibit the recovery of other types of damages otherwise authorized under paragraph (3) of this subsection. (Ga. L. 1975, p. 1534, §§ 2, 3; Ga. L. 1976, p. 1179, §§ 2, 3; Ga. L. 1982, p. 3, § 46; Ga. L. 1996, p. 1085, § 2; Ga. L. 2001, p. 848, § 2.)

Cross references. — Criminal penalty for unauthorized reproduction and sale of recorded material, § 16-8-60. Licensing and regulation of cable television systems by counties, Ch. 18, T. 36.

Code Commission notes. — Pursuant to

Code Section 28-9-5, in 2001, a comma was added following “Code section” in subsection (a); and “this paragraph” was substituted for “paragraph (4) of this subsection” in subparagraph (c)(4)(D).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 188.

C.J.S. — 86 C.J.S., Telecommunications, §§ 129 et seq., 131, 236.

ALR. — State civil actions by subscription television business for use, or providing technical means of use, of transmission by non-subscribers, 46 ALR4th 811.

46-5-4. Seizure and disposal of devices, equipment, or any plan or instruction used for committing theft of telecommunications service.

Any unlawful telecommunication device as defined in subsection (a) of Code Section 46-5-3 or other instrument, apparatus, equipment, or device, or any plan or instruction therefor, referred to in Code Section 46-5-3 may be seized by court order, or under a search warrant issued by a judge or a magistrate, or incident to a lawful arrest. Upon the conviction of any person for a violation of any provisions of Code Section 46-5-2 or 46-5-3, such instrument, apparatus, equipment, device, plan, or instruction shall be either destroyed as contraband by the sheriff of the county in which such person was convicted or turned over to the telephone company or telecommunication service provider in whose territory such instrument, apparatus, equipment, device, plan, or instruction was seized. (Ga. L. 1976, p. 1179, § 2; Ga. L. 1996, p. 1085, § 3.)

Cross references. — Licensing and regulation of cable television systems by counties, Ch. 18, T. 36.

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 188.

ALR. — Lawfulness of seizure of property

used in violation of law as prerequisite to forfeiture action or proceeding, 8 ALR3d 473.

46-5-5. Inclusion of local exchanges 495 and 567 in area code 404.

Local exchanges 495 and 567 shall be included in the current 404 area code on or before July 1, 1996, and removed from the 706 area code; provided, however, that if a geographic area of the 404 area code is designated as a different area code and such geographic area is contiguous to a part of the geographic area where local exchange 495 or 567 is operational, then nothing in this Code section shall prohibit local exchange 495 or 567 from being included in the newly designated area code. (Code 1981, § 46-5-5, enacted by Ga. L. 1995, p. 886, § 1.)

Editor's notes. — Ga. L. 1995, p. 886, § 3, not codified by the General Assembly, provides: "The Public Service Commission shall be required to conduct at least three hearings in locations outside the metropolitan areas of the state and accept evidence as to the costs, feasibility, and methodology of providing for toll free calling between two telephones where the central offices serving such telephones are within an extended area of service of not less than 22 miles of each other. The methodology and analysis of the cost and feasibility of such toll free calling area shall be conducted under the supposition of an alternative system of regulation within the framework of Section 1 of this Act. The commission shall conduct such

hearings prior to November 30, 1995, and shall report its findings to the General Assembly no later than December 31, 1995. The Public Service Commission shall conclude its consideration in Docket 4231-U of the expansion of local calling areas pursuant to its rules, including but not limited to all balloting and the formulation of an appropriate rate design, on or before January 1, 1996. The implementation of the expanded calling areas shall be completed on or before July 1, 1996."

Ga. L. 1995, p. 886, § 4, not codified by the General Assembly, provides for severability.

Law reviews. — For note on the 1995 amendment of this section, see 12 Ga. St. U.L. Rev. 333 (1995).

46-5-6. Exclusive power and authority of the Public Service Commission to prescribe rules and regulations regarding public pay telephones.

The Public Service Commission shall have the exclusive power and authority to prescribe rules and regulations for the operation, maintenance, location, and deployment of public pay telephones within this state. (Code 1981, § 46-5-6, enacted by Ga. L. 2001, p. 848, § 3.)

46-5-7. Plan to ensure confidentiality of family violence shelters' addresses and locations.

(a) Prior to January 1, 2005, each person, corporation, or other entity that provides telephone service in this state and each person, corporation, or other entity that publishes, disseminates, or otherwise provides telephone directory information or listings of telephone subscribers in this state shall file a plan with the commission setting forth in detail how such person, corporation, or other entity will protect the confidentiality of the address or location of family violence shelters, as defined in Code Section 19-13-20, in this state. Such plan shall describe the manner in which the person, corporation, or other entity will identify all such shelters and the

manner in which the person, corporation, or other entity will keep the location and address of such shelters confidential.

(b) Such persons, corporations, and other entities shall update such plans at least every 24 months.

(c) Such original and updated plans shall be approved by the commission within a reasonable time upon a determination that the plans are reasonably effective in identifying the family violence shelters in the state and in maintaining the confidentiality of the location and address of such family violence shelters. If the commission determines that a plan is inadequate, it shall state the basis on which the plan was determined to be inadequate and shall allow the person, corporation, or other entity filing such plan a period of not more than 30 days to file a revised plan that is acceptable to the commission.

(d) Such plans shall not be open to examination by the public and shall be exempt from disclosure under the provisions of Article 4 of Chapter 18 of Title 50.

(e) Within three days of filing original plans or updates with the commission, each person, corporation, or other entity subject to this Code section shall submit a copy of all original plans, updated plans, and revised plans to the State Commission on Family Violence, which is authorized to provide comments concerning such plans to the commission in order to aid in review and approval of such plans.

(f) The filing or approval of such plans shall not in any manner be a defense to any action or prosecution. (Code 1981, § 46-5-7, enacted by Ga. L. 2004, p. 765, § 2.)

Effective date. — This Code section became effective May 17, 2004.

Editor's notes. — Ga. L. 2004, p. 765, § 1, not codified by the General Assembly, pro-

vides that: "This Act shall be known and may be cited as the 'Family Violence Shelter Confidentiality Act of 2004.'"

ARTICLE 2

TELEPHONE SERVICE

RESEARCH REFERENCES

ALR. — Telephone calls as nuisance, 53
ALR4th 1153.

PART 1

GENERAL PROVISIONS

46-5-20. Judicial proceedings for disconnection and removal of illegally used telephone facilities; liability of telephone companies for complying with order of disconnection and removal.

(a) When any municipal, county, state, or federal law enforcement officer acting within his apparent jurisdiction has reason to believe that certain telephone facilities or any part thereof are being used or have been used in violation of any federal law, the laws of the State of Georgia, or the ordinances of any municipality therein, that officer may make oath or affidavit stating his belief to the district attorney of the judicial circuit in which the telephone facilities are located. Thereupon, the district attorney shall petition the judge of the superior court of that circuit to issue a rule nisi which shall be promptly served upon the person in whose name the telephone facilities are listed, requiring the party, within a reasonable time to be fixed by the judge, which shall not be less than 48 hours from time of service of the petition on said party, to show cause before the judge why the telephone facilities should not be promptly removed. At the hearing on the rule nisi the burden of proof shall be upon the petitioner.

(b) Upon a finding by the court that the telephone facilities are being or have been used in violation of the laws described in subsection (a) of this Code section, the court shall issue an order requiring the telephone company which is rendering service over the facilities to disconnect and remove such facilities. Upon receipt of such order, which shall be served upon an officer of the telephone company by the sheriff of the county in which the telephone facilities are installed or by his duly authorized deputies, the telephone company shall proceed within a reasonable time to disconnect and remove such facilities and discontinue all telephone service rendered over the facilities until further order of the court.

(c) The law enforcement officer who applies to the district attorney for the removal of such facilities shall, in his official capacity, be a necessary party to any proceeding or action arising out of or under this Code section.

(d) No telephone company shall be liable for any damages, penalty, or forfeiture, whether civil or criminal, for any act performed in compliance with any order issued by the judge of the superior court under this Code section. (Ga. L. 1962, p. 149, §§ 1-3; Ga. L. 1982, p. 3, § 46.)

Law reviews. — For note discussing organized crime in Georgia with respect to the application of state gambling laws, and sug-

gesting proposals for combatting organized crime, see 7 Ga. St. B.J. 124 (1970).

JUDICIAL DECISIONS

Cited in *Coin Call, Inc. v. Southern Bell Tel. & Tel. Co.*, 636 F. Supp. 608 (N.D. Ga. 1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 42.

C.J.S. — 86 C.J.S., Telecommunications, § 122.

ALR. — Liability of telephone company respecting messages or communications relating to gambling transaction, 62 ALR 182.

Right of telephone company to refuse, or discontinue, service because of failure to pay

bills or other violation of conditions of use, 70 ALR 894.

Right or duty to refuse telephone, telegraph, or other wire service in aid of illegal gambling operations, 30 ALR3d 1143.

Right of telephone or telegraph company to refuse, or discontinue, service because of use of improper language, 32 ALR3d 1041.

46-5-21. Using telephone communications for obscene, threatening, or harassing purposes.

(a) It shall be a misdemeanor for any person, by means of telephone communication in this state, to:

(1) Make any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent;

(2) Make a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number;

(3) Make or cause the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

(4) Make repeated telephone calls, during which conversation ensues, solely to harass any person at the called number.

(b) Any person who knowingly permits any telephone under his control to be used for any purpose prohibited by this Code section shall be guilty of a misdemeanor. (Ga. L. 1968, p. 9, § 1.)

Cross references. — Further provisions regarding unlawful communications by telephone, § 16-11-39.1.

JUDICIAL DECISIONS

Constitutionality. — Former Code 1933, § 26-2610 (see now § 16-11-39.1) and Ga. L. 1968, p. 9, § 1 (see O.C.G.A. § 46-5-21), which prohibit telephone calls for the purpose of harassing, were clear and can be

readily understood by people of ordinary intelligence seeking to avoid their violation, and therefore these sections were not unconstitutionally vague or broad and did not violate due process. *Constantino v. State*, 243

Ga. 595, 255 S.E.2d 710, cert. denied, 444 U.S. 940, 100 S. Ct. 293, 62 L. Ed. 2d 306 (1979).

Evidence sufficient for conviction. — See *Moss v. State*, 245 Ga. App. 811, 538 S.E.2d 876 (2000).

Cited in *Tuggle v. Wilson*, 158 Ga. App. 411, 280 S.E.2d 628 (1981); *Tuggle v. Wilson*, 248 Ga. 335, 282 S.E.2d 110 (1981); *Vines v. State*, 269 Ga. 438, 499 S.E.2d 630 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, §§ 194, 195.

C.J.S. — 86 C.J.S., Telecommunications, §§ 130, 131.

ALR. — Right of telephone or telegraph company to refuse, or discontinue, service because of use of improper language, 32 ALR3d 1041.

Unsolicited mailing, distribution, house call, or telephone call as invasion of privacy, 56 ALR3d 457.

Validity, construction, and application of state criminal statute forbidding use of telephone to annoy or harass, 95 ALR3d 411.

46-5-22. Using telephone communications for obscene comments, requests, or suggestions; injunction; recorded commercial message.

(a) It shall be unlawful for any person, by means of a telephone communication for commercial purposes, to make directly or by means of an electronic recording device, any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent. Any person who makes any such comment, request, suggestion, or proposal may be subject to prosecution under this Code section regardless of whether such person placed or initiated the telephone call.

(b) It shall be unlawful for any person to permit knowingly any telephone or telephone facility connected to a local exchange telephone under such person's control to be used for any purpose prohibited by this Code section.

(c) Any person who violates any provision of this Code section shall be guilty of a misdemeanor. For purposes of this subsection, each day of a violation shall constitute a separate offense.

(d) A court may grant a preliminary injunction under this Code section after due notice to the party to be enjoined and upon a sufficient showing of the likelihood of ultimate success in a prosecution under this Code section and showing that such injunction would be in the public interest. Such injunction shall be dissolved by the court if a full trial on the merits is not scheduled within such period as may be specified by the court not to exceed 30 days.

(e) In the event that a person applies to a local exchange telephone company for use of the local exchange telephone company's facilities for the purpose of transmitting a recorded commercial message, the local exchange telephone company shall have the authority to review the message and deny the applicant's request for facilities if the message

appears to violate the provisions of this Code section. (Code 1981, § 46-5-22, enacted by Ga. L. 1985, p. 1310, § 1.)

Cross references. — Penalty for false statements by telephone solicitors, § 16-9-54. Further provisions regarding unlawful communications by telephone, § 16-11-39.1. Obscene communications generally, § 16-12-80 et seq.

46-5-23. Use of automatic dialing and recorded message (ADAD) equipment.

(a)(1) As used in this Code section, the term “ADAD equipment” means any device or system of devices which is used, whether alone or in conjunction with other equipment, for the purpose of automatically selecting or dialing telephone numbers and disseminating prerecorded messages to the numbers so selected or dialed.

(2) It shall be unlawful for any person to use, to employ or direct another person to use, or to contract for the use of ADAD equipment for the purpose of advertising or offering for sale, lease, rental, or as a gift any goods, services, or property, either real or personal, primarily for personal, family, or household use or for the purpose of conducting polls or soliciting information where:

(A) Consent is not received prior to the initiation of the calls as specified in paragraph (3) of this subsection;

(B) Such use is other than between the hours of 8:00 A.M. and 9:00 P.M.;

(C) The ADAD equipment will operate unattended or is not so designed and equipped with an automatic clock and calendar device that it will not operate unattended, even in the event of power failures;

(D) Such use involves either the random or sequential dialing of telephone numbers;

(E) The telephone number required to be stated in subparagraph (G) of this paragraph is not one which during normal business hours is promptly answered in person by a person who is an agent of the person on whose behalf the automatic calls are made and who is willing and able to provide information concerning the automatic calls;

(F) The automatic dialing and recorded message player does not automatically and immediately terminate its connection with any telephone call within ten seconds after the person called fails to give consent for the playing of a recorded message or hangs up his or her telephone;

(G) The recorded message fails to state clearly the name and telephone number of the person or organization initiating the call

within the first 25 seconds of the call and at the conclusion of the call;
or

(H) Such use involves calls to telephone numbers which at the request of the customer have been omitted from the telephone directory published by the local exchange company serving the customer or involves calls to hospitals, nursing homes, fire protection agencies, or law enforcement agencies;

(3)(A) A person may give consent to a call made with ADAD equipment when a line operator introduces the call and states an intent to play a recorded message. Any such consent shall apply only to one particular call and shall not constitute prior consent to receive further calls through the use of such ADAD equipment.

(B) Any person wishing to receive telephone calls through the use of ADAD equipment shall give his or her written consent to the person using, employing or directing another person to use, or contracting for the use of such ADAD equipment. Any forms used for such written consent by any person using, employing or directing another person to use, or contracting for the use of such ADAD equipment shall clearly and conspicuously state its purpose and effect and clearly and conspicuously give notice of how the consent may be withdrawn. A record of such written consent shall be maintained by the person to whom consent is given and shall be made available to the commission or its authorized representative, without further action, during normal business hours and following reasonable notice. Such consent shall, unless withdrawn, be valid for a period of two years from the date on which it is executed; and such record of written consent shall be maintained by the person to whom consent is given for at least the same period of time. Any consent to receive telephone calls through the use of ADAD equipment shall be void and withdrawn on the fifteenth day following the receipt of a letter withdrawing such consent. It shall be unlawful for any person to whom written consent is given to fail to maintain the record of such written consent for the time period required by this paragraph or to prevent or hinder the commission or its authorized representative from inspecting any such record of written consent.

(b) It shall not be unlawful for any person to use, to employ or direct another person to use, or to contract for the use of ADAD equipment in any manner covered by the provisions of subparagraphs (a)(2)(B) through (a)(2)(G) of this Code section when:

(1) Calls are made with ADAD equipment by a nonprofit organization, or by an individual using such calls other than for commercial profit-making purposes, and the calls do not involve the advertisement or offering for sale, lease, or rental of goods, services, or property;

(2) Calls made with ADAD equipment relate to payment for, service of, or warranty coverage of previously ordered or purchased goods or services; or

(3) Calls made with ADAD equipment relate to collection of lawful debts.

(c) It shall be unlawful for any person to connect any ADAD equipment to any telephone line in this state for the purpose of making telephone calls to persons in this state through the use of ADAD equipment unless a permit has been issued for such ADAD equipment by the commission. Any person desiring to use ADAD equipment in this state shall make application for a permit to the commission on forms prescribed by the commission and shall pay a fee as prescribed by the commission for such permit. Permits shall be renewed biennially as prescribed by the commission and upon payment of a renewal fee. The fees charged shall cover the administrative cost for the issuance of such permits. Permits shall be subject to suspension or revocation for any violation of this Code section.

(d) The provisions of this Code section shall supersede any prior rule, regulation, or order of the commission governing the use of ADAD equipment but shall not prohibit or supersede any future rule, regulation, or order of the commission governing the use of ADAD equipment except to the extent that any such rule, regulation, or order directly conflicts with this subsection. Except for criminal sanctions, the commission is charged with the responsibility of enforcing this Code section; and the commission shall require local exchange companies to file with the commission appropriate tariff revisions to implement this subsection. Any person who operates or utilizes ADAD equipment in violation of the provisions of this Code section shall be subject to disconnection of telephone service if the violation does not cease within ten days from the date of notification to such person by the local exchange company; and the tariff revisions filed by local exchange companies shall provide for the giving of such notification by local exchange companies and for such disconnection of service.

(e) Any person who violates any provision of this Code section shall be guilty of a misdemeanor. (Code 1981, § 46-5-23, enacted by Ga. L. 1987, p. 1159, § 1; Ga. L. 1990, p. 8, § 46.)

Code Commission notes. — Pursuant to Code section 28-9-5, in 1987, a semicolon was substituted for a period at the end of subparagraph (a)(2)(E).

Law reviews. — For annual survey of commercial law, see 43 Mercer L. Rev. 119 (1991).

JUDICIAL DECISIONS

O.C.G.A. § 46-5-23 does not endow the commission with discretionary authority to grant or deny Automatic Dialing and Announcing Devices (ADAD) permits where

the objective standards set forth in paragraph (a)(2) have been met. Georgia Pub. Serv. Comm'n v. Charles H. Turner, Inc., 200 Ga. App. 144, 407 S.E.2d 113 (1991).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprintable offense. — Prohibited use of automatic dialing and recorded message equipment is not at this time designated as an offense which requires that persons charged with its violation be fingerprinted. 1987 Op. Att’y Gen. No. 87-21.

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state statute or law pertaining to telephone solicitation, 44 ALR5th 619. Validity, construction and application of Telephone Consumer Protection Act (47 USCS § 227), 132 ALR Fed. 625.

46-5-24. Use of certain telephone numbers by ADAD equipment prohibited.

(a) As used in this Code section, the term:

(1) “ADAD equipment” means any device or system of devices which is used, whether alone or in conjunction with other equipment, for the purpose of automatically selecting or dialing telephone numbers and disseminating prerecorded messages to the numbers so selected or dialed.

(2) “976 number” means any seven-digit telephone number the first three digits of which are 976 or any other combination of numbers and for which a per-call fee is charged for calling such telephone number.

(b) (1) It shall be unlawful for any person making use of a 976 number for the receipt of incoming calls to use, to employ or direct another person to use, or to contract for the use of ADAD equipment for the purpose of soliciting any person to call such 976 number.

(2) It shall be unlawful for any person making use of a 976 number for the receipt of incoming calls to use, to employ or direct another person to use, or to contract for the use of the United States mail for the purpose of soliciting any person to call such 976 number.

(c) No telephone exchange company shall provide access to a 976 number or numbers to any person who solicits calls to such number or numbers through the use of ADAD equipment or through the use of the United States mail. The telephone exchange companies shall, upon the order of the commission, withdraw access to a 976 number or numbers from any person if calls to such number or numbers are solicited by ADAD equipment or are solicited through the use of the United States mail.

(d) The provisions of this Code section shall supersede any rule, regulation, or order governing the use of 976 numbers if such is in conflict with this Code section. Except for criminal sanctions, the commission is charged with the responsibility of enforcing this Code section. Any person who violates any provision of this Code section shall be subject to discon-

nection of 976 number telephone service if the commission determines that any violation has occurred and upon the commission's, thereafter, issuing an order directing such disconnection.

(e) Any person who violates any provision of subsection (b) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 46-5-24, enacted by Ga. L. 1988, p. 1246, § 1.)

Code Commission notes. — Pursuant to substituted for “number” in paragraph Code section 28-9-5, in 1988, “numbers” was (a)(1).

46-5-25. Transmission of unsolicited commercial facsimile messages.

(a) As used in this Code section, the term “telefacsimile” shall refer to any process by which electronic signals are transmitted by any telephone system for conversion into written text.

(b) It shall be unlawful for any person to initiate the transmission of, employ or direct another person to initiate the transmission of, or contract for the initiation of the transmission of an unsolicited facsimile message for the commercial purpose of advertising or offering the sale, lease, rental, or gift of any goods, services, or real or personal property.

(c)(1) Subsection (b) of this Code section shall not apply where the recipient has consented to the receipt of one or more telefacsimile messages or where there exists a prior contractual or business relationship between the recipient and the initiator or the initiator's principal.

(2) The exception provided for in paragraph (1) of this subsection shall not apply where the recipient has notified the initiator or the initiator's principal that the recipient does not wish to receive further telefacsimile messages from the initiator or the initiator's principal.

(d) Any person who violates this Code section shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed \$1,000.00. Each transmission of a facsimile message in violation of this Code section shall constitute a separate offense.

(e) The commission is charged with the responsibility of civil enforcement of this Code section and the commission shall require local exchange companies to file with the commission appropriate tariff revisions to implement this subsection. Any person who violates the provisions of this Code section shall be subject to disconnection of telephone service if the violation does not cease within ten days from the date of notification to such person by the local exchange company; and the tariff revisions filed by local exchange companies shall provide for the giving of such notification by local exchange companies and for such disconnection of service. (Code 1981, § 46-5-25, enacted by Ga. L. 1990, p. 252, § 1.)

Law reviews. — For note on 1990 enactment of this Code section, see 7 Ga. St. U.L. Rev. 360 (1990).

JUDICIAL DECISIONS

Private actions under federal law not prohibited. — Georgia law does not expressly prohibit private actions under the Telephone Consumer Protection Act (47 USC

§ 227) for the transmission of unsolicited facsimile advertisements. *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga. App. 363, 537 S.E.2d 468 (2000).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting not required for violation of Code section. — Violation of O.C.G.A. § 46-5-25 is not, at this time, designated as

an offense which requires fingerprinting. 1990 Op. Att'y Gen. No. 90-22.

46-5-26. Access to live telephone operator.

(a) Each telecommunications utility and telecommunications company that provides operator service shall ensure that a caller may obtain access to a live operator through a method designed to be easily and clearly understandable and accessible to the caller. A telecommunications utility or telecommunications company shall submit to the Public Service Commission the method by which the telecommunications utility or telecommunications company shall provide access to a live operator for review, except for a telecommunications utility or telecommunications company whose operator services are under the jurisdiction, regulation, and rules of the Public Service Commission. This Code section applies regardless of the method by which the telecommunications utility or telecommunications company provides the operator service. The requirements of this Code section shall not apply to telephones located in prisons or jail facilities or to wireless telecommunication services. For the purpose of this Code section, "operator services" means services that are provided when a caller dials "0".

(b) The failure of a telecommunications utility or telecommunications company to provide access to a live operator as required in subsection (a) of this Code section shall not serve as the basis for a cause of action for personal injuries or damage to property. (Code 1981, § 46-5-26, enacted by Ga. L. 1994, p. 520, § 1.)

46-5-27. Telephone solicitations to residential, mobile, or wireless subscribers; Public Service Commission to establish and maintain list of certain subscribers; authorization for imposition of administrative fees; confidential nature of data base; required identification.

(a) The General Assembly finds that:

(1) The use of the telephone to market goods and services is pervasive now due to the increased use of cost-effective telemarketing techniques;

(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers;

(3) Every day, over 300,000 solicitors place calls to more than 18 million Americans, including citizens of this state;

(4) Telemarketing, however, can be an intrusive and relentless invasion of the privacy and peacefulness of individuals;

(5) Many citizens of this state are outraged over the proliferation of nuisance calls from telemarketers;

(6) Individuals' privacy rights and commercial freedom of speech can be balanced in a way that accommodates both the privacy of individuals and legitimate telemarketing practices; and

(7) It is in the public interest to establish a mechanism under which the individual citizens of this state can decide whether or not to receive telemarketing calls.

(b) As used in this Code section, the term:

(1) "Caller identification service" means a type of telephone service which permits telephone subscribers to see the telephone number of incoming telephone calls.

(2) "Residential, mobile, or wireless subscriber" means a person who has subscribed to telephone service from a local exchange company or mobile or wireless telephone service provider or other persons living or residing with such person.

(3) "Telephone solicitation" means any voice communication over a telephone line for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, but does not include communications:

(A) To any residential, mobile, or wireless subscriber with that subscriber's prior express invitation or permission;

(B) By or on behalf of any person or entity with whom a residential, mobile, or wireless subscriber has a prior or current business or personal relationship; or

(C) By or on behalf of a charitable organization which has filed a registration statement pursuant to Code Section 43-17-5, is exempt from such registration under paragraphs (1) through (6) of subsection (a) of Code Section 43-17-9, or is exempt from such registration as a religious organization or agency referred to in paragraph (2) of Code Section 43-17-2.

Such communication may be from a live operator, through the use of ADAD equipment as defined in Code Section 46-5-23, or by other means.

(c) No person or entity shall make or cause to be made any telephone solicitation to the telephone line of any residential, mobile, or wireless subscriber in this state who has given notice to the commission, in accordance with regulations promulgated under subsection (d) of this Code section, of such subscriber's objection to receiving telephone solicitations.

(d)(1) The commission shall establish and provide for the operation of a data base to compile a list of telephone numbers of residential, mobile, and wireless subscribers who object to receiving telephone solicitations. It shall be the duty of the commission to have such data base in operation no later than January 1, 1999.

(2) Such data base may be operated by the commission or by another entity selected by and awarded a contract by the commission.

(3) No later than January 1, 1999, the commission shall promulgate regulations which:

(A) Require each local exchange company to inform its residential, mobile, or wireless subscribers of the opportunity to provide notification to the commission or its contractor that such subscriber objects to receiving telephone solicitations;

(B) Specify the methods by which each residential, mobile, or wireless subscriber may give notice to the commission or its contractor of his or her objection to receiving such solicitations and methods for revocation of such notice;

(C) Specify the length of time for which a notice of objection shall be effective and the effect of a change of telephone number on such notice;

(D) Specify the methods by which such objections and revocations shall be collected and added to the data base;

(E) Specify the methods by which any person or entity desiring to make telephone solicitations will obtain access to the data base as required to avoid calling the telephone numbers of residential, mobile, or wireless subscribers included in the data base; and

(F) Specify such other matters relating to the data base that the commission deems desirable.

(4) If, pursuant to 47 U.S.C. Section 227(c)(3), the Federal Communications Commission establishes a single national data base of telephone numbers of subscribers who object to receiving telephone solicitations, the commission shall include the part of such single national data base that relates to Georgia in the data base established under this Code section.

(e) The commission may provide by rule or regulation for administrative fees to be imposed upon:

(1) A residential, mobile, or wireless subscriber for each notice of inclusion in the data base established under this Code section; provided, however, that the commission shall not set this fee in an amount greater than \$5.00; and

(2) A person or entity desiring to make telephone solicitations for access to or for electronic copies of the data base established under this Code section.

(f)(1) Information contained in the data base established under this Code section shall be used only for the purpose of compliance with this Code section or in a proceeding or action under subsection (h) or (i) of this Code section. Such information shall not be subject to public inspection or disclosure under Article 4 of Chapter 18 of Title 50.

(2) No person shall knowingly compile or disseminate or compile and disseminate information obtained from the data base for any reason other than those legitimate purposes established by law. Any person found guilty of violating this subsection shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed \$1,000.00. Each instance of an unauthorized disclosure of information from the data base shall constitute a separate offense.

(g)(1) Any person or entity who makes a telephone solicitation to the telephone line of any residential, mobile, or wireless subscriber in this state shall, at the beginning of such call, state clearly the identity of the person or entity initiating the call.

(2) No person or entity who makes a telephone solicitation to the telephone line of a residential, mobile, or wireless subscriber in this state shall knowingly utilize any method to block or otherwise circumvent such subscriber's use of a caller identification service.

(h) The administrator appointed pursuant to subsection (g) of Code Section 10-1-395 shall have authority to initiate proceedings, pursuant to Code Section 10-1-397, relating to a knowing violation or threatened knowing violation of subsection (c) or (g) of this Code section. Such proceedings include without limitation proceedings to issue a cease and desist order, to issue an order imposing a civil penalty up to a maximum of \$2,000.00 for each knowing violation, and to seek additional relief in any superior court of competent jurisdiction. Such actions shall be brought in the name of the state. The provisions of Code Sections 10-1-398, 10-1-398.1, and 10-1-405 shall apply to proceedings initiated by the administrator under this subsection. The administrator is authorized to issue investigative demands, issue subpoenas, administer oaths, and conduct hearings in the course of investigating a violation of subsection (c) or (g) of this Code

section, in accordance with the provisions of Code Sections 10-1-403 and 10-1-404.

(i) Any person who has received more than one telephone solicitation within any 12 month period by or on behalf of the same person or entity in violation of subsection (c) or (g) of this Code section may either bring an action to enjoin such violation; bring an action to recover for actual monetary loss from such knowing violation or to receive up to \$2,000.00 in damages for each such knowing violation, whichever is greater; or bring both such actions.

(j) It shall be a defense in any action or proceeding brought under subsection (h) or (i) of this Code section that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of this Code section.

(k) No action or proceeding may be brought under subsection (h) or (i) of this Code section:

(1) More than two years after the person bringing the action knew or should have known of the occurrence of the alleged violation; or

(2) More than two years after the termination of any proceeding or action by the State of Georgia, whichever is later.

(l) A court of this state may exercise personal jurisdiction over any nonresident or his or her executor or administrator as to an action or proceeding authorized by this Code section in accordance with the provisions of Code Section 9-10-91.

(m) The remedies, duties, prohibitions, and penalties of this Code section are not exclusive and are in addition to all other causes of action, remedies, and penalties provided by law.

(n) No provider of telephone caller identification service shall be held liable for violations of this Code section committed by other persons or entities. (Code 1981, § 46-5-27, enacted by Ga. L. 1998, p. 505, § 1; Ga. L. 2003, p. 562, § 1; Ga. L. 2004, p. 631, § 46.)

The 2003 amendment, effective July 1, 2003, inserted “, mobile, or wireless” throughout subsections (a) through (g); in subsection (a), deleted “to the home” following “services” in paragraph (a)(1), substituted “individuals” for “the home” in paragraph (a)(4), deleted “to their homes” following “calls” in paragraph (a)(5), and deleted “in their homes” following “calls” at the end of paragraph (a)(7); in paragraph (b)(2), deleted “residential” preceding “telephone service” and substituted “or mobile or wireless telephone service provider, or other” for “or the other”; in subsection

(d), inserted “, mobile, and wireless” in the first sentence of paragraph (d)(1), substituted “selected by and awarded a contract by” for “under contract with” in paragraph (d)(2), substituted “and methods for revocation” for “or revocation” in subparagraph (d)(3)(B); rewrote subsection (e); and, in subsection (f), designated the existing provisions as paragraph (f)(1) and added paragraph (f)(2).

The 2004 amendment, effective May 13, 2004, part of an Act to revise, modernize, and correct the Code, revised punctuation in paragraph (b)(2).

Editor's notes. — Ga. L. 1998, p. 505, § 2, not codified by the General Assembly, provides: "This Act shall become effective July 1, 1998, for purposes of administrative establishment of the data base, including receipt of notices, by the Public Service Commission

and shall become effective for all purposes on January 1, 1999."

Law reviews. — For review of 1998 legislation relating to public utilities and transportation, see 15 Ga. St. U.L. Rev. 209 (1998).

JUDICIAL DECISIONS

Cited in *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga. App. 363, 537 S.E.2d 468 (2000).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state statute or law pertaining to telephone solicitation, 44 ALR5th 619.

PART 1A

TELEPHONE SYSTEM FOR THE PHYSICALLY IMPAIRED

46-5-30. Establishment, administration, and operation of state-wide dual party relay service.

(a) The General Assembly finds and declares that it is in the public interest to provide basic telecommunication services to all citizens of this state who, because of physical impairments, particularly hearing and speech impairments, cannot otherwise communicate over the telephone.

(b) The commission shall establish, implement, administer, and promote a state-wide single provider dual party relay service operating seven days per week, 24 hours per day, and contract for the administration and operation of such relay service. The commission shall also establish, implement, administer, and promote a telecommunications equipment distribution program and contract for the administration and operation of such program.

(c) The commission shall require all local exchange telephone companies in this state, except those operated by telephone membership corporations, to impose a monthly maintenance surcharge on all residential and business local exchange access facilities. For the purpose of this subsection, "exchange access facility" means the access from a particular telephone subscriber's premise to the telephone system of a local exchange telephone company. "Exchange access facility" includes local exchange company provided access lines, private branch exchange trunks, and centrex network access registers, all as defined by tariffs of telephone companies as approved by the commission. The amount of the surcharge shall be determined by the commission based upon the amount of funding necessary to accomplish

the purposes of this Code section and provide the services on an ongoing basis; however, in no case shall the amount exceed 20¢ per month. A maximum of \$0.05 of this monthly surcharge per access line shall be utilized for a telecommunications equipment distribution program. If the projected cost of the operation of the relay service exceeds a monthly surcharge of \$0.15 at any time, funding for the telecommunications equipment distribution program will be reduced by the amount required to fully fund the relay service, under the existing cap of \$0.20 for the period of time necessary. No additional fees other than the surcharge authorized by this subsection shall be imposed on any user of such relay service. The local exchange companies shall collect the surcharge from their customers and transfer the moneys collected to a special fund to be held separate from all other funds. The fund shall be used solely for the administration and operation of the relay service and the telecommunications equipment distribution program and shall not be imposed, collected, or expended for any other purpose.

(d) The dual party relay system shall protect the privacy of persons to whom relay services are provided and shall require all operators to maintain the confidentiality of all telephone messages. The confidentiality and privacy of persons to whom relay services are provided will be protected by means of the following:

(1) The relay center shall not maintain any form of permanent copies of messages relayed by their operators or allow the content of telephone messages to be communicated to, or accessible to, nonstaff members;

(2) Persons using the relay services shall not be required to provide any personal identifying information until the party they are calling is on the line, and shall only be required to identify themselves to the extent necessary to fulfill the purpose of their call;

(3) Relay operators shall not leave messages with third parties unless instructed to do so by the person making the call;

(4) Relay operators shall not intentionally alter a relayed conversation; and

(5) Relay operators shall not refuse calls or limit the length of calls.

(e) Neither the commission nor the provider of the dual party relay system service nor, except in cases of willful misconduct, gross negligence, or bad faith, the employees of the provider of the dual party relay system service shall be liable for any claims, actions, damages, or causes of action arising out of or resulting from the establishment, participation in, or operation of the dual party relay system service.

(f) The commission shall select the telecommunications carrier which will provide the relay system service and award the contract for this service to the offerer whose proposal is the most advantageous to the state,

considering price, the interests of the hearing impaired and speech impaired community in having access to a high quality and technologically advanced telecommunication system, and all other factors listed in the commission's request for proposals.

(g) The commission shall select a distribution agency to manage the telecommunications equipment distribution program and award the contract for this service to the offerer whose proposal is the most advantageous to the state, considering price, the interests of the hearing impaired and speech impaired community in obtaining appropriate and effective telecommunications equipment, the training of recipients on the use of telecommunication devices, outreach efforts, and all other factors listed in the commission's request for proposals.

(h) The commission shall establish guidelines for eligibility for participation in the distribution program, taking into consideration a person's certified medical need and prohibiting distribution of telecommunications equipment to any person whose income exceeds 200 percent of the federal poverty level. The commission shall utilize appropriate external expertise, as necessary, to establish these guidelines, including contracting with public agencies or private entities. Funding for any such contracts will be covered by the \$0.05 portion of the monthly surcharge utilized for the telecommunications equipment distribution program.

(i) The commission shall establish a telecommunications equipment distribution program advisory committee to provide input on program operation and the types of equipment to be, and being, distributed by the program. The commission shall select the equipment to be distributed by the program and shall incorporate this selection into the commission's request for proposals for a distribution agency.

(j) The commission shall provide that the dual party telephone relay telephone system shall be operational no later than July 1, 1991, and that the telecommunications equipment distribution program shall be operational no later than March 31, 2003. (Code 1981, § 46-5-30, enacted by Ga. L. 1989, p. 657, § 1; Ga. L. 1990, p. 1118, § 1; Ga. L. 2002, p. 624, § 1.)

The 2002 amendment, effective July 1, 2002, in subsection (b), added the second sentence; in subsection (c), added the present fifth and sixth sentences, and in the last sentence, inserted "and the telecommunications equipment distribution program" and deleted "be used for the distribution of telecommunication devices for the deaf or similar such devices or" preceding "be im-

posed, collected"; added present subsections (g) through (i); redesignated former subsection (g) as present subsection (j), and added the language following "July 1, 1991" in that subsection.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2002, "moneys" was substituted for "monies" in the eighth sentence in subsection (c).

46-5-31. Rates and charges; surcharge not includable in gross receipts subject to franchise tax.

(a) Long-distance and all other applicable rates and charges, including the surcharge required by this part, shall apply to the users of the dual party relay system in the same manner as all other telephone subscribers, but no additional charges may be imposed for the use of the relay system. Local exchange telephone companies shall be compensated for any collection, inquiry, or other administrative services provided by said companies in conjunction with the operation of the dual party relay system.

(b) The surcharge created by this part and collected by the local exchange telephone companies is not includable in gross receipts subject to franchise tax allowed pursuant to Code Section 36-34-2 or subject to the sales and use taxes levied under Chapter 8 of Title 48. (Code 1981, § 46-5-31, enacted by Ga. L. 1990, p. 1118, § 2.)

PART 2

**CONSTRUCTION AND OPERATION OF LINES, PLANTS, OR SYSTEMS
GENERALLY**

RESEARCH REFERENCES

ALR. — Placement, maintenance, or design of standing utility pole as affecting private utility's liability for personal injury resulting from vehicle's collision with pole within or beside highway, 51 ALR4th 602.

46-5-40. "Person" defined.

As used in this part, the term "person" means:

(1) Any corporation, company, firm, association, or individual owning, leasing, or operating a public telephone service or telephone line in this state; and

(2) Any cooperative nonprofit membership corporation or limited dividend or mutual association, with respect to that part or portion of its operations devoted to the furnishing of telephone service within this state. (Ga. L. 1950, p. 311, § 8.)

JUDICIAL DECISIONS

Cited in Statesboro Tel. Co. v. Georgia Pub. Serv. Comm'n, 235 Ga. 179, 219 S.E.2d 127 (1975).

46-5-41. Obtaining of certificate of public convenience and necessity for construction, operation, acquisition, or extension of telephone lines, plants, or systems.

Except as provided in Code Section 46-5-46, no person shall construct or operate any telephone line, plant, or system or any extension thereof or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Public Service Commission a certificate that the present or future public convenience and necessity require or will require such construction, operation, or acquisition. (Ga. L. 1950, p. 311, § 1.)

JUDICIAL DECISIONS

Section requires limits on granting of competing certificates. — The requirements that no competing certificate shall be granted when the existing certificate holder is adequately serving the public, and no competing certificate shall be granted unless and until it is proved that the existing certificate holder is rendering inadequate service, are presently inherent in the public convenience and necessity provisions of Ga. L. 1950, p. 311, § 1 (see O.C.G.A. § 46-5-41). *Statesboro Tel. Co. v. Georgia Pub. Serv. Comm'n*, 235 Ga. 179, 219 S.E.2d 127 (1975).

Issuance of competing telephone certificate. — Competing telephone certificate can only be issued upon showing that public convenience and necessity so require. *Statesboro Tel. Co. v. Georgia Pub. Serv. Comm'n*, 235 Ga. 179, 219 S.E.2d 127 (1975).

Public convenience and necessity does not authorize issuance of competing certificate so long as existing certificate holder renders adequate service. *Statesboro Tel. Co. v. Georgia Pub. Serv. Comm'n*, 235 Ga. 179, 219 S.E.2d 127 (1975).

Certificate holder not allowed opportunity to improve service before competing certificate granted. — There is no requirement that an existing telephone certificate holder rendering inadequate service to the public

be afforded an opportunity to improve service before a competing telephone certificate can be granted by the Public Service Commission. *Statesboro Tel. Co. v. Georgia Pub. Serv. Comm'n*, 235 Ga. 179, 219 S.E.2d 127 (1975).

Telephone company will not be heard to complain of unspecified loss. — A public service telephone company enjoys profits by reason of certificates granted by the state, and it will not be heard to complain because of the possibility of an unspecified "loss" incurred in providing adequate telephone service to the public. *Statesboro Tel. Co. v. Georgia Pub. Serv. Comm'n*, 235 Ga. 179, 219 S.E.2d 127 (1975).

Judicial notice of certificate. — Federal district court could take judicial notice pursuant to Fed. R. Evid. 201 that a cable company possessed a valid certificate of authorization from the Georgia Public Service Commission that allowed it to exercise eminent domain under O.C.G.A. § 46-5-1(a) where that certificate accompanied a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Davis v. Williams Commun., Inc.*, 258 F. Supp. 2d 1348 (N.D. Ga. 2003).

Cited in *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975); *Coin Call, Inc. v. Southern Bell Tel. & Tel. Co.*, 636 F. Supp. 608 (N.D. Ga. 1986).

OPINIONS OF THE ATTORNEY GENERAL

Commission may revoke certificate for nonuse. — After a hearing on all of the facts of a particular case, the Public Service Commission can revoke for nonuse a certificate of public convenience and necessity which it

has granted to a telephone company. 1971 Op. Att'y Gen. No. 71-144.

Commission may alter boundaries of telephone service areas. — Commission may alter established boundaries of telephone

service areas by granting competing certificates within the same service areas if the public convenience and necessity would be served thereby. 1979 Op. Att'y Gen. No. 79-20.

Commission may authorize company to serve consumer located in competitor's service area. — The Public Service Commission has the authority to authorize a telephone company to provide service to a consumer located in the service area certificated to a

competing telephone company by granting the telephone company, which the consumer wishes to be served by, a certificate of public convenience and necessity to serve the area within which the consumer is located. Nonetheless, the commission cannot award such a competing certificate unless the commission determines that the existing certificate holder is unwilling or incapable of providing adequate service within the area. 1979 Op. Att'y Gen. No. 79-20.

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, §§ 5, 11, 12, 19, 21.

C.J.S. — 86 C.J.S., Telecommunications, §§ 5, 6, 8 et seq., 17, 30, 34 et seq.

46-5-42. Interference with existing telephone lines, plants, or systems by person constructing or extending a telephone line, plant, or system.

If any person, in constructing or extending his telephone line, plant, or system, unreasonably interferes or is about to interfere unreasonably with any line, plant, system, or service of any other person, the commission, on its own initiative or on the complaint of any person claiming to be injuriously affected, may, after a hearing conducted after the giving of reasonable notice, make such order and prescribe such terms and conditions with respect thereto as are just and reasonable. (Ga. L. 1950, p. 311, § 2.)

JUDICIAL DECISIONS

Cited in *Statesboro Tel. Co. v. Georgia Pub. Serv. Comm'n*, 235 Ga. 179, 219 S.E.2d 127 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 114.

ALR. — Right of public utility not having an exclusive franchise to protection against,

or damages for, interference with its operations, property, or plant by a competitor, 119 ALR 432.

46-5-43. Prescription by commission of rules and regulations as to application for certificate of public convenience and necessity; giving notice of receipt of application.

The application for any certificate of public convenience and necessity provided for in Code Section 46-5-41 shall be made under such rules and regulations as the commission may from time to time prescribe. Upon the

receipt of any such application for such certificate, the commission shall cause notice thereof to be given by mail or by personal service to the chief executive officer of the municipalities affected, if any, and to any person occupying the territory affected, and shall publish such notice once a week for three consecutive weeks in a newspaper of general circulation in each territory affected. (Ga. L. 1950, p. 311, § 3.)

JUDICIAL DECISIONS

Existing certificate holder entitled to notice of filing of competing application and would at hearing on that application be permitted to show the adequacy of its exist-

ing service or ability and willingness to improve service. *Statesboro Tel. Co. v. Georgia Pub. Serv. Comm'n*, 235 Ga. 179, 219 S.E.2d 127 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, §§ 12, 19, 21.

C.J.S. — 86 C.J.S., Telecommunications, §§ 5, 6, 8 et seq., 17, 30.

46-5-44. Power of commission to issue or deny certificate.

The commission shall have power, after a hearing, either to issue the certificate of public convenience and necessity as prayed for, to refuse to issue the same, or to issue it for the construction, operation, or acquisition of only a portion of the contemplated line, plant, or system or extension thereof. (Ga. L. 1950, p. 311, § 4.)

JUDICIAL DECISIONS

Competing telephone certificate issued only upon showing of necessity. — A competing telephone certificate, like a noncompeting telephone certificate, can only be issued upon showing that public

convenience and necessity so require. *Statesboro Tel. Co. v. Georgia Pub. Serv. Comm'n*, 235 Ga. 179, 219 S.E.2d 127 (1975).

OPINIONS OF THE ATTORNEY GENERAL

Commission without authority to revoke or cancel certificate issued under this section. — The commission does not have the authority to revoke or cancel a certificate of

public convenience and necessity issued under Ga. L. 1950, p. 311, § 4 (see O.C.G.A. § 46-5-44). 1958-59 Op. Att'y Gen. p. 303.

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, §§ 12, 19, 21.

C.J.S. — 86 C.J.S., Telecommunications, §§ 5, 6, 8 et seq., 17, 30

46-5-45. Filing complaints with commission regarding persons constructing, operating, or acquiring telephone line, plant, or system without certificate.

Whenever any person is engaged in or is about to engage in the construction, operation, or acquisition of any telephone line, plant, or system without having secured a certificate of public convenience and necessity as required by Code Section 46-5-41, any interested person may file a complaint with the commission. The commission may, with or without notice, make its order requiring the person complained of to cease and desist from such construction, operation, or acquisition until the commission makes and files its decision on the complaint or until the further order of the commission. The commission may, after a hearing conducted after the giving of reasonable notice, make such order and prescribe such terms and conditions with respect thereto as are just and reasonable. (Ga. L. 1950, p. 311, § 6.)

JUDICIAL DECISIONS

Cited in *Statesboro Tel. Co. v. Georgia Pub. Serv. Comm'n*, 235 Ga. 179, 219 S.E.2d 127 (1975).

RESEARCH REFERENCES

C.J.S. — 86 C.J.S., Telecommunications, §§ 5, 6, 8 et seq., 17.

46-5-46. Granting of certificates to persons engaged in construction or operation of telephone line, plant, or system as of February 17, 1950.

(a) Any person engaged in the construction or operation of any telephone line, plant, or system or any extension thereof as of February 17, 1950, shall be entitled to receive a certificate of public convenience and necessity from the commission authorizing such person to continue the construction or operation of such line, plant, or system or any extension thereof in the territory being served by such person on February 17, 1950, if by February 17, 1951, such person files maps with the commission showing the territory being served by such person.

(b) If more than one person files maps pursuant to subsection (a) of this Code section indicating service in the same territory, the commission shall, after a hearing conducted after the giving of reasonable notice to the interested parties, determine from such evidence as it may reasonably require which of such persons shall be entitled to the certificate. In making such determination, the commission shall consider the ability of such persons to furnish thereafter reasonably adequate service in the territory in question.

(c) Pending the granting of a certificate as provided in this Code section, any person may lawfully continue the construction or operation of any telephone line, plant, or system or any extension thereof in the territory being served by that person on February 17, 1950.

(d) This Code section shall not be construed to require any person to secure a certificate for an extension within any municipality within which that person has lawfully commenced operations prior to February 17, 1950, or for an extension within or to territory already served by such person, which extension is necessary in the ordinary course of business.

(e) This Code section shall not be construed to require any person to secure a certificate for the construction of substitute facilities within or to any municipality or territory already served by that person or for an extension into territory contiguous to that already occupied by that person and not receiving similar service from another person if no certificate of public convenience and necessity has been issued to or applied for by any other person. (Ga. L. 1950, p. 311, §§ 1, 5.)

JUDICIAL DECISIONS

Cited in *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975); *Statesboro Tel. Co. v. Georgia Pub. Serv. Comm'n*, 235 Ga. 179, 219 S.E.2d 127 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, §§ 12, 19, 21. **C.J.S.** — 86 C.J.S., Telecommunications, §§ 5, 6, 8 et seq., 17, 30.

PART 3

RURAL TELEPHONE COOPERATIVES

46-5-60. Short title.

This part may be cited as the “Rural Telephone Cooperative Act.” (Ga. L. 1950, p. 192, § 1.)

46-5-61. Declaration of purpose.

Cooperative nonprofit corporations may be organized under this part for the purpose of furnishing telephone service in rural areas to the widest practicable number of users of such service. (Ga. L. 1950, p. 192, § 2.)

Cross references. — Nonprofit corporations generally, Ch. 3, T. 14.

46-5-62. Definitions.

As used in this part, the term:

(1) "Cooperative" means any corporation organized under this part or which becomes subject to this part.

(2) "Person" means any natural person, firm, association, corporation, business trust, or partnership.

(3) "Rural area" means any area within this state which is located outside:

(A) The boundaries of an incorporated or unincorporated city, town, village, or borough having a population in excess of 1,500 inhabitants according to the last preceding federal census; and

(B) Any suburban or populated area contiguous to the boundaries of any such city, town, village, or borough, which area has a common economic, social, or administrative interest with any such city, town, village, or borough.

(4) "Telephone company" means any natural person, firm, association, corporation, partnership, cooperative nonprofit membership corporation, or limited dividend or mutual association owning, leasing, or operating any line, facility, or system used in the furnishing of telephone service within this state.

(5) "Telephone service" means any communication service whereby voice communication through the use of electricity and wire connections between the transmitting and receiving apparatus is the principal intended use thereof. This term shall include all telephone lines, facilities, or systems used in the rendition of such service. (Ga. L. 1950, p. 192, § 3; Ga. L. 1952, p. 4, § 1.)

JUDICIAL DECISIONS

Telephone company applies only to rural telephone cooperatives. — Federal district court rejected landowners' argument that because a cable company provided services other than voice communication, it was not a "telephone company," and thus could not obtain the authority to exercise eminent

domain under O.C.G.A. § 46-5-1 because the definition of "telephone company" on which the landowners relied, found in O.C.G.A. § 46-5-62(4) and (5), applied only to rural telephone cooperatives. *Davis v. Williams Communs., Inc.*, 258 F. Supp. 2d 1348 (N.D. Ga. 2003).

OPINIONS OF THE ATTORNEY GENERAL

Cellular telecommunications excluded. — Cellular communications service is not a telephone service and, as such, is not subject

to regulation by the Georgia Public Service Commission. 1994 Op. Att'y Gen. No. 94-7.

46-5-63. Powers of cooperatives generally.

A cooperative shall have power:

- (1) To sue and be sued in its corporate name;
- (2) To have an initial existence for a term of 50 years with right of renewal for one or more like terms unless a shorter term is stated in the articles of incorporation;
- (3) To adopt a corporate seal and alter the same;
- (4) To furnish, improve, and expand telephone service in rural areas to its members, to governmental agencies and political subdivisions, and to other persons not in excess of 10 percent of the number of its members; provided, however, that, without regard to this 10 percent limitation, telephone service may be made available by a cooperative through interconnection of facilities to any number of subscribers of other telephone systems and through pay stations to any number of users; provided, further, that a cooperative which acquires existing telephone facilities in rural areas may continue service to persons, not in excess of 40 percent of the number of its members, who are already receiving service from such facilities without requiring such persons to become members; but such persons may become members upon such terms as may be prescribed in the bylaws; provided, further, that no cooperative shall furnish any telephone service in any area or territory professed to be served by any other telephone company unless such telephone company is unable or unwilling to furnish or extend reasonably adequate telephone service in such area or territory;
- (5) To construct, purchase, lease as lessee, or otherwise acquire; to improve, expand, install, equip, maintain, and operate; and to sell, assign, convey, lease as lessor, mortgage, pledge, or otherwise dispose of or encumber telephone lines, facilities, systems, lands, buildings, structures, plants, equipment, exchanges, and any other real or personal property, whether tangible or intangible, which shall be deemed necessary, convenient, or appropriate to accomplish the purpose for which the cooperative is organized, provided that no cooperative shall construct, purchase, lease as lessee, take, receive, or otherwise acquire, improve, expand, install, equip, maintain, or operate any telephone lines, facilities, systems, lands, buildings, structures, plants, equipment, exchanges, or any other real or personal property, whether tangible or intangible, within (A) the boundaries of any incorporated or unincorporated city, town, village, or borough within this state having a population in excess of 1,500 inhabitants according to the last preceding federal census, and (B) any suburban or populated area contiguous to the boundaries of any such city, town, village, or borough having a common economic, social, or administrative interest within any such city, town, village, or borough;

(6) To connect and interconnect its telephone lines, facilities, or systems with other telephone lines, facilities, or systems, provided that any such connection or interconnection shall be in such manner and according to such specifications as will avoid interference with or hazards to existing telephone lines, facilities, or systems;

(7) To make its facilities available to persons furnishing telephone service within or without this state;

(8) To purchase, lease as lessee, or otherwise acquire; to use and exercise; and to sell, assign, convey, mortgage, pledge, or otherwise dispose of or encumber franchises, rights, privileges, licenses, and easements;

(9) To issue membership certificates and nonvoting shares of stock as provided in this part;

(10) To borrow money and otherwise contract indebtedness; to issue or guarantee notes, bonds, and other evidences of indebtedness; and to secure the payment thereof by mortgage, pledge, deed of trust, security deed, or any other encumbrance upon any or all of its then-owned or after-acquired real or personal property, assets, franchises, or revenues;

(11) To construct, maintain, and operate telephone lines along, upon, under, and across publicly owned lands and public thoroughfares, including all roads, highways, streets, alleys, bridges, and causeways, provided that the construction, maintenance, and operation of telephone lines along, upon, under, and across publicly owned lands and public thoroughfares, including all roads, highways, streets, alleys, bridges, and causeways, shall be conditioned upon first having obtained the consent and permission of the governmental authority affected and shall be under such terms and conditions as may be promulgated by that governmental authority;

(12) To exercise the power of eminent domain in the manner provided by Title 22 for the exercise of such power by other corporations constructing or operating telephone lines, facilities, or systems;

(13) To become a member of other cooperatives or corporations or to own stock therein;

(14) To conduct its business and exercise its powers within or without this state;

(15) To adopt, amend, and repeal bylaws;

(16) To make any and all contracts necessary, convenient, or appropriate for the full exercise of the powers granted by this part; and

(17) To do and perform any other acts and things and to have and exercise any other powers which may be necessary, convenient, or

appropriate to accomplish the purpose for which the cooperative is organized. (Ga. L. 1950, p. 192, § 4; Ga. L. 1952, p. 4, § 2; Ga. L. 1953, Jan.-Feb. Sess., p. 132, § 1; Ga. L. 1973, p. 229, § 1; Ga. L. 1982, p. 2107, § 48; Ga. L. 1984, p. 22, § 46; Ga. L. 1994, p. 237, § 2.)

RESEARCH REFERENCES

C.J.S. — 86 C.J.S., Telecommunications, § 20 et seq.

ALR. — Duty of public utility to notify patron in advance of temporary suspension of service, 52 ALR 1078.

Right and duty of telephone companies to make or discontinue physical connection of exchanges or lines, 76 ALR 953.

46-5-64. Power of superior court to create cooperatives, to approve amendments to their articles of incorporation, conversion, consolidation, merger, or dissolution.

The superior court shall have power, by compliance with this part, to create cooperatives, to approve amendments to articles of incorporation of cooperatives, to approve articles of conversion and combined articles of consolidation and conversion of existing corporations proposing to become subject to this part, to approve articles of consolidation of cooperatives, to approve articles of merger of cooperatives, and to approve articles of dissolution of cooperatives. The judges of the superior court are authorized and empowered to make orders and decrees pursuant to this part in vacation at chambers in the county where the application for such order or decree is pending or in any county forming a part of the judicial circuit in which the application is pending, in the same manner and as fully and amply as the said judges could do in term time. (Ga. L. 1950, p. 192, § 5.)

Cross references. — Provisions of Constitution of Georgia relating to granting of

corporate powers and privileges, Ga. Const. 1983, Art. III, Sec. VI, Para. V.

46-5-65. Names of cooperatives.

(a) The name of the cooperative shall include the words “Telephone” and “Cooperative,” and the abbreviation “Inc.” unless:

(1) In an affidavit made by its president and vice-president and filed with the clerk of the superior court of the county in which the principal office of the cooperative is located and with the Secretary of State; or

(2) In an affidavit made by a person signing articles of incorporation, consolidation, merger, or conversion, which relate to such cooperative, and presented concurrently with the presentation for approval of any such articles to the superior court or a judge thereof and filed with the Secretary of State

it shall appear that the cooperative desires to do business in another state and is or would be precluded therefrom by reason of the inclusion of such words or either thereof in its name.

(b) This Code section shall not apply to any corporation which becomes subject to this part by complying with Code Section 46-5-90 or which does business in this state pursuant to Code Section 46-5-99 and which elects to retain a corporate name which does not comply with this Code section. (Ga. L. 1950, p. 192, § 6.)

46-5-66. Incorporators.

Five or more persons, including cooperatives, may organize a cooperative in the manner provided in this part. (Ga. L. 1950, p. 192, § 7.)

46-5-67. Contents of articles of incorporation; signing and acknowledgment; recitation of purpose and powers; statements regarding issuance of nonvoting shares of stock.

(a) Articles of incorporation of a cooperative shall recite that they are executed pursuant to this part; shall state the name of the cooperative, the address of its principal office, the names and addresses of the incorporators, and the names and addresses of its trustees; and may contain any provisions, not inconsistent with this part, which are deemed necessary or advisable for the conduct of its business, including provisions for the issuance of nonvoting shares of stock as provided in this Code section.

(b) Such articles shall be signed by each incorporator and acknowledged by at least two of the incorporators. If the incorporators are cooperatives, the articles shall be signed by representatives of each cooperative and acknowledged by representatives of at least two cooperatives.

(c) It shall not be necessary to recite in the articles of incorporation of a cooperative the purpose for which it is organized or any of its corporate powers.

(d) If a cooperative desires to issue nonvoting shares of stock, its articles of incorporation shall state:

(1) The total number of such shares of stock which may be issued and the par value of each share;

(2) The fixed or maximum rate of dividends on the par value of such shares of stock, in either case not exceeding 4 percent per annum, and whether dividends shall be cumulative or noncumulative;

(3) Whether such shares of stock may be issued to members only or to members and nonmembers;

(4) The maximum number of such shares of stock which may be owned by any person; and

(5) The terms and conditions on which such shares of stock may be transferred, redeemed, and retired. (Ga. L. 1950, p. 192, § 8.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5 et seq.

C.J.S. — 86 C.J.S., Telecommunications, §§ 18, 19.

46-5-68. Presentation of articles of incorporation to superior court for approval; accompaniment of articles by Secretary of State's certificate and by required affidavits.

The articles of incorporation, executed and acknowledged in accordance with Code Section 46-5-67, shall be presented, by application signed by two of the persons who signed the articles of incorporation, to the superior court of the county in which the principal office of the cooperative is to be located, or to the judge of the superior court of that county in vacation, or in the event that the judge of the superior court of said county is absent from the circuit, disqualified, or for illness or other reason cannot act in the premises, then to any judge of the superior court of this state. The application shall be accompanied by a certificate of the Secretary of State declaring that the name of the proposed cooperative is not the name of any other then existing corporation registered in the records of the Secretary of State, and by such affidavits as may be required by applicable provisions of this part. (Ga. L. 1950, p. 192, § 9.)

46-5-69. Approval of articles by judicial order; application as constituting charter of cooperative.

Upon presentation of the articles of incorporation to the superior court, or to the judge of the superior court, the judge shall examine the same and if it shall appear to the judge that the articles of incorporation are legitimately within the purview and intention of the laws of this state, the judge shall pass an order approving the articles of incorporation. The application, including the articles of incorporation and the order thereon, shall constitute the charter of the cooperative named therein. (Ga. L. 1950, p. 192, § 10.)

46-5-70. Filing of articles with clerk of court; payment of fee to clerk.

The applicants shall file the application, including the articles of incorporation and the order of the judge thereon, in the office of the clerk of the superior court of the county in which the principal office of the cooperative is to be located, and shall concurrently therewith deposit with and pay to said clerk the fee provided for in Code Section 46-5-100. (Ga. L. 1950, p. 192, § 11.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5.

C.J.S. — 86 C.J.S., Telecommunications, §§ 18, 19.

46-5-71. Submittal to clerk of publisher's affidavit.

The applicants shall submit to the clerk, along with the articles of incorporation, an affidavit signed by the duly authorized agent or publisher of a newspaper having general circulation in the county where the principal office of the cooperative is to be located, which affidavit shall state that there has been deposited with the newspaper the cost of publishing the articles of incorporation and the order of the judge thereon once a week for four weeks. (Ga. L. 1950, p. 192, § 12.)

46-5-72. Time of advertisement of articles; appearance of advertisements prior to granting of charter.

The first of said advertisements shall appear within one week after the filing of the articles of incorporation as provided in Code Section 46-5-70 unless otherwise ordered by the court. It shall not be necessary that any of the advertisements appear prior to the granting of the charter by the judge. (Ga. L. 1950, p. 192, § 13.)

46-5-73. Duty of clerk to deliver to applicants certified copies of articles and of order thereon.

Upon the filing of the articles of incorporation and the order of the judge thereon with the clerk of the superior court and the fee being paid as required by Code Section 46-5-70, the clerk shall forthwith deliver to the applicants or their attorney two certified copies of the articles of incorporation and the order of the judge thereon, and the filing of the clerk thereon and receipt for the cost which has been paid to the clerk. (Ga. L. 1950, p. 192, § 14.)

46-5-74. Filing of copies of articles and order with Secretary of State; payment of fee.

Upon receiving the two certified copies of the articles of incorporation and the order of the judge thereon, the applicants or their attorney shall present the same to the Secretary of State for registration and recordation and shall concurrently therewith pay to the Secretary of State for the use of the state the fee provided for in Code Section 46-5-100. (Ga. L. 1950, p. 192, § 15; Ga. L. 1984, p. 22, § 46; Ga. L. 1985, p. 149, § 46.)

46-5-75. Certificate of Secretary of State.

The Secretary of State shall thereupon attach to one of the certified copies of the articles of incorporation with order of the judge thereon,

which articles of incorporation with the order of the judge thereon constitute the charter of the corporation as granted by the superior court, a certificate in substantially the following form:

State of Georgia
Office of the Secretary of State
Ex Officio Corporation Commissioner

This is to certify that _____
(the name of the corporation) has been duly incorporated under the laws of the State of Georgia, on the _____ day of _____, _____, for a period of _____ years from said date, in accordance with the certified copy hereto attached, and that a certified copy of the articles of incorporation constituting the charter of said corporation has duly been filed in the office of the Secretary of State and the fees therefor paid, as provided by law.

Witness my hand and official seal, this _____ day of _____, _____.

Secretary of State, Ex Officio
Corporation Commissioner of the
State of Georgia

(Ga. L. 1950, p. 192, § 16; Ga. L. 1982, p. 3, § 46; Ga. L. 1999, p. 81, § 46.)

46-5-76. Certified copies of charter and Secretary of State’s certificate as evidence of incorporation of cooperative and of nature and contents of charter.

Such certified copies of the charter, together with the certificate of the Secretary of State thereon, shall be received as evidence in any court or proceeding as evidence of the incorporation of the cooperative and of the nature and contents of its charter. (Ga. L. 1950, p. 192, § 17.)

46-5-77. Time of corporate existence of cooperative.

The corporate existence of the cooperative shall begin at the time of the filing of the articles of incorporation, with the judge’s order thereon, with the clerk of the superior court, but the cooperative shall not be licensed to transact any business until it shall have received the certificate from the Secretary of State in the manner prescribed in Code Section 46-5-75. (Ga. L. 1950, p. 192, § 18.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5. **C.J.S.** — 86 C.J.S., Telecommunications, § 18.

46-5-78. Bylaws of cooperative generally.

The board of directors shall adopt the first bylaws of a cooperative to be adopted following an incorporation, conversion, combined consolidation and conversion, merger, or consolidation. Thereafter, the members shall adopt, amend, or repeal the bylaws by the affirmative vote of a majority of those members voting thereon at a meeting of the members. The bylaws shall set forth the rights and duties of members, directors, and shareholders, if any, and may contain other provisions for the regulation and management of the affairs of the cooperative not inconsistent with this part or with its articles of incorporation. (Ga. L. 1950, p. 192, § 19.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5.

C.J.S. — 86 C.J.S., Telecommunications, § 18.

46-5-79. Qualifications for membership in cooperative; certificate of membership; share certificates; payment for shares of stock.

(a) Each incorporator of a cooperative shall be a member thereof, but no other person may become a member thereof unless he agrees to use telephone service furnished by the cooperative when it is made available through its facilities. Membership in a cooperative shall be evidenced by a certificate of membership, which shall not be transferable, except as provided in the bylaws. The bylaws may prescribe additional qualifications and limitations in respect of membership, provided that ownership of shares of stock, if any are authorized, shall not be a condition of membership in the cooperative.

(b) If the issuance of shares of stock is provided for in the articles of incorporation, ownership of such shares shall be evidenced by share certificates. No share of stock shall be issued except for cash, or for property at its fair value, in an amount equal to the par value of such share of stock.

(c) Membership and share certificates shall contain such provisions, consistent with this part and the articles of incorporation of the cooperative, as shall be prescribed by its bylaws. (Ga. L. 1950, p. 192, § 20.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5.

C.J.S. — 86 C.J.S., Telecommunications, § 19.

46-5-80. Meetings of members — Generally.

(a) An annual meeting of the members of a cooperative shall be held at such time and place as shall be provided in the bylaws.

(b) Special meetings of the members may be called by the president, by the board of directors, by any three directors, or by not less than 200 members or 10 percent of all members, whichever is less.

(c) Except as otherwise provided in this part, written or printed notice stating the time and place of each meeting of the members and, in the case of a special meeting, the purpose or purposes for which the meeting is called, shall be given to each member, either personally or by mail, not less than ten days nor more than 25 days before the date of the meeting. If mailed, such notice shall be deemed to be given when deposited in the United States mail with postage prepaid, addressed to the member at his address as it appears on the records of the cooperative.

(d) Unless the bylaws prescribe the presence of a greater percentage or number of the members for a quorum, a quorum for the transaction of business at all meetings of the members of a cooperative having not more than 500 members shall be 10 percent of all members present in person. A quorum for a cooperative having more than 500 members shall be 50 members or 2 percent of all members, whichever is greater, present in person. If less than a quorum is present at any meeting, a majority of those present in person may adjourn the meeting to another time without the giving of notice of such later meeting to absent members.

(e) Each member shall be entitled to one vote on each matter submitted to a vote at a meeting of the members. Voting shall be in person, but, if the bylaws so provide, may also be by mail. (Ga. L. 1950, p. 192, § 21.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5.

C.J.S. — 86 C.J.S., Telecommunications, § 19.

46-5-81. Meetings of members — Waiver of notice.

Any person entitled to notice of a meeting may waive such notice in writing either before or after such meeting. If any such person attends such meeting, such attendance shall constitute a waiver of notice of such meeting, unless such person participates therein solely to object to the transaction of any business because the meeting has not been legally called or convened. (Ga. L. 1950, p. 192, § 22.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5.

46-5-82. Board of directors.

(a) The business of a cooperative shall be managed by a board of not less than five directors, each of whom shall be a member of the cooperative or of another cooperative which is a member thereof. The bylaws shall prescribe the number of directors, their qualifications, other than those prescribed in this part, the manner of holding meetings of the board of directors and of electing successors to directors who resign, die, or otherwise become incapable of acting. The bylaws may also provide for the removal of directors from office and for the election of their successors. Directors shall not receive any salaries for their services as such and, except in emergencies, shall not receive any salaries for their services in any other capacity without the approval of the members. The bylaws may, however, prescribe a fixed fee for attendance at each meeting of the board of directors and may provide for reimbursement of actual expenses of attendance.

(b) The directors of a cooperative named in any articles of incorporation, consolidation, merger, conversion, or combined consolidation and conversion shall hold office until the next annual meeting of the members and until their successors are elected and qualify. At each annual meeting, or, in case of failure to hold the annual meeting as specified in the bylaws, at a special meeting called for that purpose, the members shall elect directors to hold office until the next annual meeting of the members, except as otherwise provided in this part. Each director shall hold office for the term for which he is elected and until his successor is elected and qualifies.

(c) Instead of electing all the directors annually, the bylaws may provide that half of them, or a number as near thereto as possible, shall be elected to serve until the next annual meeting of the members and that the remaining directors shall be elected to serve until the second succeeding annual meeting. Thereafter, as directors' terms expire, the members shall elect their successors to serve until the second succeeding annual meeting after their election. Instead of electing all of the directors annually or biannually, the bylaws may provide that one-third of them, or a number as near thereto as possible, shall be elected to serve until the next annual meeting of the members, that one-third shall be elected to serve until the second succeeding annual meeting of the members, and that the remaining directors shall be elected to serve until the third succeeding annual meeting. Thereafter, as directors' terms expire, the members shall elect their successors to serve until the third succeeding annual meeting after their election.

(d) A majority of the board of directors shall constitute a quorum.

(e) The board of directors may exercise all of the powers of a cooperative not conferred upon the members by this part, or by its articles of incorporation or bylaws. (Ga. L. 1950, p. 192, § 23.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5.

C.J.S. — 86 C.J.S., Telecommunications, §§ 18, 19.

46-5-83. Division of service territory into districts; election of district delegates; boundaries of districts; voting by members at district meetings and by district delegates at any meeting.

The bylaws may provide for the division of the territory served or to be served by a cooperative into two or more districts for any purpose, including, without limitation, the nomination and election of directors and the election and functioning of district delegates. Such delegates, who shall be members, may nominate and elect directors. The bylaws shall prescribe the boundaries of the districts or the manner of establishing such boundaries, the manner of changing such boundaries, and the manner in which such districts shall function. No member at any district meeting, and no district delegate at any meeting, shall vote by proxy or by mail. (Ga. L. 1950, p. 192, § 24.)

46-5-84. Officers of cooperative.

The officers of a cooperative shall consist of a president, vice-president, secretary, and treasurer, who shall be elected annually by and from the board of directors. When a person holding any such office ceases to be a director, he shall cease to hold such office. The offices of secretary and of treasurer may be held by the same person. The board of directors may also elect or appoint such other officers, agents, or employees as it deems necessary or advisable and shall prescribe their powers and duties. Any officer may be removed from office and his successor elected in the manner prescribed in the bylaws. (Ga. L. 1950, p. 192, § 25.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5.

C.J.S. — 86 C.J.S., Telecommunications, §§ 18, 19.

46-5-85. Amendment of articles of incorporation.

(a) A cooperative may amend its articles of incorporation by complying with the requirements of this Code section, provided that a change of location of principal office may be effected in the manner set forth in Code Section 46-5-86.

(b) The proposed amendment shall be presented to a meeting of the members, the notice of which shall set forth or have attached thereto the proposed amendment. If the proposed amendment, with any changes, is approved by the affirmative vote of not less than two-thirds of those

members voting thereon at such meeting, articles of amendment shall be executed and acknowledged on behalf of the cooperative by its president or vice-president, and its seal shall be affixed thereto and attested by its secretary.

(c) The articles of amendment shall recite that they are executed pursuant to this part and shall state:

- (1) The name of the cooperative;
- (2) The address of its principal office; and
- (3) The amendment to its articles of incorporation.

(d) The president or vice-president executing such articles of amendment shall make and annex thereto an affidavit stating that the provisions of this Code section in regard to the amendment set forth in such articles were duly complied with.

(e) An application for approval of the articles of amendment, which application shall include such articles and the prescribed affidavits and which shall be signed and acknowledged by the president or vice-president of the cooperative, shall be presented to and approved by the superior court, or the judge thereof in vacation, filed with the clerk of the superior court of the county in which the principal office of the cooperative is located and with the Secretary of State, and published, in the same manner as an application for incorporation. The fees to be paid at the time of such filing shall be as prescribed in Code Section 46-5-100. Upon such filing, the amendment shall be deemed to be effective. (Ga. L. 1950, p. 192, § 26.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5.

C.J.S. — 86 C.J.S., Telecommunications, § 18.

46-5-86. Change of location of principal office.

A cooperative may, upon authorization of its members or board of directors, change the location of its principal office by compliance with the requirements of this Code section. An application for approval of such change shall be presented to and approved by the superior court of the county in which the principal office of the cooperative is to be located, or to the judge of the superior court in vacation. Upon approval, the application and approval shall be filed with the clerk of the superior court of that county and with the Secretary of State and shall be published in the same manner as an application for incorporation. The application, together with the approval of the judge thereon, shall also be filed with the clerk of the superior court of each county in which the principal office of the cooperative has previously been located. The fees to be paid at the time of

such filing shall be as prescribed in Code Section 46-5-100. (Ga. L. 1950, p. 192, § 27.)

46-5-87. Consolidation of cooperatives.

Any two or more cooperatives (each of which is designated in this Code section as a “consolidating cooperative”) may consolidate into a new cooperative (designated in this Code section as the “new cooperative”) by complying with the following requirements:

(1) The proposition for the consolidation of the consolidating cooperatives into the new cooperative, along with proposed articles of consolidation to give effect thereto, shall be submitted to a meeting of the members of each consolidating cooperative, the notice of which shall have attached thereto a copy of the proposed articles of consolidation;

(2) If the proposed consolidation and the proposed articles of consolidation, with any amendments, are approved by the affirmative vote of not less than two-thirds of those members of each consolidating cooperative voting thereon at each such meeting, articles of consolidation in the form approved shall be executed and acknowledged on behalf of each consolidating cooperative by its president or vice-president, and its seal shall be affixed thereto and attested by its secretary. The articles of consolidation shall recite that they are executed pursuant to this part and shall state:

(A) The name of each consolidating cooperative and the address of its principal office;

(B) The name of the new cooperative and the address of its principal office;

(C) That each consolidating cooperative agrees to the consolidation;

(D) The names and addresses of the directors of the new cooperative; and

(E) The terms and conditions of the consolidation and the mode of carrying the same into effect, including the manner in which members and shareholders, if any, of the consolidating cooperatives may or shall become members and shareholders, respectively, of the new cooperative.

In addition, the articles of consolidation may contain any provisions, not inconsistent with this part, deemed necessary or advisable for the conduct of the business of the new cooperative. The president or vice-president of each consolidating cooperative executing such articles of consolidation shall make and annex thereto an affidavit stating that the preceding

provisions of this Code section in regard to such articles were duly complied with by such cooperative;

(3) An application for approval of the articles of consolidation, including such articles and the prescribed affidavits, signed and acknowledged by the president or vice-president of each consolidating cooperative, shall be presented to and approved by the superior court, or the judge thereof in vacation, filed with the clerk of the superior court of the county in which the principal office of the new cooperative is to be located and with the Secretary of State, and published in the same manner as an application for incorporation. The fees to be paid at the time of such filing shall be as prescribed in Code Section 46-5-100. Upon such filing, the consolidation shall be deemed to be effective. (Ga. L. 1950, p. 192, § 28.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5.

C.J.S. — 86 C.J.S., Telecommunications, § 26.

46-5-88. Merger of cooperatives.

Any one or more cooperatives (each of which is designated in this Code section as a “merging cooperative”) may merge into another cooperative (designated in this Code section as the “surviving cooperative”) by complying with the following requirements:

(1) The proposition for the merger of the merging cooperatives into the surviving cooperative, along with proposed articles of merger to give effect thereto, shall be submitted to a meeting of the members of each merging cooperative and of the surviving cooperative, the notice of which shall have attached thereto a copy of the proposed articles of merger;

(2) If the proposed merger and the proposed articles of merger, with any amendments, are approved by the affirmative vote of not less than two-thirds of those members of each cooperative voting thereon at each such meeting, articles of merger in the form approved shall be executed and acknowledged on behalf of each such cooperative by its president or vice-president, and its seal shall be affixed thereto and attested by its secretary. The articles of merger shall recite that they are executed pursuant to this part and shall state:

(A) The name of each merging cooperative and the address of its principal office;

(B) The name of the surviving cooperative and the address of its principal office;

(C) That each merging cooperative and the surviving cooperative agree to the merger;

(D) The names and addresses of the directors of the surviving cooperative; and

(E) The terms and conditions of the merger and the mode of carrying the same into effect, including the manner in which members and shareholders, if any, of the merging cooperatives may or shall become members and shareholders, respectively, of the surviving cooperative.

In addition, the articles of merger may contain any provisions, not inconsistent with this part, deemed necessary or advisable for the conduct of the business of the surviving cooperative. The president or vice-president of each cooperative executing such articles of merger shall make and annex thereto an affidavit stating that the preceding provisions of this Code section in regard to such articles were duly complied with by such cooperative;

(3) An application for approval of the articles of merger, including such articles and the prescribed affidavits, signed and acknowledged by the president or vice-president of each merging cooperative, shall be presented to and approved by the superior court, filed with the clerk of the superior court of the county in which the principal office of the surviving cooperative is located and with the Secretary of State, and published in the same manner as an application for incorporation. The fees to be paid at the time of such filing shall be as prescribed in Code Section 46-5-100. Upon such filing, the merger shall be deemed to be effective. (Ga. L. 1950, p. 192, § 29; Ga. L. 1984, p. 22, § 46; Ga. L. 1985, p. 149, § 46.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5.

C.J.S. — 86 C.J.S., Telecommunications, § 26.

46-5-89. Effect of consolidation or merger.

(a) In the case of a consolidation, the existence of the consolidating cooperatives shall cease, and the articles of consolidation shall be deemed to be the articles of incorporation of the new cooperative. In the case of a merger, the separate existence of the merging cooperatives shall cease and the articles of incorporation of the surviving cooperative shall be deemed to be amended to the extent, if any, that changes therein are provided for in the articles of merger.

(b) All the rights, privileges, immunities, and franchises, and all property, both real and personal, including, without limitation, applications for membership, all debts due on whatever account, and all other choses in action of each of the consolidating or merging cooperatives shall be

deemed to be transferred to and vested in the new or surviving cooperative without further act or deed.

(c) The new or surviving cooperative shall be responsible and liable for all the liabilities and obligations of each of the consolidating or merging cooperatives; and any claim existing, or any action or proceeding pending, by or against any of the consolidating or merging cooperatives may be prosecuted as if the consolidation or merger had not taken place; but the new or surviving cooperative may be substituted in its place.

(d) Neither the rights of creditors nor any liens upon the property of any of such cooperatives shall be impaired by such consolidation or merger. (Ga. L. 1950, p. 192, § 30.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5. **C.J.S.** — 86 C.J.S., Telecommunications, § 26.

46-5-90. Conversion of telephone corporation into a cooperative; consolidation of telephone corporations into a cooperative.

(a) Any corporation organized under the laws of this state and furnishing or having the corporate power to furnish telephone service may be converted into a cooperative, and shall thereupon become subject to this part, with the same effect as if originally organized under this part, by complying with the following requirements:

(1) The proposition for the conversion of such corporation into a cooperative, along with proposed articles of conversion to give effect thereto, shall be submitted to a meeting of the members or stockholders of such corporation or, in case of a corporation having no members or stockholders, to a meeting of the incorporators of such corporation, the notice of which shall have attached thereto a copy of the proposed articles of conversion;

(2) If the proposition for the conversion of such corporation into a cooperative and the proposed articles of conversion, with any amendments, are approved by the affirmative vote of not less than two-thirds of those members of such corporation voting thereon at such meeting, or, if such corporation is a stock corporation, by the affirmative vote of the holders of not less than two-thirds of those shares of the capital stock of such corporation represented at such meeting and voting thereon, or, in the case of a corporation having no members and no shares of its capital stock outstanding, by the affirmative vote of not less than two-thirds of its incorporators, then articles of conversion in the form approved shall be executed and acknowledged on behalf of such corporation by its president or vice-president, and its seal shall be affixed thereto and attested by its secretary;

(3) The articles of conversion shall recite that they are executed pursuant to this part and shall state:

(A) The name of the corporation and the address of its principal office prior to its conversion into a cooperative;

(B) The statute or statutes under which it was organized;

(C) That such corporation elects to become a nonprofit telephone cooperative subject to this part;

(D) Its name as a cooperative;

(E) The address of the principal office of the cooperative;

(F) The names and addresses of the directors of the cooperative; and

(G) The manner in which members, stockholders, or incorporators of such corporation may or shall become members of the cooperative.

In addition, the articles of conversion may contain any provisions, not inconsistent with this part, deemed necessary or advisable for the conduct of the business of the cooperative, including the provisions for the issuance of nonvoting shares of stock as provided for in Code Section 46-5-67. If the articles of conversion make provision for the issuance of such shares of stock, they shall also state the manner in which members, stockholders, or incorporators of such corporation may or shall become shareholders of the cooperative. The president or vice-president executing such articles of conversion shall make and annex thereto an affidavit stating that the provisions of this Code section were duly complied with in regard to such articles;

(4) The articles of conversion shall be deemed to be the articles of incorporation of the cooperative, and an application for approval thereof, including such articles and the prescribed affidavit, signed and acknowledged by the president or vice-president of the corporation seeking to be converted into a cooperative, shall be presented to and approved by the superior court, or the judge thereof, filed with the clerk of the superior court of the county in which the principal office of the cooperative is to be located and with the Secretary of State, and published in the same manner as an application for original incorporation. The fee to be paid at the time of such filing shall be as described in Code Section 46-5-100. Upon such filing, the conversion shall be deemed to be effective.

(b) Any two or more corporations organized under the laws of this state and furnishing or having the corporate power to furnish telephone service may, if otherwise permitted to consolidate by the laws of this state, consolidate into a cooperative subject to this part, with the same effect as if

originally organized under this part, by complying with the following requirements:

(1) The proposition for the consolidation into a cooperative and the proposed articles of consolidation and conversion, with any amendments, shall be approved by each consolidating corporation in accordance with the statute or statutes under which it was organized and in accordance with the provisions of subsection (a) of this Code section;

(2) The articles of consolidation and conversion in the form approved shall be executed, acknowledged, and sealed in the manner prescribed in subsection (a) of this Code section and in the statute or statutes under which the consolidating corporations were organized. The articles of consolidation and conversion shall state that they are executed pursuant to this part and such statute or statutes and that each consolidating corporation elects that the new corporation shall be a cooperative. In addition, the articles of consolidation and conversion shall contain all other information required by such statute or statutes and by paragraph (2) of subsection (a) of this Code section, and may contain any provisions not inconsistent with this part deemed necessary or advisable for the conduct of the business of the cooperative. The president or vice-president executing such articles of consolidation and conversion shall make and annex thereto an affidavit stating that the preceding provisions of this Code section and of the statute or statutes under which the consolidating corporations were organized were duly complied with in regard to such articles. The articles of consolidation and conversion shall be deemed to be the articles of incorporation of the cooperative, and an application for approval thereof, including such articles and the prescribed affidavits, signed and acknowledged by the president or vice-president of each consolidating corporation, shall be presented to and approved by the superior court, filed with the clerk of the superior court of the county in which the principal office of the cooperative is to be located and with the Secretary of State, and published in the same manner as an application for incorporation. The fees to be paid upon such filing shall be as prescribed in Code Section 46-5-100. Upon such filing, the consolidation and conversion shall be deemed to be effective. (Ga. L. 1950, p. 192, § 31; Ga. L. 1984, p. 22, § 46; Ga. L. 1985, p. 149, § 46.)

46-5-91. Dissolution of cooperatives.

(a) A cooperative which has not commenced business may be dissolved by presenting to the superior court of the county where its principal office is located, or to the judge of the superior court in vacation, articles of dissolution which shall be executed and acknowledged on behalf of the cooperative by a majority of the incorporators and which shall state:

(1) The name of the cooperative;

- (2) The address of its principal office;
- (3) That the cooperative has not commenced business;
- (4) That any sums received by the cooperative, less any part thereof disbursed for expenses of the cooperative, have been returned or paid to those entitled thereto;
- (5) That no debt of the cooperative is unpaid; and
- (6) That a majority of the incorporators elect that the cooperative be dissolved.

The judge shall examine into the facts, and if he shall find the same to be true, he shall pass and enter an order that the cooperative is dissolved. Thereupon, the incorporators shall deliver the articles of dissolution and the order of the judge thereon to the clerk of the superior court of the county where the principal office of the cooperative is located, who, upon payment of the costs as set out in Code Section 46-5-100, shall deliver two certified copies of the articles of dissolution and the order of the judge thereon to the incorporators or their attorney, who shall forthwith deliver one of the copies to the Secretary of State for recording.

(b) A cooperative which has commenced business may be dissolved in the following manner:

(1) The proposition to dissolve shall be submitted to the members of the cooperative at any annual or special meeting, the notice of which shall set forth such proposition. The members at any such meeting shall approve, by the affirmative vote of not less than a majority of all members of the cooperative, the proposition that the cooperative be dissolved. Upon such approval, a certificate of election to dissolve (referred to in this Code section as the "certificate"), executed and acknowledged on behalf of the cooperative by its president or vice-president under its seal, attested by its secretary, and stating the name of the cooperative, the address of its principal office, and that the members of the cooperative have duly voted that the cooperative be dissolved, together with an affidavit made by its president or vice-president executing the certificate and stating that the statements in the certificate are true, shall be attached to a petition to the superior court of the county in which the principal office of the cooperative is located, or to the judge thereof in vacation, who shall examine into the facts alleged in the petition and the certificate; and if he shall find the same to be true and the relief prayed for within the purview and intent of this part, he shall grant the petition by proper order;

(2) Upon the granting of the petition, the certificate and the order of the judge thereon shall be forthwith filed in the office of the clerk of the superior court of the county in which the principal office of the cooperative is located and in the office of the Secretary of State; and the

fees for such filing as provided in Code Section 46-5-100 shall be submitted therewith. Upon such filing, the cooperative shall cease to carry on its business except to the extent necessary for the winding up thereof; but its corporate existence shall continue until the final order of dissolution has been made and entered by the judge and filed in the office of the clerk of said county and in the office of the Secretary of State. The board of directors shall, immediately upon the filing of the certificate with the order of the judge thereon in the office of the clerk of the superior court, cause notice of the dissolution proceedings to be mailed to each known creditor of and claimant against the cooperative; and the certificate and the order of the judge thereon shall be published once a week for four consecutive weeks in a newspaper of general circulation in the county in which the principal office of the cooperative is located. The board of directors shall wind up and settle the affairs of the cooperative; collect sums owing to it; liquidate its property and assets; pay and discharge its debts, obligations, and liabilities, other than those to patrons arising by reason of their patronage; and do all other things required to wind up its business. After paying or discharging or adequately providing for the payment or discharge of all its debts, obligations, and liabilities, other than those to patrons arising by reason of their patronage, the board of directors shall distribute any remaining sums, first, to shareholders, if any, for the pro rata return of the par value of their shares, together with any accrued dividends; second, to patrons for the pro rata return of all amounts standing to their credit by reason of their patronage; and third, to members for the pro rata repayment of membership fees. Any sums then remaining shall be distributed among its members and former members in proportion to their patronage;

(3) After the winding up and settling of the affairs of the cooperative, the board of directors shall authorize the execution of articles of dissolution, which shall be executed and acknowledged on behalf of the cooperative by its president or vice-president; and its seal shall be affixed thereto and attested by its secretary. The articles of dissolution shall recite that they are executed pursuant to this part and shall state:

- (A) The name of the cooperative;
- (B) The address of its principal office;
- (C) The date on which the certificate of election to dissolve and the order of the judge thereon was filed in the office of the clerk of the superior court;
- (D) That there are no actions or suits pending against the cooperative;
- (E) That all debts, obligations, and liabilities of the cooperative have been paid and discharged or that adequate provision has been made therefor; and

(F) That the preceding provisions of this subsection have been duly complied with.

The president or vice-president executing the articles of dissolution shall make and annex thereto an affidavit stating that the statements made therein are true. An application for final order of dissolution, accompanied by the articles of dissolution and the prescribed affidavit, shall be presented to the superior court of the county in which the principal office of the cooperative is located, or to the judge of the superior court in vacation, who, upon determination that preceding provisions of this subsection have been complied with, shall grant to the cooperative a final order of dissolution. The order shall be filed in the office of the clerk of said county and with the Secretary of State, and upon such filing the dissolution shall be deemed effective. The fees to be paid at the time of the filings provided for in this subsection shall be as prescribed in Code Section 46-5-100. (Ga. L. 1950, p. 192, § 32.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5.

C.J.S. — 86 C.J.S., Telecommunications, § 26.

46-5-92. Operation of cooperatives on nonprofit basis; contents of bylaws and of contracts with members and patrons regarding nonprofit operation.

A cooperative shall be operated on a nonprofit basis for the mutual benefit of its members and patrons. The bylaws of a cooperative or its contracts with members and patrons shall contain such provisions relative to the disposition of revenues and receipts as may be necessary and appropriate to establish and maintain its nonprofit and cooperative character. In the case of a cooperative authorized to issue shares of stock, such bylaws or contracts shall provide that no moneys shall be paid or credits given on the basis of patronage except after the declaration or payment of dividends on the outstanding shares of stock in accordance with the articles of incorporation of the cooperative; and such bylaws or contracts shall otherwise be consistent with the cooperative's obligations in regard to such shares of stock. (Ga. L. 1950, p. 192, § 33.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5.

C.J.S. — 86 C.J.S., Telecommunications, §§ 21, 22.

46-5-93. Pledging or encumbering of property, assets, rights, and privileges of cooperative by board of directors to secure indebtedness to federal government; tax exemption for mortgages and deeds of trust; sale, pledge, or encumbrance of property.

(a) In order to secure any indebtedness of the cooperative to the United States government or any agency or instrumentality thereof, the board of directors of a cooperative shall have full power and authority, without authorization by the members thereof, to authorize the execution and delivery of mortgages or deeds of trust of, or the pledging or encumbering of, any or all of the property, assets, rights, privileges, licenses, franchises, and permits, wherever situated, of the cooperative, as well as the revenues therefrom, all upon such terms and conditions as the board of directors shall determine. Any such mortgage or deed of trust shall be exempt from any mortgage recordation tax imposed by this state.

(b) A cooperative may not otherwise sell, mortgage, lease, or otherwise dispose of or encumber all or a substantial portion of its property unless such sale, mortgage, lease, or other disposition or encumbrance is authorized by the affirmative vote of not less than two-thirds of all the members of the cooperative, provided that notwithstanding any other provision of this part or any other provision of law, the board of directors may, upon the authorization of a majority of those members of the cooperative present at a meeting of the members thereof, the notice of which shall have set forth the proposed action, sell, lease, or otherwise dispose of all or a substantial portion of its property to another cooperative or a foreign corporation doing business in this state pursuant to this part, or to the holders of any notes, bonds, or other evidences of indebtedness issued to the United States government or any agency or instrumentality thereof. (Ga. L. 1950, p. 192, § 34.)

46-5-94. Liability of members and shareholders for debts of cooperative.

No member or shareholder shall be liable or responsible for any debts of the cooperative; and the property of the members and shareholders shall not be subject to execution therefor. (Ga. L. 1950, p. 192, § 35.)

46-5-95. Effect of recordation of mortgage, deed of trust, or other instrument of real and personal property of cooperative.

Any mortgage, deed of trust, or other instrument executed by a cooperative or foreign corporation doing business in this state pursuant to this part, which mortgage, deed of trust, or other instrument affects real and personal property and which is recorded in the real property records in any county in which such property is located or is to be located, shall have the same force and effect as if the mortgage, deed of trust, or other instrument

were also recorded, filed, or indexed as provided by law in the proper office in such county as a mortgage of personal property, provided that such instrument shall be indexed on the chattel mortgage record of the county although recorded already upon the real estate mortgage record. All after-acquired property of such cooperative or foreign corporation, which property is described or referred to as being mortgaged or pledged in any such mortgage, deed of trust, or other instrument, shall become subject to the lien thereof immediately upon the acquisition of such property by such cooperative or foreign corporation, whether or not such property was in existence at the time of the execution of such mortgage, deed of trust, or other instrument. Recordation of any such mortgage, deed of trust, or other instrument shall constitute notice and otherwise have the same effect with respect to such after-acquired property as it has, under the laws relating to recordation, with respect to property owned by such cooperative or foreign corporation at the time of the execution of such mortgage, deed of trust, or other instrument and therein described or referred to as being mortgaged or pledged thereby. (Ga. L. 1950, p. 192, § 36.)

46-5-96. Construction standards.

Construction of telephone lines and facilities by a cooperative shall, as a minimum requirement, comply with the standards of the National Electrical Code in effect at the time of such construction and shall be in such manner and according to such specifications as will avoid interference with or hazards to existing telephone lines, facilities, or systems. (Ga. L. 1950, p. 192, § 37.)

46-5-97. Limitation of actions.

All rights of action accruing against any cooperative or any foreign corporation doing business in this state pursuant to this part, which rights of action grow out of the acquisition of rights of way or easements or the occupying of lands of others by the cooperative or foreign corporation, shall be barred at the end of 12 months from the date of the accrual of such cause of action. In cases where any such cooperative or foreign corporation takes possession of the lands of another without having obtained an easement or without having condemned the property and such cooperative or foreign corporation continues to use any such land of another in accordance with the rights and powers granted to the cooperative or foreign corporation by this part, and the owner of such lands takes no legal steps to prevent the occupancy of the lands by the cooperative or foreign corporation, then the rights of the owner of such lands shall be limited to whatever damages may have been caused to his realty by such occupation; and the same shall be barred upon the expiration of six months after such unauthorized occupancy begins. (Ga. L. 1950, p. 192, § 38.)

46-5-98. Taking of acknowledgments by officers, trustees, members, or shareholders of cooperatives.

No person who is authorized to take acknowledgments under the laws of this state shall be disqualified from taking acknowledgments of instruments executed in favor of a cooperative or to which the cooperative is a party, by reason of that person's being an officer, trustee, member, or shareholder of such cooperative. (Ga. L. 1950, p. 192, § 39; Ga. L. 1982, p. 3, § 46.)

Cross references. — Power of notary to take acknowledgments of any party to any written instrument executed to or by a corporation of which such notary is a stockholder, director, etc., § 45-17-12.

46-5-99. Extension of telephone service into state by foreign nonprofit or cooperative corporations; Secretary of State as agent for foreign corporations; rights and powers of foreign corporations.

Any foreign nonprofit or cooperative corporation furnishing or authorized to furnish telephone service and owning or operating telephone lines or facilities in a state adjacent to this state may construct or acquire extensions of such lines in this state and operate such extensions without complying with any statute of this state pertaining to the qualification of foreign corporations for the doing of business in this state. Before constructing or operating such extensions, any such corporation shall designate the Secretary of State as its agent to accept service of process on its behalf, such designation to be effected by an instrument executed and acknowledged on its behalf by its president or vice president under its seal attested by its secretary and filed with the Secretary of State. Thereafter, with respect to its operation in this state, such corporation shall have only the rights, powers, privileges, and immunities of a cooperative organized under this part. In the event any process is served upon the Secretary of State, he shall forthwith forward the same by registered or certified mail or statutory overnight delivery to such corporation at the address thereof specified in the instrument executed pursuant to this Code section. (Ga. L. 1950, p. 192, § 40; Ga. L. 2000, p. 1589, § 3; Ga. L. 2004, p. 631, § 46.)

The 2004 amendment, effective May 13, 2004, part of an Act to revise, modernize, and correct the Code, revised punctuation in the second sentence of this Code section.

Editor's notes. — Ga. L. 2000, p. 1589,

§ 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

46-5-100. Fees.

(a) Each cooperative shall be charged by the clerk of the superior court the fee as provided in subsection (g) of Code Section 15-6-77 for the filing of incorporation proceedings.

(b) Each cooperative shall be charged by the Secretary of State the fees specified in Code Section 14-2-122 for the filing of documents and issuance of certificates. (Ga. L. 1950, p. 192, § 41; Ga. L. 1981, p. 1396, § 17; Ga. L. 1987, p. 325, § 1; Ga. L. 1989, p. 946, § 112; Ga. L. 1991, p. 1324, § 10.)

Code Commission notes. — Pursuant to ing “superior court” near the beginning of § 28-9-5, in 1988 “the” was inserted preceded subsection (a).

46-5-101. Annual license fee; exemption of cooperatives from taxation.

Each cooperative and each foreign corporation doing business in this state pursuant to this part shall pay annually, on or before July 1, to the Secretary of State a fee of \$10.00 but shall be exempt from all other excise and income taxes whatsoever. (Ga. L. 1950, p. 192, § 42.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, §§ 12, 19, 29.

C.J.S. — 86 C.J.S., Telecommunications, § 30.

46-5-102. Interconnection of lines, facilities, or systems of cooperatives and other telephone companies.

The lines, facilities, or systems of any cooperative or foreign corporation doing business in this state pursuant to this part and the lines, facilities, or systems of any other telephone company may, upon such terms and conditions as may be mutually agreeable to such cooperative or foreign corporation and such telephone company, be interconnected in order to provide continuous lines of communication for the subscribers of any such cooperative, foreign corporation, or telephone company. In the event any such cooperative or foreign corporation and any such telephone company shall be unable to agree upon the terms and conditions of such interconnection, including compensation therefor, the commission shall, upon the request of either party, establish terms and conditions with respect to such interconnection which shall be reasonable and nondiscriminatory. (Ga. L. 1950, p. 192, § 43.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 25.

C.J.S. — 86 C.J.S., Telecommunications, §§ 31, 32, 109.

46-5-103. Jurisdiction of commission.

Cooperatives and foreign corporations doing business in this state pursuant to this part shall be subject to the jurisdiction and supervision of the commission in the same manner and in every respect as any other

telephone company owning, leasing, or operating a public telephone service or telephone line in this state. (Ga. L. 1950, p. 192, § 44.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 21.

C.J.S. — 86 C.J.S., Telecommunications, §§ 5, 6, 8 et seq., 17.

46-5-104. Applicability of Chapter 5 of Title 10.

Chapter 5 of Title 10 shall not apply to any note, bond, or other evidence of indebtedness issued to the United States government or any agency or instrumentality thereof by any cooperative or foreign corporation doing business in this state pursuant to this part; nor shall Chapter 5 of Title 10 apply to any mortgage, deed of trust, or other instrument executed to secure the same. Chapter 5 of Title 10 also shall not apply to the issuance of membership certificates, shares of stock, or any other evidence of member, shareholder, or patron interest by any cooperative or any such foreign corporation. (Ga. L. 1950, p. 192, § 45.)

46-5-105. Construction of part.

This part is complete in itself and shall be controlling. This part shall be construed liberally. The enumeration in this part of any object, purpose, power, manner, method, or thing shall not be deemed to exclude like or similar objects, purposes, powers, manners, methods, or things. (Ga. L. 1950, p. 192, § 46.)

PART 4

EMERGENCY TELEPHONE NUMBER “911” SYSTEM

Cross references. — Emergency management, Ch. 3, T. 38.

RESEARCH REFERENCES

C.J.S. — 86 C.J.S., Telecommunications, §§ 3, 4, 17.

46-5-120. Short title.

This part shall be known and may be cited as the “Georgia Emergency Telephone Number ‘911’ Service Act of 1977.” (Ga. L. 1977, p. 1040, § 1.)

46-5-121. Legislative intent.

(a) The General Assembly finds and declares that it is in the public interest to shorten the time required for a citizen to request and receive

emergency aid. There currently exist numerous different emergency phone numbers throughout the state. Provision for a single, primary three-digit emergency number through which emergency services can be quickly and efficiently obtained would provide a significant contribution to law enforcement and other public service efforts by making it easier to notify public safety personnel. Such a simplified means of procuring emergency services will result in the saving of lives, a reduction in the destruction of property, and quicker apprehension of criminals. It is the intent of the General Assembly to establish and implement a cohesive state-wide emergency telephone number “911” system which will provide citizens with rapid, direct access to public safety agencies by dialing telephone number “911” with the objective of reducing the response time to situations requiring law enforcement, fire, medical, rescue, and other emergency services.

(b) The General Assembly further finds and declares that the benefits of “911” service should be widely available, regardless of whether a “911” call is placed from a traditional landline telephone or from a wireless telephone. It is also in the public interest that users of wireless telephones should bear some of the cost of providing this life-saving service, as users of landline telephones currently do. It is the intent of the General Assembly to bring wireless telephone service within the scope of this part and to establish a means by which local public safety agencies may provide enhanced “911” service to wireless telephone users. (Ga. L. 1977, p. 1040, § 2; Ga. L. 1998, p. 1017, § 2.)

Cross references. — Provision of emergency medical services, Ch. 11, T. 31.

JUDICIAL DECISIONS

No waiver of defense of sovereign and official immunity. — The General Assembly, in its enactment of O.C.G.A. Pt. 4, Ch. 5, T. 46, has not waived defenses of sovereign and official immunity which could otherwise be asserted by the county and its employees and

officers in their implementation and operation of the “911” telephone system. *Hendon v. DeKalb County*, 203 Ga. App. 750, 417 S.E.2d 705, cert. denied, 203 Ga. App. 906, 417 S.E.2d 705 (1992).

46-5-122. Definitions.

As used in this part, the term:

(1) “Addressing” means the assigning of a numerical address and street name (the name may be numerical) to each location within a local government’s geographical area necessary to provide public safety service as determined by the local government. This address replaces any route and box number currently in place in the “911” data base and facilitates quicker response by public safety agencies.

(1.1) "Agency" means the Georgia Emergency Management Agency established pursuant to Code Section 38-3-20 unless the context clearly requires otherwise.

(2) "Director" means the director of emergency management appointed pursuant to Code Section 38-3-20.

(3) "Emergency '911' system" means a local exchange telephone service or wireless service which facilitates the placing of calls by persons in need of emergency services to a public safety answering point by dialing the telephone number "911" and under which calls to "911" are answered by public safety answering points established and operated by the local government subscribing to the "911" service. The term "emergency '911' system" also includes "enhanced '911' service," which means an emergency telephone system that provides the caller with emergency "911" system service and, in addition, directs "911" calls to appropriate public safety answering points by selective routing based on the geographical location from which the call originated and provides the capability for automatic number identification and automatic location identification features.

(4) "Exchange access facility" means the access from a particular telephone subscriber's premises to the telephone system of a service supplier. Exchange access facilities include service supplier provided access lines, PBX trunks, and Centrex network access registers, all as defined by tariffs of the telephone companies as approved by the Georgia Public Service Commission. Exchange access facilities do not include service supplier owned and operated telephone pay station lines, Wide Area Telecommunications Services (WATS), Foreign Exchange (FX), or incoming only lines.

(5) "Local government" means any city, county, military base, or political subdivision of Georgia and its agencies.

(6) "'911' charge" means a contribution to the local government for the "911" service start-up equipment costs, subscriber notification costs, addressing costs, billing costs, nonrecurring and recurring installation, maintenance, service, and network charges of a service supplier providing "911" service pursuant to this part, and costs associated with the hiring, training, and compensating of dispatchers employed by the local government to operate said "911" system at the public safety answering points.

(7) "Public agency" means the state and any city, county, city and county, municipal corporation, chartered organization, public district, or public authority located in whole or in part within this state which provides or has authority to provide fire-fighting, law enforcement, ambulance, medical, or other emergency services.

(8) "Public safety agency" means a functional division of a public agency which provides fire-fighting, law enforcement, emergency medi-

cal, suicide prevention, civil defense, poison control, drug prevention, child abuse, spouse abuse, or other emergency services.

(8.1) "Public safety answering point" means the public safety agency which receives incoming "911" telephone calls and dispatches appropriate public safety agencies to respond to such calls.

(9) "Service supplier" means a person or entity who provides local exchange telephone service or wireless service to a telephone subscriber.

(10) "Telephone subscriber" means a person or entity to whom local exchange telephone service or wireless service, either residential or commercial, is provided and in return for which the person or entity is billed on a monthly basis. When the same person, business, or organization has several telephone access lines, each exchange access facility shall constitute a separate subscription. When the same person, business, or organization has several wireless telephones, each wireless telecommunications connection shall constitute a separate connection.

(11) "Wireless enhanced '911' charge" means a contribution to the local government for the following:

(A) The costs to the local government of implementing or upgrading, and maintaining, an emergency "911" system which is capable of receiving and utilizing the following information, as it relates to "911" calls made from a wireless telecommunications connection: automatic number identification, the location of the base station or cell site which receives the "911" call, and the location of the wireless telecommunications connection;

(B) Nonrecurring and recurring installation, maintenance, service, and network charges of a wireless service supplier to provide the information described in subparagraph (A) of this paragraph; and

(C) Other costs which may be paid with money from the Emergency Telephone System Fund, pursuant to subsection (e) of Code Section 46-5-134.

(12) "Wireless service" means "commercial mobile service" as defined under Section 332(D) of the federal Telecommunications Act of 1996 (47 U.S.C. Section 157, et seq.), regulations of the Federal Communications Commission, and the Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66) and includes real-time, two-way interconnected voice service which is provided over networks which utilize intelligent switching capability and offer seamless handoff to customers. The term does not include one-way signaling service, data transmission service, nonlocal radio access line service, or a private telecommunications service.

(13) "Wireless service supplier" means a provider of wireless service.

(14) "Wireless telecommunications connection" means any mobile station for wireless service that connects a provider of wireless service to

a provider of local exchange telephone service. (Ga. L. 1977, p. 1040, § 3; Ga. L. 1984, p. 22, § 46; Ga. L. 1985, p. 149, § 46; Ga. L. 1988, p. 1984, § 1; Ga. L. 1990, p. 179, § 1; Ga. L. 1991, p. 93, § 1; Ga. L. 1993, p. 1368, § 1; Ga. L. 1998, p. 1017, § 3; Ga. L. 1999, p. 873, § 1; Ga. L. 2004, p. 631, § 46.)

The 2004 amendment, effective May 13, 2004, part of an Act to revise, modernize, and correct the Code, revised punctuation in paragraph (12).

JUDICIAL DECISIONS

No waiver of defense of sovereign and official immunity. — The General Assembly, in its enactment of the “Georgia Emergency Telephone Number ‘911’ Service Act,” § 46-5-121 et. seq., has not waived defenses of sovereign and official immunity which could otherwise be asserted by the county

and its employees and officers in their implementation and operation of the “911” telephone system. *Hendon v. DeKalb County*, 203 Ga. App. 750, 417 S.E.2d 705, cert. denied, 203 Ga. App. 906, 417 S.E.2d 705 (1992).

46-5-123. Creation of “911” Advisory Committee; selection of members; filling of vacancies.

(a) For the purposes of the development and implementation of a plan for the state-wide emergency telephone number “911” system, there is created the “911” Advisory Committee to be composed of the director of emergency management, who shall serve as chairperson; the commissioner of administrative services or his or her designee; and ten other members appointed by the Governor, as follows:

(1) Three members appointed from nominees of the Georgia Municipal Association;

(2) Three members appointed from nominees of the Association County Commissioners of Georgia; and

(3) Four members who are experienced in and currently involved in the management of emergency telephone systems.

(b) When appointments are made, the associations making nominations pursuant to this Code section shall submit at least three times as many nominees as positions to be filled at that time by nominees of the association.

(c) The appointed members of the committee shall serve at the pleasure of the Governor. Vacancies shall be filled in the same manner as the original appointment. (Ga. L. 1977, p. 1040, § 4; Ga. L. 1998, p. 1017, § 4; Ga. L. 1999, p. 372, § 4.)

46-5-124. Guidelines for implementing state-wide emergency telephone number “911” system; training and equipment standards.

(a) The agency shall develop guidelines for implementing a state-wide emergency telephone number “911” system. The guidelines shall provide for:

(1) Steps of action necessary for public agencies to effect the necessary coordination, regulation, and development preliminary to a “911” system that will incorporate the requirements of each public service agency in each local government of Georgia;

(2) Identification of mutual aid agreements necessary to effect the “911” system, including coordination on behalf of the State of Georgia with any federal agency to secure financial assistance or other desirable activities in connection with the receipt of funding that may be provided to communities for the planning, development, or implementation of the “911” system;

(3) The coordination necessary between local governments planning or developing a “911” system and other state agencies, the Public Service Commission, all affected utility and telephone companies, wireless service suppliers, and other agencies;

(4) The actions to establish emergency telephone communications necessary to meet the requirements for each local government, including law enforcement, fire-fighting, medical, suicide prevention, rescue, or other emergency services; and

(5) The actions to be taken by a local government desiring to provide wireless enhanced “911” service, including requirements contained in 47 Code of Federal Regulations Section 20.18.

(b) The agency shall be responsible for encouraging and promoting the planning, development, and implementation of local “911” system plans. The agency shall develop any necessary procedures to be followed by public agencies for implementing and coordinating such plans and shall mediate whenever disputes arise or agreements cannot be reached between the local political jurisdiction and other public agencies involving the “911” system.

(c) Subject to the approval of the Governor, the director shall be authorized to promulgate rules and regulations to establish minimum standards relating to training and equipment. Such training standards shall not be inconsistent with the training course or certification required for communications officers under Code Section 35-8-23. Notwithstanding any other law to the contrary, no communications officer hired to the staff of a “911” communications center shall be required to complete his or her training pursuant to Code Section 35-8-23 prior to being hired or employed for such position.

(d) The agency shall maintain the registry of wireless service suppliers provided for in Code Section 46-5-124.1. (Ga. L. 1977, p. 1040, § 1; Ga. L. 1984, p. 22, § 46; Ga. L. 1998, p. 1017, § 5; Ga. L. 1999, p. 81, § 46; Ga. L. 1999, p. 873, § 2.)

Editor's notes. — The plan for implementing a statewide emergency telephone number "911" system required by former Code Section 46-5-124 was submitted to the committee for its review on October 29,

1979. A meeting of the committee was held November 19, 1979, at which time the plan and the effective date were approved. The plan became effective on December 1, 1979.

JUDICIAL DECISIONS

No waiver of defense of sovereign and official immunity. — The General Assembly, in its enactment of the "Georgia Emergency Telephone Number '911' Service Act," O.C.G.A. § 46-5-121 et. seq., has not waived defenses of sovereign and official immunity which could otherwise be asserted by the

county and its employees and officers in their implementation and operation of the "911" telephone system. *Hendon v. DeKalb County*, 203 Ga. App. 750, 417 S.E.2d 705, cert. denied, 203 Ga. App. 906, 417 S.E.2d 705 (1992).

46-5-124.1. Service suppliers must register certain information with the director; notification of changes.

(a) Any wireless service supplier that provides wireless service or is authorized to provide wireless service in Georgia shall register the following information with the director:

(1) The name, address, and telephone number of the representative of the wireless service supplier to whom the resolution adopted pursuant to Code Section 46-5-133 or other notification of intent to provide automatic number identification or automatic location identification, or both, of a wireless telecommunications connection should be submitted;

(2) The name, address, and telephone number of the representative of the wireless service supplier with whom a local government must coordinate to implement automatic number identification or automatic location identification, or both, of a wireless telecommunications connection;

(3) The counties in Georgia in which the wireless service supplier is authorized to provide wireless service; and

(4) Every corporate name under which the wireless service supplier is authorized to provide wireless service in Georgia.

(b) A wireless service supplier shall notify the director of any change to the information described in subsection (a) of this Code section within 30 days of such change. (Code 1981, § 46-5-124.1, enacted by Ga. L. 1999, p. 873, § 3.)

46-5-125. Formation of multijurisdictional and regional “911” systems.

Nothing in this part shall be construed to prohibit or discourage the formation of multijurisdictional or regional “911” systems; and any system established pursuant to this part may include the jurisdiction, or any portion thereof, of more than one public agency. (Ga. L. 1977, p. 1040, § 6.)

46-5-126. Cooperation by commission and telephone industry.

The agency shall coordinate its activities with those of the Public Service Commission, which shall encourage the Georgia telephone industry to activate facility modification plans for a timely “911” implementation. (Ga. L. 1977, p. 1040, § 7; Ga. L. 1998, p. 1017, § 15.)

46-5-127. Approval of “911” systems by agency.

After January 1, 1978, no emergency telephone number “911” system shall be established, and no existing system shall be expanded to provide wireless enhanced “911” service, without written confirmation by the agency that the local plan conforms to the guidelines and procedures provided for in Code Section 46-5-124. (Ga. L. 1977, p. 1040, § 8; Ga. L. 1998, p. 1017, § 6.)

46-5-128. Cooperation by public agencies.

All public agencies shall assist the agency in its efforts to carry out the intent of this part; and such agencies shall comply with the guidelines developed pursuant to Code Section 46-5-124 by furnishing a resolution of intent regarding an emergency telephone number “911” system. (Ga. L. 1977, p. 1040, § 9; Ga. L. 1998, p. 1017, § 7.)

46-5-129. Use of “911” emblem.

The agency may develop a “911” emblem which may be utilized on marked vehicles used by public safety agencies participating in a local “911” system. (Ga. L. 1980, p. 699, § 1; Ga. L. 1998, p. 1017, § 8.)

46-5-130. Federal assistance.

The agency is authorized to apply for and accept federal funding assistance in the development and implementation of a state-wide emergency telephone number “911” system. (Ga. L. 1977, p. 1040, § 10; Ga. L. 1998, p. 1017, § 15.)

46-5-131. Exemptions from liability in operation of “911” system.

(a) Whether participating in a state-wide emergency “911” system or an emergency “911” system serving one or more local governments, neither

the state nor any local government of the state nor any emergency “911” system provider, its employees, directors, officers, and agents, except in cases of wanton and willful misconduct or bad faith, shall be liable for death or injury to the person or for damage to property as a result of either developing, adopting, establishing, participating in, implementing, maintaining, or carrying out duties involved in operating the “911” emergency telephone system or in the identification of the telephone number, address, or name associated with any person accessing an emergency “911” system.

(b) No local government of the State of Georgia shall be required to release, indemnify, defend, or hold harmless any emergency “911” system provider from any loss, claim, demand, suit, or other action or any liability whatsoever which arises out of subsection (a) of this Code section, unless the local government agrees or has agreed to assume such obligations. (Code 1981, § 46-5-131, enacted by Ga. L. 1984, p. 652, § 1; Ga. L. 1990, p. 179, § 2.)

Cross references. — Limitation of liability of persons rendering emergency care generally, § 51-1-29.

JUDICIAL DECISIONS

No waiver of defense of sovereign and official immunity. — The General Assembly, in its enactment of the “Georgia Emergency Telephone Number ‘911’ Service Act,” O.C.G.A. § 46-5-121 et. seq., has not waived defenses of sovereign and official immunity which could otherwise be asserted by the county and its employees and officers in their implementation and operation of the “911” telephone system. *Hendon v. DeKalb County*, 203 Ga. App. 750, 417 S.E.2d 705, cert. denied, 203 Ga. App. 906, 417 S.E.2d 705 (1992).

Wanton and willful conduct defined. — Wanton and willful conduct differs from gross negligence. Willful conduct is based on an actual intention to do harm or inflict injury, while wanton conduct is that which is so reckless or so charged with indifference to the consequences as to justify the jury in finding a wantonness equivalent in spirit to actual intent. *Hendon v. DeKalb County*, 203 Ga. App. 750, 417 S.E.2d 705, cert. denied, 203 Ga. App. 906, 417 S.E.2d 705 (1992).

46-5-132. Fees by wireless service supplier.

It shall be unlawful for any wireless service supplier to assess or charge any fee for an emergency telephone call placed on a “911” emergency telephone system. The prohibition provided for in this Code section shall only apply to actual emergency telephone calls made on such system and shall not apply to nor prohibit any fee assessed or charged for the implementation or enhancement of such system. (Code 1981, § 46-5-132, enacted by Ga. L. 1988, p. 465, § 1; Ga. L. 1998, p. 1017, § 9.)

46-5-133. Authority of local government to adopt resolution to impose monthly “911” charge.

(a) Subject to the provisions of subsection (b) of this Code section, the governing authority of any local government which operates or which contracts for the operation of an emergency “911” system is authorized to adopt a resolution to impose a monthly “911” charge upon each exchange access facility subscribed to by telephone subscribers whose exchange access lines are in the areas served or which would be served by the “911” service. Subject to the provisions of subsection (b) of this Code section and of subparagraphs (a)(2)(A) and (a)(2)(B) of Code Section 46-5-134, the governing authority of any local government which operates or contracts for the operation of an emergency “911” system which is capable of providing or provides enhanced “911” service to persons or entities with a wireless telecommunications connection, excluding a military base, is authorized to adopt a resolution to impose a monthly wireless enhanced “911” charge upon each wireless telecommunications connection subscribed to by telephone subscribers whose billing address is within the geographic area that is served by the local government or that would be served by the local government for the purpose of such an emergency “911” system. Such resolution, or any amendment to such resolution, shall fix a date on which such resolution and the imposition and collection of the “911” charge or wireless enhanced “911” charge, as provided in the resolution, shall become effective; provided, however, that such effective date shall be at least 120 days following the date of the adoption of such resolution or any amendment to such resolution by the local government. The “911” charge must be uniform, may not vary according to the type of exchange access facility used, and may be billed on a monthly or quarterly basis. The wireless enhanced “911” charge must be uniform, not vary according to the type of wireless telecommunications connection used, and may be billed on a monthly or quarterly basis.

(b)(1) Except as provided in paragraph (2) of this subsection, no local government shall be authorized to exercise the power conferred by this Code section unless either:

(A) A majority of the voters residing in that political subdivision who vote in an election called for such purpose shall vote to authorize the implementation of this Code section. Such election shall be called and conducted as other special elections are called and conducted in such local government when requested by such local government authority. The question or questions on the ballot shall be as prescribed by the election superintendent, provided that separate questions may be posed regarding implementation of a “911” charge and of a wireless enhanced “911” charge; or

(B) After a public hearing held upon not less than ten days’ public notice.

(2) The provisions of paragraph (1) of this subsection shall not apply with respect to a local government if the governing authority of such local government has on or before March 7, 1988, contracted with a local exchange telephone service supplier for the purchase or operation, or both, of a local exchange telephone "911" system.

(c) On and after January 1, 1999, no monthly "911" charge provided for in this Code section may be imposed or continue to be imposed unless each dispatch center funded in whole or in part from such charges is in compliance with Code Section 36-60-19, relating to required TDD training for communications officers. (Code 1981, § 46-5-133, enacted by Ga. L. 1988, p. 1984, § 2; Ga. L. 1990, p. 179, § 3; Ga. L. 1998, p. 540, § 3; Ga. L. 1998, p. 1017, § 10; Ga. L. 1999, p. 81, § 46; Ga. L. 1999, p. 873, § 4.)

Code Commission notes. — Two 1988 Ga. L. 1988, p. 1984, was redesignated as Acts added a § 46-5-132. Pursuant to Code § 46-5-133. section 28-9-5, the Code section added by

46-5-134. Billing of subscribers; liability of subscriber for service charge; taxes on service; establishment of Emergency Telephone System Fund; records; use of federal, state, municipal, or private funds.

(a)(1) The subscriber of an exchange access facility may be billed for the monthly "911" charge, if any, imposed with respect to that facility by the service supplier. Such "911" charge may not exceed \$1.50 per month per exchange access facility provided to the telephone subscriber. All exchange access facilities billed to federal, state, or local governments shall be exempt from the "911" charge. Each service supplier shall, on behalf of the local government, collect the "911" charge from those telephone subscribers to whom it provides exchange telephone service in the area served by the emergency "911" system. As part of its normal billing process, the service supplier shall collect the "911" charge for each month an exchange access facility is in service, and it shall list the "911" charge as a separate entry on each bill. If a service supplier receives a partial payment for a bill from a telephone subscriber, the service supplier shall apply the payment against the amount the telephone subscriber owes the service supplier first.

(2)(A) If the governing authority of a local government operates or contracts for the operation of an emergency "911" system which is capable of providing or provides automatic number identification of a wireless telecommunications connection and the location of the base station or cell site which receives a "911" call from a wireless telecommunications connection, the subscriber of a wireless telecommunications connection whose billing address is within the geographic area that is served by the local government or that would be served by the local government for the purpose of such an emergency "911" system may be billed for the monthly wireless enhanced "911" charge,

if any, imposed with respect to that connection by the wireless service supplier. Such wireless enhanced "911" charge may not exceed the amount of the monthly "911" charge imposed upon subscribers of exchange access facilities pursuant to paragraph (1) of this subsection and, in no event, shall such wireless enhanced "911" charge exceed \$1.00 per month per wireless telecommunications connection provided to the telephone subscriber.

(B) On and after October 1, 2001, if the governing authority of a local government operates or contracts for the operation of an emergency "911" system which is capable of providing or provides automatic number identification and automatic location identification of a wireless telecommunications connection, the subscriber of a wireless telecommunications connection whose billing address is within the geographic area that is served by the local government or that would be served by the local government for the purpose of such an emergency "911" system may be billed for the monthly wireless enhanced "911" charge, if any, imposed with respect to that connection by the wireless service supplier. Such wireless enhanced "911" charge may not exceed the amount of the monthly "911" charge imposed upon subscribers of exchange access facilities pursuant to paragraph (1) of this subsection and shall be imposed on a monthly basis for each wireless telecommunications connection provided to the telephone subscriber.

(C) All wireless telecommunications connections billed to federal, state, or local governments shall be exempt from the wireless enhanced "911" charge. Each wireless service supplier shall, on behalf of the local government, collect the wireless enhanced "911" charge from those telephone subscribers whose billing address is within the geographic area that is served by the local government or that would be served by the local government for the purpose of such an emergency "911" system. As part of its normal billing process, the wireless service supplier shall collect the wireless enhanced "911" charge for each month a wireless telecommunications connection is in service, and it shall list the wireless enhanced "911" charge as a separate entry on each bill. If a wireless service supplier receives partial payment for a bill from a telephone subscriber, the wireless service supplier shall apply the payment against the amount the telephone subscriber owes the wireless service supplier first.

(D) Notwithstanding the foregoing, the application of any "911" service charge with respect to a mobile telecommunications service, as defined in 4 U.S.C. Section 124(7), shall be governed by the provisions of Code Section 48-8-6.

(b) Every telephone subscriber in the area served by the emergency "911" system shall be liable for the "911" and the wireless enhanced "911"

charges imposed under this Code section until it has been paid to the service supplier. A service supplier shall have no obligation to take any legal action to enforce the collection of the "911" or wireless enhanced "911" charge. The service supplier shall provide the governing authority within 60 days with the name and address of each subscriber who has refused to pay the "911" or wireless enhanced "911" charge after such "911" or wireless enhanced "911" charge has become due. A collection action may be initiated by the local government that imposed the charges, and reasonable costs and attorneys' fees associated with that collection action may be awarded to the local government collecting the "911" or wireless enhanced "911" charge.

(c) The local government contracting for the operation of an emergency "911" system shall remain ultimately responsible to the service supplier for all emergency "911" system installation, service, equipment, operation, and maintenance charges owed to the service supplier. Any taxes due on emergency "911" system service provided by the service supplier will be billed to the local government subscribing to the service. State and local taxes do not apply to the "911" or wireless enhanced "911" charge billed to telephone subscribers under this Code section.

(d)(1) Each service supplier that collects "911" or wireless enhanced "911" charges on behalf of the local government is entitled to retain as an administrative fee an amount equal to 3 percent of the gross "911" or wireless enhanced "911" charge receipts to be remitted to the local government. The remaining amount shall be due quarterly to the local government and shall be remitted to it no later than 60 days after the close of a calendar quarter. The "911" and the wireless enhanced "911" charges collected by the service supplier shall be deposited and accounted for in a separate restricted revenue fund known as the Emergency Telephone System Fund maintained by the local government. The local government may invest the money in the fund in the same manner that other moneys of the local government may be invested and any income earned from such investment shall be deposited into the Emergency Telephone System Fund.

(2)(A) Before July 1, 2002, 30¢ of the monthly wireless enhanced "911" charge imposed pursuant to subparagraph (a)(2)(A) of this Code section shall be deposited in a separate restricted reserve account of the Emergency Telephone System Fund, which shall be designated as the Wireless Phase I Reserve Account. Money from the Wireless Phase I Reserve Account shall be used only to pay the nonrecurring and recurring installation, maintenance, service, and network charges of a wireless service supplier which are associated with providing automatic number identification of a wireless telecommunications connection and the location of the base station or cell site which receives a "911" call from a wireless telecommunications connection;

provided, however, that if the local government has not, by July 1, 2002, begun operation or contracted for the operation of an emergency "911" system which is capable of providing or provides automatic location identification of a wireless telecommunications connection, the funds in the Wireless Phase I Reserve Account on July 1, 2002, shall be transferred into an appropriate unrestricted account or accounts of the Emergency Telephone System Fund and may be used for any purpose authorized under subsection (e) of this Code section. No wireless enhanced "911" charge may be imposed pursuant to subparagraph (a)(2)(B) of this Code section for a period of 24 months following the transfer of funds from the Wireless Phase I Reserve Account pursuant to this subparagraph. On and after July 1, 2002, 15¢ of the monthly wireless enhanced "911" charge imposed pursuant to subparagraph (a)(2)(A) of this Code section shall be deposited in the Wireless Phase I Reserve Account.

(B) Thirty cents of the monthly wireless enhanced "911" charge imposed pursuant to subparagraph (a)(2)(B) of this Code section shall be deposited in a separate restricted reserve account of the Emergency Telephone System Fund, which shall be designated as the Wireless Phase II Reserve Account. Money from the Wireless Phase II Reserve Account shall be used only to pay the nonrecurring and recurring installation, maintenance, service, and network charges of a wireless service supplier which are associated with providing automatic number identification and automatic location identification of a wireless telecommunications connection. Any funds which are in the Wireless Phase I Reserve Account at the time when the wireless enhanced "911" charge is first imposed pursuant to subparagraph (a)(2)(B) of this Code section shall be transferred to the Wireless Phase II Reserve Account.

(3) The governing authority of a local government operating or contracting for the operation of an emergency "911" system shall, by resolution, reaffirm the necessity for the "911" and the wireless enhanced "911" charges beginning with the thirteenth month following the month in which emergency "911" system service is first provided in the political subdivision and during such month annually thereafter.

(4) Such monthly "911" and wireless enhanced "911" charges may be reduced at any time by the governing authority by resolution; provided, however, that the said governing authority shall be required to reduce such monthly "911" or wireless enhanced "911" charge at any time the projected revenues from "911" or wireless enhanced "911" charges will cause the unexpended revenues in the Emergency Telephone System Fund at the end of the fiscal year to exceed by one and one-half times the unexpended revenues in such fund at the end of the immediately preceding fiscal year or at any time the unexpended revenues in such

fund at the end of the fiscal year exceed by one and one-half times the unexpended revenues in such fund at the end of the immediately preceding fiscal year. Such reduction in the "911" or wireless enhanced "911" charge shall be in an amount which will avert the accumulation of revenues in such fund at the end of the fiscal year which will exceed by one and one-half times the amount of revenues in the fund at the end of the immediately preceding fiscal year. Funds in the Wireless Phase I Reserve Account and the Wireless Phase II Account shall not be considered in making the calculations described in this paragraph.

(e) Money from the Emergency Telephone System Fund shall be used only to pay for:

(1) The lease, purchase, or maintenance of emergency telephone equipment, including necessary computer hardware, software, and data base provisioning; addressing; and nonrecurring costs of establishing a "911" system;

(2) The rates associated with the service supplier's "911" service and other service supplier's recurring charges;

(3) The actual cost of salaries, including benefits, of employees hired by the local government solely for the operation and maintenance of the emergency "911" system and the actual cost of training such of those employees who work as dispatchers;

(4) Office supplies of the public safety answering points used directly in providing emergency "911" system services;

(5) The cost of leasing or purchasing a building used as a public safety answering point. Moneys from the fund cannot be used for the construction or lease of an emergency "911" system building until the local government has completed its street addressing plan;

(6) The lease, purchase, or maintenance of computer hardware and software used at a public safety answering point, including computer-assisted dispatch systems;

(7) Supplies directly related to providing emergency "911" system services, including the cost of printing emergency "911" public education materials; and

(8) The lease, purchase, or maintenance of logging recorders used at a public safety answering point to record telephone and radio traffic.

(f) The local government may contract with a service supplier for any term negotiated by the service supplier and the local government for an emergency "911" system and may make payments from the Emergency Telephone System Fund to provide any payments required by the contract.

(g) The service supplier shall maintain records of the amount of the "911" and wireless enhanced "911" charges collected for a period of at

least three years from the date of collection. The local government may, at its expense, require an annual audit of the service supplier's books and records with respect to the collection and remittance of the "911" and wireless enhanced "911" charges.

(h) In order to provide additional funding for the local government for emergency "911" system purposes, the local government may receive federal, state, municipal, or private funds which shall be expended for the purposes of this part.

(i) Subject to the provisions of Code Section 46-5-133, a telephone subscriber may be billed for the monthly "911" or wireless enhanced "911" charge for up to 18 months in advance of the date on which the "911" service becomes fully operational.

(j) In the event the local government is a federal military base providing emergency services to local exchange telephone subscribers residing on the base, a local exchange telephone service supplier is authorized to apply the "911" charges collected to the bill for "911" service rather than remit the funds to an Emergency Telephone System Fund. (Code 1981, § 46-5-134, enacted by Ga. L. 1990, p. 179, § 4; Ga. L. 1991, p. 93, § 2; Ga. L. 1991, p. 94, § 46; Ga. L. 1993, p. 1368, § 2; Ga. L. 1998, p. 1017, § 11; Ga. L. 1999, p. 81, § 46; Ga. L. 1999, p. 466, § 1; Ga. L. 1999, p. 873, § 5; Ga. L. 2000, p. 136, § 46; Ga. L. 2002, p. 970, § 3.)

The 2002 amendment, effective May 14, 2002, added subparagraph (a)(2)(D). See Editor's note for applicability.

Editor's notes. — Ga. L. 2002, p. 970, § 4, not codified by the General Assembly, provides: "If a court of competent jurisdiction enters a final judgment on the merits that is based on federal law, is no longer subject to appeal, and substantially limits or impairs the essential elements of Sections 116

through 126 of Title 4 U.S.C., then all provisions and applications of this Act are declared to be invalid and have no legal effect as of the date of entry of such judgment."

Ga. L. 2002, p. 970, § 5, not codified by the General Assembly, provides that this Act "shall apply to charges for mobile telecommunications services reflected on customer bills issued on or after August 2, 2002."

46-5-134.1. Counties where the governing authorities of more than one local government have adopted a resolution to impose an enhanced "911" charge.

(a) This Code section shall apply in counties where the governing authorities of more than one local government have adopted a resolution to impose a wireless enhanced "911" charge in accordance with the provisions of subsection (a) of Code Section 46-5-133 and notwithstanding any contrary provision of Code Section 46-5-133 or 46-5-134.

(b) A wireless service supplier may certify to any of the governing authorities described in subsection (a) of this Code section that the wireless service supplier is unable to determine whether the billing addresses of its subscribers are within the geographic area that is served by such local

government. Upon such certification, the wireless service supplier shall be authorized to collect the wireless enhanced “911” charge from any of its subscribers whose billing address is within the county and is within an area that is as close as reasonably possible to the geographic area that is served by such local government. The wireless service supplier shall notify such subscribers that if such subscriber’s billing address is not within the geographic area served by such local government, such subscriber is not obligated to pay the wireless enhanced “911” charge.

(c) Unless otherwise provided in an agreement among the governing authorities described in subsection (a) of this Code section, the charges collected by a wireless service supplier pursuant to this Code section shall be remitted to such governing authorities based upon the number of calls from wireless telecommunications connections that each such individual local government receives and counts relative to the total number of calls from wireless telecommunications connections that are received and counted by all of such local governments.

(d) The authority granted to a wireless service supplier pursuant to this Code section shall terminate (1) on the date that the wireless service supplier certifies to a governing authority described in subsection (a) of this Code section that the wireless service supplier is able to determine whether the billing addresses of its subscribers are within the geographic area that is served by such governing authority or (2) on the date which is 180 days from the date that any of its subscribers were first billed under this Code section, whichever is earlier. Upon termination of such authority, the wireless service supplier shall collect the wireless enhanced “911” charge as provided in Code Section 46-5-134. (Code 1981, § 46-5-134.1, enacted by Ga. L. 1999, p. 873, § 6.)

46-5-135. Liability of service supplier in civil action.

A service supplier, including any telephone company and its employees, directors, officers, and agents, is not liable for any damages in a civil action for injuries, death, or loss to persons or property incurred by any person as a result of any act or omission of a service supplier or any of its employees, directors, officers, or agents, except for willful or wanton misconduct, either in connection with developing, adopting, implementing, maintaining, or operating any emergency “911” system or in the identification of the telephone number, address, or name associated with any person accessing an emergency “911” system. (Code 1981, § 46-5-135, enacted by Ga. L. 1990, p. 179, § 5.)

JUDICIAL DECISIONS

No waiver of defense of sovereign and official immunity. — The General Assembly, in its enactment of the “Georgia Emergency Telephone Number ‘911’ Service Act,” O.C.G.A. § 46-5-121 et. seq., has not waived defenses of sovereign and official immunity

which could otherwise be asserted by the county and its employees and officers in their implementation and operation of the "911" telephone system. *Hendon v. DeKalb*

County, 203 Ga. App. 750, 417 S.E.2d 705, cert. denied, 203 Ga. App. 906, 417 S.E.2d 705 (1992).

46-5-136. Authority of local government to create advisory board.

(a) The governing authority of a local government by resolution shall create an advisory board consisting of the sheriff, representatives from other public safety agencies which respond to emergency calls under the system, and other individuals knowledgeable of emergency "911" systems and the emergency needs of the citizens of the local government, provided that such advisory board shall not exceed 13 members.

(b) The advisory board shall assist the local government in:

(1) Reviewing and analyzing the progress by public safety agencies in developing "911" system requirements;

(2) Recommending steps of action to effect the necessary coordination, regulation, and development of a "911" system;

(3) Identifying mutual aid agreements necessary to effect the "911" system;

(4) Assisting in the promulgation of necessary rules, regulations, operating procedures, schedules, and other such policy and administrative devices as shall be deemed necessary and appropriate; and

(5) Providing other services as may be deemed appropriate by the local government.

(c) The members of the advisory board shall not be compensated from moneys deposited into the Emergency Telephone System Fund. (Code 1981, § 46-5-136, enacted by Ga. L. 1990, p. 179, § 6; Ga. L. 1992, p. 1645, § 1.)

46-5-137. Powers of Public Service Commission not affected.

This part shall not be construed as affecting the jurisdiction or powers of the Public Service Commission to establish rates, charges, or tariffs. (Code 1981, § 46-5-137, enacted by Ga. L. 1990, p. 179, § 7.)

46-5-138. Joint authorities.

(a)(1) By proper resolution of the local governing bodies, an authority may be created and activated by:

(A) Any two or more municipal corporations;

(B) Any two or more counties; or

(C) One or more municipal corporations and one or more counties.

(2) The resolutions creating and activating a joint authority shall specify the number of members of the authority, the number to be appointed by each participating county or municipal corporation, their terms of office, and their residency requirements.

(3) The resolutions creating and activating joint authorities may be amended by appropriate concurrent resolutions of the participating governing bodies.

(b) The public authority shall be authorized to contract with the counties or municipalities which formed the authority to operate an emergency "911" system for such local governments throughout the corporate boundaries of such local governments. Pursuant to such contracts, the local governments shall be authorized to provide funding to the authority from the Emergency Telephone System Fund, including the Wireless Phase I and Phase II Reserve Accounts, maintained by each local government. No authority shall be formed until each local government forming the authority has imposed a monthly "911" charge or a monthly wireless enhanced "911" charge.

(c) Each authority shall have all of the powers necessary or convenient to carry out and effectuate the purposes and provisions of this part, including, but without limiting the generality of the foregoing, the power:

- (1) To bring and defend actions;
- (2) To adopt and amend a corporate seal;
- (3) To make and execute contracts and other instruments necessary to exercise the powers of the authority;
- (4) To receive and administer gifts, grants, and devises of any property;
- (5) To operate emergency call answering services for law enforcement, emergency management, fire, and emergency medical service agencies 24 hours a day, seven days a week, 365 days a year;
- (6) To acquire, by purchase, gift, or construction, any real or personal property desired to be acquired to operate the emergency "911" system;
- (7) To sell, lease, exchange, transfer, assign, pledge, mortgage, dispose of, or grant options for any real or personal property or interest therein for any such purposes; and
- (8) To mortgage, convey, pledge, or assign any properties, revenues, income, tolls, charges, or fees owned or received by the authority.

(d) The authority shall elect a chairperson and such other officers as deemed necessary by the authority. The authority shall select a director who shall be responsible for establishing operating standards and procedures

and overseeing the operations of the emergency “911” system. The director may be an employee working in the operation of the emergency “911” system. The authority shall be responsible for hiring, training, supervising, and disciplining employees working in the operation of the emergency “911” system. An appropriate number of full-time and part-time employees shall be hired to operate the emergency “911” system. The authority shall determine the compensation of such employees and shall be authorized to provide other employee benefits. The authority shall submit its annual budget and a report of its financial records to the local governments which created the authority.

(e) The authority may contract with a service supplier in the same manner that local governments are so authorized under the provisions of this part.

(f) Notwithstanding subsection (i) of Code Section 46-5-134, if the joint authority and each local governing body activating the joint authority certify to the service provider in writing prior to the end of the 18 month period in advance of the date on which the “911” service was to have become fully operational that the system cannot be placed in operation on the date originally projected but that all parties are proceeding in a diligent and timely fashion to implement such service, the service provider shall continue to collect the monthly “911” charge for an additional period of 18 months or until the “911” service becomes fully operational, whichever occurs first. (Code 1981, § 46-5-138, enacted by Ga. L. 1993, p. 1368, § 3; Ga. L. 1998, p. 1017, § 12; Ga. L. 2004, p. 366, § 2A.)

The 2004 amendment, effective July 1, 2004, added subsection (f).

46-5-138.1. Guidelines pertaining to additional charges on exchange access facilities involving contracts between two or more counties.

(a) Notwithstanding any provision of paragraph (1) of subsection (a) of Code Section 46-5-134 to the contrary, where two or more counties, none of which offers emergency “911” services on May 1, 1998, and any participating municipalities within such counties, if any, agree by intergovernmental contract to initiate or contract for the joint operation of an emergency “911” system for the first time after May 1, 1998, such local governments may impose a monthly “911” charge which exceeds \$1.50 per exchange access facility but only so long as the following procedure is followed:

(1) The participating local governments shall, with input from a local exchange service supplier, prepare an estimated budget for the implementation of the joint emergency “911” system with costs limited to items eligible for funding through the Emergency Telephone System Fund;

(2) An estimate of the revenue to be generated by the “911” charge authorized by paragraph (1) of subsection (a) of Code Section 46-5-134 during the first 18 months of collection shall be prepared;

(3) If the total amount necessary for implementation of the emergency “911” system in paragraph (1) of this subsection exceeds the estimated revenue from imposition of the “911” charge specified in paragraph (2) of this subsection, the monthly “911” charge per exchange access facility may be increased on a pro rata basis during the first 18 months of collection to the extent necessary to provide revenue sufficient to pay the amount specified in paragraph (1) of this subsection, but in no case shall such monthly charge be greater than \$2.50 per exchange access facility. Notwithstanding subsection (i) of Code Section 46-5-134, if each local governing body which is a party to an intergovernmental contract certifies to the service provider in writing prior to the end of the 18 month period in advance of the date on which the “911” service was to have become fully operational that the system cannot be placed in operation on the date originally projected but that all parties are proceeding in a diligent and timely fashion to implement such service, the service provider shall continue to collect the monthly “911” charge for an additional period of 18 months or until the “911” service becomes fully operational, whichever occurs first; and

(4) Such local governments comply with the requirements of Code Section 46-5-133 which relate to the imposition of a monthly “911” charge.

Nothing in this subsection shall be construed to authorize the imposition of any charge upon a wireless telecommunications connection. Except as otherwise provided in this subsection, the requirements of Code Section 46-5-134 which relate to monthly “911” charges on exchange access facilities shall apply to charges imposed pursuant to this subsection.

(b) The increased monthly “911” charge authorized by subsection (a) of this Code section shall also be available to any joint “911” authority created pursuant to Code Section 46-5-138 after May 1, 1998. (Code 1981, § 46-5-138.1, enacted by Ga. L. 1998, p. 1017, § 13; Ga. L. 2004, p. 366, § 2B.)

The 2004 amendment, effective July 1, 2004, added the last sentence in paragraph (a)(3).

46-5-139. Joint Study Committee on Wireless Enhanced “911” Charges.

Following the conclusion of the 2002 session of the General Assembly, the President of the Senate and the Speaker of the House of Representatives shall each appoint no fewer than three members of their respective bodies to serve as members of the Joint Study Committee on Wireless Enhanced

“911” Charges. Such joint study committee shall make any recommendations it considers appropriate to the General Assembly no later than December 31, 2002. The General Assembly may implement the provisions of this Code section by appropriate resolution. (Code 1981, § 46-5-139, enacted by Ga. L. 1998, p. 1017, § 14.)

ARTICLE 3

TELEGRAPH SERVICE

Cross references. — Authority of telegraph companies to engage in business of selling or issuing checks, money orders, etc., § 7-1-681.

46-5-140. Definitions.

As used in this article, the term:

(1) “Telegraph company” means every corporation, company, association, joint-stock association, partnership, and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating, or managing any telegraph line or part of a telegraph line used in the conduct of the business of affording for hire communication by telegraph within this state.

(2) “Telegraph line” means conduits, poles, wires, cables, crossarms, instruments, machines, appliances, instrumentalities, and all devices, including radio and other advancements of the art of telegraphy, real estate, easements, apparatus, property, and routes used and operated to facilitate the business of affording communication service by telegraph to the public for hire within this state. (Code 1981, § 46-5-140, enacted by Ga. L. 1983, p. 859, § 1.)

Editor’s notes. — Former § 46-5-140, relating to petition for charter of telegraph company, has been renumbered as present § 46-5-141.

46-5-141. Petition for charter of telegraph company; qualified petitioners; contents of petition.

All corporate powers and privileges granted to telegraph companies in this state shall be granted in the manner described in this Code section. Whenever at least five persons who are 18 years of age or over and who are citizens of the United States, two-thirds of whom are residents of this state, propose to form a corporation for constructing, equipping, and operating any telegraph line or for carrying on the business of a telegraph company, they shall make and file in the office of the Secretary of State, in duplicate, a petition for charter, under their hands and seals, setting forth:

- (1) The name of the corporation proposed;
- (2) The object for which it is formed;

- (3) The amount of its proposed capital stock;
- (4) The number of shares of such capital stock;
- (5) The places from and to which such telegraph line is intended to be constructed, equipped, and operated, or, if already constructed, then the places from and to which the same is intended to be operated, giving as nearly as practicable the counties and cities through which it may or does pass;
- (6) The location of the principal office of such corporation by city and county, which shall be in this state;
- (7) The time of commencement and duration of said corporation, the period of duration not to exceed 50 years; and
- (8) The name and residence of each applicant. (Ga. L. 1893, p. 86, §§ 1, 2; Civil Code 1895, §§ 2339, 2340; Civil Code 1910, §§ 2803, 2804; Code 1933, § 104-101; Code 1981, § 46-5-140; Code 1981, § 46-5-141, enacted by Ga. L. 1983, p. 859, § 1; Ga. L. 1984, p. 22, § 46.)

Editor's notes. — Former § 46-5-141, relating to petition filing fee and issuance of license, has been renumbered as present § 46-5-142.

OPINIONS OF THE ATTORNEY GENERAL

Only American citizens permitted to operate public utilities under this section. — With certain minor exceptions such as former Code 1933, § 104-101 (see O.C.G.A. § 46-5-141), Philippine citizens are permitted under Georgia law to exploit natural resources and operate public utilities on the same basis as American citizens, corporations, or associations. 1967 Op. Att'y Gen. No. 67-245.

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5. **C.J.S.** — 86 C.J.S., Telecommunications, § 18.

46-5-142. Filing fee for petition for charter; Public Service Commission to review capitalization of proposed company; issuance of license to open stock-subscription books.

Upon the filing of the petition for charter as specified in Code Section 46-5-141, the applicants shall pay to the Secretary of State the fee of \$100.00. The Secretary of State shall thereafter transmit a copy of the petition to the Public Service Commission for approval prior to the issuance of a license. The Public Service Commission shall then approve or disapprove the issuance of a license based, in part, upon whether the proposed telegraph company has a sufficient amount of capitalization for incorporation. The Public Service Commission shall thereafter notify the Secretary of State in writing of its decision. If the petition is approved, the Secretary of State shall then issue to the applicants a license as commissioners to open books of

subscription to the capital stock of the corporation at such times and places as a majority of the commissioners may determine after having given public notice thereof in the legal organ of the county where the principal office of the company will be located for at least two weeks and in one or more of the public newspapers of this state for at least two weeks. (Ga. L. 1893, p. 86, § 2; Civil Code 1895, § 2340; Civil Code 1910, § 2804; Code 1933, § 104-102; Code 1981, § 46-5-141; Code 1981, § 46-5-142, enacted by Ga. L. 1983, p. 859, § 1; Ga. L. 1992, p. 6, § 46.)

Editor's notes. — Former § 46-5-142, relating to organizational meeting, has been renumbered as present § 46-5-143.

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, §§ 12, 19, 29.

C.J.S. — 86 C.J.S., Telecommunications, § 30.

46-5-143. Call of organizational meeting to elect directors; notice of meeting; voting by subscribers of capital stock; minimum number of Georgia residents as directors.

As soon as possible after the capital stock has been fully subscribed, the commissioners shall call a meeting of the subscribers to the capital stock for the purpose of electing directors and transacting such other business as may come before the meeting. Notice of the meeting shall be given by depositing in the post office, properly addressed to each subscriber, at least ten days before the time fixed, a written or printed notice stating the object, time, and place of such meeting. In all elections for directors of the proposed corporation, each subscriber to the capital stock shall be entitled to one vote for each share of the capital stock subscribed for by him, which vote may be cast in person or by written proxy. At least three persons, two-thirds of whom shall be residents of Georgia, shall be elected as directors of the proposed corporation. (Ga. L. 1893, p. 86, § 3; Civil Code 1895, § 2341; Civil Code 1910, § 2805; Code 1933, § 104-103; Code 1981, § 46-5-142; Code 1981, § 46-5-143, enacted by Ga. L. 1983, p. 859, § 1.)

Editor's notes. — Former § 46-5-143, relating to report of organizational meeting

and certificate of organization, has been renumbered as present § 46-5-144.

RESEARCH REFERENCES

C.J.S. — 86 C.J.S., Telecommunications, § 18.

46-5-144. Filing report of organization meeting with Secretary of State; duplicate copy of report; issuance and recording of certificate of organization; time limit for organization of corporation.

(a) The commissioners shall make a full report of their proceedings and of the proceedings of the meeting of the stockholders, including a copy of the notice provided for in Code Section 46-5-143; a copy of the list of subscribers, with a statement of their respective residences and the number of shares subscribed for by each; and the names and residences of the directors elected at the stockholders' meeting and their respective terms of office. This report shall be sworn to by at least a majority of the commissioners and shall be filed with the Secretary of State in duplicate. Attached to the report of the commissioners shall be the publishers' affidavits certifying that the aforementioned required publication has been completed. The Secretary of State shall forward a copy of the report to the Public Service Commission for its approval.

(b) Upon the filing of the report and its approval by the Public Service Commission, the Secretary of State shall issue a certificate of the complete organization of the corporation, duly authenticated under his official signature and the seal of the state, and the proceedings shall be recorded in his office in a book for that purpose.

(c) Upon the recording of such proceedings in the manner required by this Code section, the corporation shall be deemed fully organized and shall become and be duly incorporated under the corporate name set forth in the written declaration on file in the office of the Secretary of State and shall be authorized to proceed to business. Unless such corporation shall have so completed its organization within two years after the date of the filing of the written declaration for that purpose in the office of the Secretary of State, the license to the commissioners shall be held and deemed revoked and forfeited. (Ga. L. 1893, p. 86, § 4; Civil Code 1895, § 2342; Civil Code 1910, § 2806; Code 1933, § 104-104; Code 1981, § 46-5-143; Code 1981, § 46-5-144, enacted by Ga. L. 1983, p. 859, § 1.)

Editor's notes. — Former § 46-5-144, relating to powers of telegraph corporations generally, has been renumbered as present § 46-5-146.

RESEARCH REFERENCES

C.J.S. — 86 C.J.S., Telecommunications, § 18.

46-5-145. Amendment of charter.

Any telegraph company incorporated under this article may amend its charter as provided by Code Sections 14-4-100 through 14-4-105. (Code 1981, § 46-5-145, enacted by Ga. L. 1983, p. 859, § 1.)

Editor's notes. — Former § 46-5-145, relating to duties of telegraph companies, has been renumbered as present § 46-5-147.

46-5-146. Powers of telegraph corporations generally.

(a) Any corporations created under and by virtue of this article shall exist and shall have and enjoy succession under its corporate name and may, under such name:

(1) Make and enter into contracts;

(2) Sue and be sued;

(3) Purchase and hold such real or personal property as may be required for the purposes of the corporation within the scope of its business and sell, alienate, mortgage, pledge, convey, or otherwise dispose of the same, with all rights and privileges therewith connected; and

(4) Make and establish such bylaws, rules, and regulations for its government as may be necessary.

(b) Such corporation shall also have power:

(1) To have and use a corporate seal, and to alter the same at pleasure;

(2) To appoint such officers or agents as may be necessary for the proper management of the affairs of such corporation; and

(3) To erect and maintain telegraph lines in and throughout this state or elsewhere in the United States, with all necessary stations, offices, apparatus, improvements, and machinery, and to employ the same with any new inventions which may from time to time be acquired, in the rapid transmission, for remuneration and profit, of information, messages, and intelligence to and from the various places and stations on the telegraph line of such corporation. (Ga. L. 1893, p. 86, § 5; Civil Code 1895, § 2343; Civil Code 1910, § 2807; Code 1933, § 104-201; Code 1981, § 46-5-144; Code 1981, § 46-5-146, enacted by Ga. L. 1983, p. 859, § 1.)

Editor's notes. — Former § 46-5-146, relating to territorial extent of telegraph companies duties to deliver dispatches and mes-

sages, has been renumbered as present § 46-5-148.

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, § 5 et seq.

C.J.S. — 86 C.J.S., Telecommunications, §§ 9, 20 et seq.

ALR. — Liability to telegraph company respecting telegram relating to gambling transaction, 44 ALR 783.

Right and duty of telephone companies to make or discontinue connection of exchanges or lines, 76 ALR 953.

Deposit required by public utility, 43 ALR2d 1262.

46-5-147. Duty of telegraph companies to receive dispatches and messages and to transmit and deliver them with impartiality, good faith, and due diligence.

Every telegraph company which has a line of wires in this state and which is engaged in telegraphing for the public shall, during its usual business hours, receive dispatches or messages, whether from other telegraphic lines or from individuals, and, on payment or tender of the usual charge according to the regulations established by the commission, shall transmit and deliver the same with impartiality and good faith and with due diligence, under penalty of \$25.00, which penalty may be recovered by action in a court having jurisdiction thereof, by either the sender of the dispatch or message or the person to whom sent or directed, whichever may first bring an action, provided that nothing in this Code section shall be construed as impairing or in any way modifying the right of any person to recover damages for any breach of contract or duty by any telegraph company; and such penalty and such damages may, if the party so elects, be recovered in the same action. (Ga. L. 1908, p. 94, § 1; Civil Code 1910, § 2812; Code 1933, § 104-206; Code 1981, § 46-5-145; Code 1981, § 46-5-147, enacted by Ga. L. 1983, p. 859, § 1.)

Editor's notes. — Former § 46-5-147, relating to actions against telegraph companies, has been renumbered as present § 46-5-149.

JUDICIAL DECISIONS

Cited in Western Union Tel. Co. v. James, 162 U.S. 650, 16 S. Ct. 934, 40 L. Ed. 1105 (1896); Petty v. Western Union Tel. Co., 138 Ga. 314, 75 S.E. 152 (1912); Western Union Tel. Co. v. Travis, 144 Ga. 110, 86 S.E. 221

(1915); Cheshire v. Western Union Tel. Co., 16 Ga. App. 790, 86 S.E. 405 (1915); Postal Telegraph-Cable Co. v. Kaler, 65 Ga. App. 641, 16 S.E.2d 77 (1941).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, §§ 37, 38, 44, 55, 57, 64, 69.

C.J.S. — 86 C.J.S., Telecommunications, §§ 3, 4, 17, 69 et seq.

ALR. — Liability of telegraph company for transmitting forged message, 10 ALR 828.

Duty of telegraph company to notify sender of message in case of inability to transmit or deliver promptly, 17 ALR 109; 55 ALR 639.

Question of proximate cause as affecting liability for damages for failure to obtain telephone connection, 19 ALR 1419.

Telegraph company as agent of sender so as to bind him as against addressee by mis-

take in transmitting message, 42 ALR 293; 54 ALR 1369; 54 ALR 1369.

Liability of telegraph company respecting telegram relating to gambling transaction, 44 ALR 783.

Right of public utility corporation to refuse its service because of collateral matter not related to that service, 55 ALR 771.

Duty to furnish telegraph or telephone service to privately wired or equipped building, 56 ALR 794.

Negligence of sendee in failing to discover mistakes or omissions in transmitting telegram as affecting liability of telegraph company, 57 ALR 49.

Requirement as to time for filing claim against telegraph company as affected by

claimant's ignorance of error in delay, 66 ALR 199.

Right of telephone company to refuse, or discontinue, service because of failure to pay bills or other violation of conditions of use, 70 ALR 894.

Right of one neither sender nor addressee to recover against telegraph company because of delay or mistake, 72 ALR 1198.

Duty and liability of telephone company for failure to deliver, relay, or transmit message, 78 ALR 661.

Liability of telegraph company for punitive damages for wrongful or negligent acts of employees as regards messages, 89 ALR 356.

Measure of damages recoverable for loss of or failure to obtain employment for indefinite term, as result of telegraph company's breach of duty as to transmission or delivery of message, 103 ALR 546.

Provision in telegraph or carrier's contract regarding amount of recovery or dam-

ages as provision for liquidated damages (or valuation of right) or a mere limitation of liability, 128 ALR 632.

What amounts to waiver of requirement of written claim within specified time, as condition of telegraph company's liability, 129 ALR 403.

Damages recoverable for mistake transmission or delay in delivery of telegram ordering supplies or machinery for a manufacturing or processing business, 154 ALR 719.

Measure of damages in action against telegraph company based on error as to price in transmission of message, 167 ALR 1398.

Construction and effect, under Interstate Commerce Act, of provisions on telegraph blanks as to limitation of liability, 20 ALR2d 761.

Liability of telegraph or telephone company for transmitting or permitting transmission of libelous or slanderous messages, 91 ALR3d 1015.

46-5-148. Territorial extent of telegraph company's duty to deliver dispatches and messages.

Telegraph companies shall deliver all dispatches or messages to the persons to whom the same are addressed or to their agents, on payment of any charges due for the same, provided that such persons or agents reside within the city in which the station is located or, if the station is not located in a city, within one mile of the station. (Ga. L. 1908, p. 94, § 2; Civil Code 1910, § 2813; Code 1933, § 104-207; Code 1981, § 46-5-146; Code 1981, § 46-5-148, enacted by Ga. L. 1983, p. 859, § 1.)

Editor's notes. — Former § 46-5-146 has been renumbered as this Code section.

JUDICIAL DECISIONS

Inference by jury from pleading. — Although it is not expressly stated in the evidence that the telegraphic station of the defendant company was located in the city at the time the message was sent, the jury might have inferred from the fact that the agent of the defendant company in another

city, the point from which the message was sent, received a message directed to the first mentioned city, that the station was then located within that city. *Petty v. Western Union Tel. Co.*, 138 Ga. 314, 75 S.E. 152 (1912).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Telecommunications, §§ 69, 70.

C.J.S. — 86 C.J.S., Telecommunications, § 129.

ALR. — Duty of telegraph company to notify sender of message in case of inability to transmit or deliver promptly, 17 ALR 109; 55 ALR 639.

Liability of telegraph company respecting telegram relating to gambling transaction, 44 ALR 783.

Duty and liability of telephone company for failure to deliver, relay, or transmit message, 78 ALR 661.

Liability of telegraph company for punitive damages for wrongful or negligent acts of employees as regards messages, 89 ALR 356.

46-5-149. Venue for actions against telegraph companies; service of process.

(a) Whenever any person has any claim or demand upon any telegraph company having offices or more than one place of doing business in this state, such person may institute an action against such telegraph company within the county where the principal office of such company is located, or in any county where such telegraph company may have an agency or place of business, or where such place of business was located at the time the cause of action accrued or the contract was made out of which the cause of action arose.

(b) In all actions brought under this Code section, service shall be effected upon such telegraph company by leaving a copy of the summons and complaint with the agent of the company, if any; if there is no such agent in the county, then a copy of the summons and complaint shall be left at the agency or place of doing business where the same was located at the time such cause of action accrued or the contract was made out of which the cause of action arose. (Ga. L. 1880-81, p. 115, §§ 1, 2; Code 1882, § 3412; Civil Code 1895, § 2348; Civil Code 1910, § 2814; Code 1933, § 104-208; Code 1981, § 46-5-147; Code 1981, § 46-5-149, enacted by Ga. L. 1983, p. 859, § 1.)

Editor's notes. — Former § 46-5-147 has been renumbered as this Code section.

JUDICIAL DECISIONS

Sufficiency of pleadings. — A petition against a telegraph company, alleging that it had "an office and agent in (the) county, doing business therein," sufficiently showed jurisdiction in the courts of the county,

under former Civil Code 1895, § 2348 (see O.C.G.A. § 46-5-149). *Western Union Tel. Co. v. Bailey*, 115 Ga. 725, 42 S.E. 89, 61 L.R.A. 933 (1902).

RESEARCH REFERENCES

C.J.S. — 86 C.J.S., Telecommunications, and Television, §§ 122, 125, 129.

ALR. — Constitutionality of statute fixing venue of offense committed while upon public conveyances, or at stations or depots under the route thereof, 11 ALR 1020.

Telegraph company as agent of sender so

as to bind him as against addressee by mistake in transmitting message, 42 ALR 293; 54 ALR 1369.

Liability of telegraph company respecting telegram relating to gambling transaction, 44 ALR 783.

Requirement as to time for filing claim

against telegraph company as affected by claimant's ignorance of error or delay, 66 ALR 199.

Right of one neither sender nor addressee to recover against telegraph company because of delay or mistake, 72 ALR 1198.

Duty and liability of telephone company for failure to deliver, relay, or transmit message, 78 ALR 661.

Liability of telegraph company for punitive damages for wrongful or negligent acts

of employees as regards messages, 89 ALR 356.

What amounts to waiver of requirement of written claim within specified time, as condition of telegraph company's liability, 129 ALR 403.

Construction and effect, under Interstate Commerce Act, of provisions on telegraph blanks as to limitation of liability, 20 ALR2d 761.

ARTICLE 4

TELECOMMUNICATIONS AND COMPETITION DEVELOPMENT

Editor's notes. — Ga. L. 1995, p. 886, § 3, not codified by the General Assembly, provides: "The Public Service Commission shall be required to conduct at least three hearings in locations outside the metropolitan areas of the state and accept evidence as to the costs, feasibility, and methodology of providing for toll free calling between two telephones where the central offices serving such telephones are within an extended area of service of not less than 22 miles of each other. The methodology and analysis of the cost and feasibility of such toll free calling area shall be conducted under the supposition of an alternative system of regulation within the framework of Section 1 of this Act. The commission shall conduct such

hearings prior to November 30, 1995, and shall report its findings to the General Assembly no later than December 31, 1995. The Public Service Commission shall conclude its consideration in Docket 4231-U of the expansion of local calling areas pursuant to its rules, including but not limited to all balloting and the formulation of an appropriate rate design, on or before January 1, 1996. The implementation of the expanded calling areas shall be completed on or before July 1, 1996."

Ga. L. 1995, p. 886, § 4, not codified by the General Assembly, provides for severability.

Law reviews. — For note on the 1995 enactment of this article, see 12 Ga. St. U.L. Rev. 333 (1995).

46-5-160. Short title.

This article shall be known and may be cited as "The Telecommunications and Competition Development Act of 1995." (Code 1981, § 46-5-160, enacted by Ga. L. 1995, p. 886, § 2.)

JUDICIAL DECISIONS

Cited in Georgia Pub. Serv. Comm'n v. ALLTEL Ga. Communications Corp., 244 Ga. App. 645, 536 S.E.2d 542 (2000).

46-5-161. Legislative findings; intent.

(a) The General Assembly finds:

(1) It is in the public interest to establish a new regulatory model for telecommunications services in Georgia to reflect the transition to a reliance on market based competition as the best mechanism for the

selection and provision of needed telecommunications services at the most efficient pricing;

(2) Investment in the telecommunications infrastructure required to further economic growth in Georgia and to meet the growing demands of Georgia's consumers will be encouraged through competition; and

(3) In order to ensure the implementation of this new reliance on market based competition, any legislative obstacles to competition for local exchange services must be removed.

(b) It is the intent of this article to:

(1) Permit local exchange companies to elect alternative forms of regulation;

(2) Protect the consumer during the transition to a competitive telecommunications market;

(3) Assure reasonable cost for universal access to basic telecommunications services throughout Georgia;

(4) Encourage investment in Georgia's telecommunications infrastructure and encourage the introduction of innovative products and services for Georgia's consumers;

(5) Authorize competition for local exchange services; and

(6) Allow pricing flexibility for all telecommunications services other than basic local exchange services. (Code 1981, § 46-5-161, enacted by Ga. L. 1995, p. 886, § 2.)

JUDICIAL DECISIONS

Cited in Georgia Pub. Serv. Comm'n v. ALLTEL Ga. Communications Corp., 227 Ga. App. 382, 489 S.E.2d 350 (1997), *aff'd*, 270 Ga. 105, 505 S.E.2d 218 (1998); Georgia

Pub. Serv. Comm'n v. ALLTEL Ga. Communications Corp., 244 Ga. App. 645, 536 S.E.2d 542 (2000).

46-5-162. Definitions.

As used in this article, the term:

(1) "Alternative regulation" means a form of regulation pursuant to which the rates, terms, and conditions for telecommunications services provided by a local exchange company are set pursuant to the rules specified in this article.

(2) "Basic local exchange services" or "universal access local exchange services" mean the provision to residential and single line business customers in Georgia of services composed of a touch tone switched access line and dial tone, of a quality sufficient for two way voice and 9600 baud data/fax communications. This service shall include 1+

dialing for access to competitive providers of telecommunications services by January 1, 1997. The elements of universal access local exchange services are subject to subsequent review and modification by the commission.

(3) "Caller identification service" means a type of telephone service which permits telephone customers to see the telephone number of incoming telephone calls.

(4) "Commission" means the Georgia Public Service Commission.

(5) "Electing company" means a local exchange company subject to the alternative regulation described in this article.

(6) "Fund" means the Universal Access Fund created in Code Section 46-5-167.

(7) "Gross domestic product-price index" or "GDP-PI" means the gross domestic product fixed weight price index calculated by the United States Department of Commerce.

(8) "Interconnection service" means the service of providing access to a local exchange company's facilities for the purpose of enabling another telecommunications company to originate or terminate telecommunications service.

(9) "Local calling area" means the geographic area encompassing one or more local exchanges as described in commission orders or in maps, tariffs, and rate schedules reviewed and approved by the commission.

(10) "Local exchange company" means a telecommunications company authorized to provide local exchange service as described in this article. For purposes of this article, there shall be two categories of local exchange companies:

(A) Tier 1 companies are those companies with 2 million or more access lines within Georgia holding a certificate of public convenience and necessity issued by the commission; and

(B) Tier 2 companies are those companies with less than 2 million access lines within Georgia holding a certificate of public convenience and necessity issued by the commission.

(11) "Local exchange services" means services offered for the transmission and utilization of two-way interactive communications and associated usage with the local calling area.

(12) "Local interconnection services" means that part of switched interconnection service provided for the purpose of originating or terminating a call which originates and terminates within the local calling area.

(13) “Portability” means the technical capability that permits a customer to retain the same local number at the same customer location regardless of the provider of the local exchange service.

(14) “Switched access” means that part of switched interconnection service provided for the purpose of originating or terminating a toll service.

(15) “Switched interconnection service” means that part of interconnection service which utilizes the local exchange company’s switching facilities to provide line or trunkside access or both to the local exchange company’s end office or tandem switches for the purpose of originating and terminating the telecommunications services of other telecommunications companies.

(16) “Tariff” means the schedule or other writing filed with the commission that describes the rates, terms, and conditions of certain telecommunications services provided by the telecommunications company.

(17) “Telecommunications company” means any person, firm, partnership, corporation, association, or municipal, county, or local governmental entity offering telecommunications services to the public for hire.

(18) “Telecommunications services” means the services for the transmission of two-way interactive communications to the public for hire. For purposes of illustration, the term “telecommunications services” includes without limitation local exchange services and interconnection services.

(19) “Toll service” means the transmission of two-way interactive switched communications between local calling areas.

(20) “Universal access provider” means a local exchange company that is obligated to provide basic local exchange service in all of its local calling areas in response to reasonable requests for such service and which, in consideration of such obligation, may have its rates for local switched interconnection service established as provided in this article. (Code 1981, § 46-5-162, enacted by Ga. L. 1995, p. 886, § 2.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1995, “2” was substituted for “two” in subparagraphs (10)(A) and (10)(B).

JUDICIAL DECISIONS

Cited in Georgia Pub. Serv. Comm’n v. ALLTEL Ga. Communications Corp., 244 Ga. App. 645, 536 S.E.2d 542 (2000).

46-5-163. Certificates of authority.

(a) A telecommunications company including a telecommunications services reseller shall not provide telecommunications services without a certificate of authority issued by the commission. The provisions of Code Section 46-5-45 shall apply in circumstances where a telecommunications company is providing telecommunications services without a certificate issued by the commission.

(b) The commission shall have the authority to issue multiple certificates of authority for local exchange services upon a showing to the commission that an applicant possesses satisfactory financial and technical capability. Any certificate existing on July 1, 1995, shall remain effective and shall be considered a certificate of authority under this article. A certificate is not required for a telecommunications company to provide commercial mobile services. The commission shall also have the authority to issue certificates to long distance telecommunications carriers subject to federal court decisions, federal law, and regulations of the Federal Communications Commission.

(c) A showing of public convenience and necessity is not a condition for issuing a competing certificate of authority. Prior to July 1, 1998, only a currently certificated Tier 2 local exchange company may be issued a certificate of authority to compete for service in an area serviced by an existing Tier 2 local exchange company.

(d) Any certificate of authority issued by the commission is subject to revocation, suspension, or adjustment where the commission finds upon complaint and hearing that a local exchange company has engaged in unfair competition or has abused its market position.

(e) The commission shall grant certificates of authority in a timely manner and all such proceedings on complaints regarding abuse shall be resolved in a timely manner.

(f) All local exchange companies certificated by the commission shall be subject to the same rules and regulations applied by the commission to other local exchange companies certificated to provide local exchange services within the same area; provided, however, that in promulgating rules and regulations necessary to implement the provisions of this article, the commission may adopt rules and regulations for local exchange companies certificated after July 1, 1995, which vary from other rules and regulations applicable to the delivery of telecommunications services but which are appropriate and consistent to service being delivered by such local exchange companies and are adopted in the public interest. (Code 1981, § 46-5-163, enacted by Ga. L. 1995, p. 886, § 2.)

46-5-164. Interconnection among certificated local exchange companies.

(a) All local exchange companies shall permit reasonable interconnection with other certificated local exchange companies. This subsection

includes all or portions of such services as needed to provide local exchange services.

(b) The rates, terms, and conditions for such interconnection services shall not unreasonably discriminate between providers and shall be negotiated in good faith between the providers and filed with the commission.

(c) In the event that such rates, terms, or conditions cannot be negotiated by the parties, the commission shall determine the reasonable rates, terms, or conditions for the interconnection services.

(d) Such interconnection services shall be provided for intrastate services on an unbundled basis similar to that required by the FCC for services under the FCC's jurisdiction.

(e) The commission is authorized to allow local exchange companies to resell the services purchased from other local exchange companies pursuant to rules determining when and under what circumstances such resale shall be allowed; provided, however, that the resale of basic local exchange services supported by the Universal Access Fund shall be limited to users and uses conforming to the definition of basic local exchange services set forth in paragraph (2) of Code Section 46-5-162. Any local exchange company or telecommunications company desiring to purchase or to resell services purchased from another local exchange company may petition the commission for the authorization to purchase or to resell such services. In cases where the purchase or resale of services purchased is authorized by the commission, the commission shall determine the reasonable rates, terms, or conditions for the purchase or resale of such local exchange services such that no local exchange company or telecommunications company gains an unfair market position. The commission shall render a final decision in any proceeding initiated pursuant to the provisions of this subsection no later than 60 days after the close of the record except that the commission, by order, may extend such period in any case in which it shall find that the complexity of the issues and the length of the record require an extension of such period, in which event the commission shall render a decision at the earliest date practicable. In no event shall the commission delay the rendering of a final decision in such proceeding beyond the earlier of 120 days after the close of the record or 180 days from the filing of the notice of petition under this subsection. The commission, at its discretion or upon a petition filed by either party, may modify a ruling rendered under this subsection, provided that a petition for modification may not be filed more than once in any 18 month period.

(f) The basic local exchange services of Tier 2 local exchange companies may be purchased by competing providers at the tariffed rate, provided such reselling does not result in the loss of intrastate or interstate revenues to the selling company for the individual service being resold. This subsection does not apply to Tier 2 local exchange companies that have

switched access rates that are lower than or at parity with the same local exchange company's interstate switched access rates.

(g) The commission shall have the authority to require local exchange companies to provide additional interconnection services and unbundling. (Code 1981, § 46-5-164, enacted by Ga. L. 1995, p. 886, § 2.)

46-5-165. Alternative regulation of rates, terms, and conditions.

(a) Any Tier 1 local exchange company may elect to have its rates, terms, and conditions for its services determined pursuant to the alternative regulation described in this article, in lieu of other forms of regulation including but not limited to rate of return or rate base monitoring or regulation, upon the filing of notice with the commission and committing to provide basic local exchange services upon reasonable request and to invest \$500 million per year for five years to improve and strengthen telecommunications services in Georgia; provided, however, that after the expiration of three years of such investments, the commission shall determine, after notice and opportunity for a Tier 1 local exchange company or other interested parties to be heard, whether such investment commitment should be continued for the remaining two years or whether such commitment should be reduced.

(b) Any Tier 2 local exchange company may elect to have the rates, terms, and conditions for its services determined pursuant to the alternative regulation described in this article upon the filing of notice with the commission and committing to provide basic local exchange services upon reasonable request.

(c) The alternative regulation under this article shall become effective on the date specified by the electing company but in no event sooner than 30 days after such notice is filed with the commission.

(d) On the date a telecommunications company elects the alternative regulation described in this article, all existing rates, terms, and conditions for the services provided by the electing company contained in the then existing tariffs and contracts are deemed just and reasonable. (Code 1981, § 46-5-165, enacted by Ga. L. 1995, p. 886, § 2.)

JUDICIAL DECISIONS

Interim period after electing alternative regulation. — During the transition period occurring between the date of an incumbent local exchange company's election of alternative regulation and the date alternative regulation became effective, the commission retained its authority to adjust the existing rates of the company so that the rates remained reasonable and just. Georgia Pub.

Serv. Comm'n v. ALLTEL Ga. Communications Corp., 227 Ga. App. 382, 489 S.E.2d 350 (1997), aff'd, 270 Ga. 105, 505 S.E.2d 218 (1998).

The Public Service Commission has authority to review rates for no less than 30 days after a notice of election of alternative regulation is filed. ALLTEL Ga. Communications Corp. v. Georgia Pub. Serv. Comm'n,

270 Ga. 105, 505 S.E.2d 218 (1998).

Rule nisi issued by Public Service Commission provided reasonable notice of the Commission's intent to investigate the authorized return on equity of a Tier 2 local

exchange company and to adjust its rates prior to its election of alternative regulation. Georgia Pub. Serv. Comm'n v. ALLTEL Ga. Communications Corp., 244 Ga. App. 645, 536 S.E.2d 542 (2000).

46-5-166. Rates for basic local exchange services.

(a) An electing local exchange company shall have its rates for basic local exchange services determined pursuant to this Code section.

(b) Rates for basic local exchange services for residential and single line business customers in effect on the date the local exchange company becomes subject to alternative regulation described in this article shall be the maximum rates that the local exchange company may charge for basic local exchange services for a period of five years, provided that such maximum rates are subject to review by the commission pursuant to subsection (f) of this Code section under rules promulgated by the commission. During such period, the local exchange company may charge less than the authorized maximum rates for basic local exchange services. Thereafter, rate adjustments for basic local exchange services may be made pursuant to subsection (c) of this Code section.

(c) Rates for basic local exchange services may be adjusted by the electing company subject to an inflation based cap. Inflation shall be measured by the change in the GDP-PI. The electing company is authorized to adjust the cap on an annual basis. The cap requires that the annual percentage rate increase for basic local exchange services shall not exceed the greater of one-half of the percentage change in the GDP-PI for the preceding year when the percentage change in the GDP-PI exceeds 3 percent or the GDP-PI minus 2 percentage points.

(d) In the event the GDP-PI is no longer available, the commission shall elect a comparable broad national measure of inflation calculated by the United States Department of Commerce for its use.

(e) The local exchange company shall set rates for all other local exchange services on a basis that does not unreasonably discriminate between similarly situated customers; provided, however, that all such rates are subject to a complaint process for abuse of market position in accordance with rules to be promulgated by the commission. Competing local exchange companies may resell local exchange services purchased from other local exchange companies.

(f)(1) Except as otherwise provided in this subsection, the rates for switched access by each Tier 1 local exchange company shall be no higher than the rates charged for interstate access by the same local exchange company. The rates for switched access shall be negotiated in good faith

between the parties. In the event that the rates for switched access cannot be negotiated between the parties, any party may petition the commission to set reasonable rates, terms, or conditions for switched access. The commission shall render a final decision in any proceeding initiated pursuant to the provisions of this paragraph no later than 60 days after the close of the record except that the commission, by order, may extend such period in any case in which it shall find that the complexity of the issues and the length of the record require an extension of such period, in which event the commission shall render a decision at the earliest date practicable. In no event shall the commission delay the rendering of a final decision in such proceeding beyond the earlier of 120 days after the close of the record or 180 days from the filing of the notice of petition for determination of rates for switched access that initiated the proceeding.

(2) Each Tier 2 local exchange company shall, prior to July 1, 2000, adjust in equal annual increments its intrastate switched access charges to parity with its similar interstate access rates. The commission shall have authority to govern the transition of Tier 2 local exchange company switched access rates to their corresponding interstate levels and shall allow adjustment of other rates, including those of basic local exchange services or universal service funds, as may be necessary to recover those revenues lost through the concurrent reduction of the intrastate switched access rates. In no event shall such adjustments exceed the revenues associated with intrastate to interstate access parity as of July 1, 1995. In addition, if access revenues have dropped below July 1, 1995, levels in subsequent years, the adjustment in those years will be based on the reduced balance. Any intrastate to interstate switched access adjustments resulting in increased local rates that have been capped under subsection (b) of this Code section will be allowed and a new cap will be established pursuant to this Code section. In the event that the rates for switched access cannot be negotiated in good faith between the parties, the commission shall determine the reasonable rates for switched access in accordance with the procedures provided in paragraph (1) of this subsection.

(g) In accordance with rules to be promulgated by the commission, any electing company shall file tariffs with the commission for basic local exchange services and other local exchange services that state the terms and conditions of such services and the rates as established pursuant to this Code section. (Code 1981, § 46-5-166, enacted by Ga. L. 1995, p. 886, § 2.)

JUDICIAL DECISIONS

Construction of paragraph (f)(2). — Where a Tier 2 local exchange company experiences the same access sales or a growth in access sales during the phase-down of rates into parity with inter-

state access rates, the mandate of paragraph (f)(2) is to calculate revenues lost by virtue of selling each intrastate switched access unit at the concurrently reduced rate; growth in access revenue is not calculated as an offset

against such revenue lost by a company during the phase-down period. *Georgia Pub. Serv. Comm'n v. Alltel Ga. Communications Corp.*, 230 Ga. App. 563, 497 S.E.2d 50 (1998).

Order addressing disposition of overearnings authorized. — Public Service Commission's determination that Tier 2 local exchange companies' return on equity earnings exceeded that authorized and its

order for the application of over-earnings to reduce intrastate access rates did not violate either O.C.G.A. § 46-2-25(d), which prohibits rate-making orders with retroactive effect, or paragraph (f)(2) of O.C.G.A. § 46-5-166, regarding adjustments to intrastate access rates. *Georgia Pub. Serv. Comm'n v. ALLTEL Ga. Communications Corp.*, 244 Ga. App. 645, 536 S.E.2d 542 (2000).

46-5-167. Universal Access Fund.

(a) The commission shall create a Universal Access Fund to assure the provision of reasonably priced access to basic local exchange services throughout Georgia. The fund shall be administered by the commission under rules to be promulgated by the commission as needed to assure that the fund operates in a competitively neutral manner between competing telecommunications providers.

(b) The commission shall require all telecommunications companies providing telecommunications services within Georgia to contribute quarterly to the fund in a proportionate amount to their gross revenues from sale to end users of such telecommunications services as determined by rules to be promulgated by the commission.

(c) The commission may also require any telecommunications company to contribute to the fund if, after notice and opportunity for hearing, the commission determines that the company is providing private local exchange services or radio based local exchange services in this state that compete with a telecommunications service provided in this state for which a contribution to the fund is required under this Code section.

(d) Contributions to the fund shall be determined by the commission based upon estimates as to the difference in the reasonable actual costs of basic local exchange services throughout Georgia and the amounts established by law or regulations of the commission as to the maximum amounts that may be charged for such services.

(e) Moneys in the fund shall be distributed quarterly to all providers of basic local exchange services upon application and demonstration that the reasonable costs as determined by the commission to provide basic local exchange services exceed the maximum fixed price permitted for such basic local exchange services. The commission may take into account the possibility that a competing local exchange company is providing or could provide lower cost basic local exchange services. Competitive providers shall be entitled to obtain a similar subsidy from the fund to the extent that they provide basic local exchange services; provided, however, that such subsidy shall not exceed 90 percent of the per line amount provided the incumbent local exchange company for existing basic local exchange service or 100 percent of new basic local exchange service.

(f) The commission shall require any local exchange company seeking reimbursement from the fund to file the information reasonably necessary to determine the actual and reasonable costs of providing basic local exchange services.

(g) The commission shall have the authority to make adjustments to the contribution or distribution levels based on yearly reconciliations and to order further contributions or distributions as needed between companies to equalize reasonably the burdens of providing basic local exchange service throughout Georgia.

(h) A local exchange company or other company shall not establish a surcharge on customers' bills to collect from customers' contributions required under this Code section. (Code 1981, § 46-5-167, enacted by Ga. L. 1995, p. 886, § 2.)

46-5-168. Jurisdiction and authority of commission.

(a) The jurisdiction of the commission under this article shall be construed to include the authority necessary to implement and administer the express provisions of this article through rule-making proceedings and orders in specific cases.

(b) The commission's jurisdiction shall include the authority to:

(1) Adopt reasonable rules governing certification of local exchange companies;

(2) Grant, modify, impose conditions upon, or revoke a certificate;

(3) Establish and administer the Universal Access Fund including modifications to the maximum allowable charge for basic local exchange service;

(4) Adopt reasonable rules governing service quality;

(5) Resolve complaints against a local exchange company regarding that company's service;

(6) Require a telecommunications company electing alternative regulation under this article to comply with the rate adjustment provisions of this article;

(7) Approve and if necessary revise, suspend, or deny tariffs in accordance with the provisions of this article;

(8) If necessary, elect another comparable measurement of inflation calculated by the United States Department of Commerce;

(9) Establish reasonable rules and methodologies for performing cost allocations among the services provided by a telecommunications company; and

(10) Direct telecommunications companies to make investments and modifications necessary to enable portability.

(c) The commission shall render a final decision in any proceeding initiated pursuant to the provisions of this article no later than 60 days after the close of the record except that the commission, by order, may extend such period in any case in which it shall find that the complexity of the issues and the length of the record require an extension of such period, in which event the commission shall render a decision at the earliest date practicable. In no event shall the commission delay the rendering of a final decision in such proceeding beyond the earlier of 120 days after the close of the record or 180 days from the filing of the notice of rulemaking, petition, or complaint that initiated the proceeding.

(d) In conducting any rule-making proceeding under this article, the commission shall consider the following factors:

(1) The extent to which cost-effective competitive alternatives are available to existing telecommunications networks and services; and

(2) Requirements necessary to prevent any disadvantage or economic harm to consumers, protect universal affordable service, establish and maintain an affordable Universal Access Fund, protect the quality of telecommunications services, prevent anticompetitive practices, and prevent abandonment of service to areas where there is no competing provider of telecommunications service.

(e) Subject to any other provision of law protecting the confidentiality of trade secrets, the commission shall have access to the books and records of telecommunications companies as may be necessary to ensure compliance with the provisions of this article and with the commission's rules and regulations and to carry out its responsibilities under this article.

(f) In order to promote economic development and competitive advantage for the State of Georgia, the commission shall have the authority to petition, intervene, or otherwise commence proceedings before the appropriate federal agencies and courts having specific jurisdiction over the regulation of telecommunications seeking to enhance the competitive market for telecommunications services within the state. (Code 1981, § 46-5-168, enacted by Ga. L. 1995, p. 886, § 2.)

JUDICIAL DECISIONS

Commission has no authority to adjudicate contractual disputes between local exchange carriers. — O.C.G.A. § 46-5-168 does not grant authority to the Georgia State Public Commission to adjudicate contractual disputes between local exchange carriers; instead, the statute simply allows the commission to adopt rules and impose con-

ditions for the public good. *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs.*, 278 F.3d 1223 (11th Cir. 2002), vacated, 297 F.3d 1276 (11th Cir. 2002).

Commission has authority under federal law to interpret and enforce interconnection agreements and its determination is subject

to review in federal court. *BellSouth Telecomms., Inc. v. MCI Metro Access Trans- mission Servs.*, 317 F.3d 1270 (11th Cir. 2003).

46-5-169. Company obligations associated with alternative regulation.

A company electing alternative regulation:

(1) Shall comply with orders issued and rules adopted by the commission to implement the express provisions of this article as a condition of obtaining or retaining a certificate of authority under this article;

(2) Shall not refuse any reasonable application for basic local exchange service;

(3) Shall not give any unreasonable preference or advantage to any customer when providing telecommunications services;

(4) Shall not, either directly or through affiliated companies, engage in any anticompetitive act or practice including but not limited to price squeezing, price discrimination, predatory pricing, or tying arrangements, as such terms are commonly applied in antitrust law;

(5) Shall not cross-subsidize nonregulated or alternatively regulated services with revenue created by regulated services;

(6) Shall not give any preference to affiliated companies;

(7) Shall allow the resale of its services. Nothing in this Code section shall restrict a customer from authorizing an agent to order such services on its behalf; and

(8) Shall not be required to seek regulatory approval of its depreciation rates or schedules. (Code 1981, § 46-5-169, enacted by Ga. L. 1995, p. 886, § 2.)

46-5-170. Access to local telephone numbering resources and assignments.

Providers of local exchange services shall have access to local telephone numbering resources and assignments on equitable terms that include recognition of the scarcity of such resources and that are in accordance with adopted national assignment guidelines and commission rules. Additionally, all local exchange companies shall make the necessary modifications to allow portability of local numbers between different certificated providers of local exchange service as soon as reasonably possible after such portability has been shown to be technically and economically feasible and in the public interest. (Code 1981, § 46-5-170, enacted by Ga. L. 1995, p. 886, § 2.)

46-5-171. Local call charges based on duration or time of call prohibited.

A local exchange company may not charge a residential customer or single line business for basic local exchange service based on the duration

of a call or on the time of day that a call is made; provided, however, that such restriction shall not apply in any case where a customer or business requests charges based on the duration of a call or on the time of day that a call is made. This Code section does not prohibit a local exchange company from offering discounts based on the time of day that a call is made if the company also offers basic local exchange service at a rate permitted under Code Section 46-5-166. (Code 1981, § 46-5-171, enacted by Ga. L. 1995, p. 886, § 2.)

46-5-171.1. Written authorization required by customer prior to being charged for service initiated by a third party.

(a) Except as provided in subsection (b) of this Code section, no telecommunications company shall charge a customer for any service which is provided to the customer by a nonaffiliated third party until such third party has certified to the telecommunications company that the third party has received the customer's written authorization for such charges. When a customer initiates a new type of such third-party service or changes the type or types of such third-party service received, the invoice for such new or changed services must state the charges for such services in a clear, conspicuous, separate, and distinct manner so as to ensure that the customer is aware of the new or changed charges.

(b) This Code section shall not apply to any transaction between a customer and that customer's selected provider of basic local exchange, inter-LATA, or intra-LATA telecommunications services or initial requests to subscribe to such services; wireless services; requests for a change in a customer's provider of local exchange service or a change in a customer's primary interexchange inter-LATA or intra-LATA carrier; or customer initiated use of abbreviated dialing codes or other pay-per-use services. (Code 1981, § 46-5-171.1, enacted by Ga. L. 1998, p. 1378, § 1; Ga. L. 1999, p. 877, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1999, "customer initiated" was substituted for "customer-initiated" in subsection (b).

Editor's notes. — Ga. L. 1998, p. 1378,

§ 2, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 1998, and shall apply to services which are initiated or changed after that date."

46-5-172. Annual report of Tier 1 company's investment commitment.

A Tier 1 local exchange company shall provide an annual report with quarterly updates to the commission regarding its investment commitment as prescribed in subsection (a) of Code Section 45-5-165. Contributions to infrastructure for distance learning and telemedicine by a Tier 1 local exchange company shall be considered an investment credit toward the

required investment commitment of such Tier 1 company. (Code 1981, § 46-5-172, enacted by Ga. L. 1995, p. 886, § 2.)

46-5-173. Unpublished telephone identification.

(a) Any person that obtains an unpublished telephone identification using a telephone caller identification service may not do any of the following without the written consent of the customer of the unpublished telephone line identification:

(1) Intentionally disclose the unpublished telephone line identification to another person for purposes of resale or commercial gain;

(2) Intentionally use the unpublished telephone line identification to solicit business; or

(3) Intentionally disclose the unpublished telephone line identification through a computer data base, on-line bulletin board, or other similar mechanism.

(b) Each intentional disclosure or use of an unpublished telephone line identification is a separate violation. A person other than a corporation who violates subsection (a) of this Code section may be required by the commission to pay a civil penalty of not more than \$5,000.00. A corporation that violates subsection (a) of this Code section may be required by the commission to pay a civil penalty of not more than \$50,000.00.

(c) The commission shall promulgate rules to further establish privacy guidelines applicable to telecommunications services.

(d) No provider of telephone caller identification service shall be held liable for violations of this article committed by other persons or corporations. (Code 1981, § 46-5-173, enacted by Ga. L. 1995, p. 886, § 2.)

46-5-174. Commission's annual report to General Assembly.

The commission shall report to the General Assembly annually on the status of the transition to alternative regulation of telecommunications services in Georgia. (Code 1981, § 46-5-174, enacted by Ga. L. 1995, p. 886, § 2.)

ARTICLE 5

TELECOMMUNICATIONS MARKETING ACT OF 1998

46-5-180. Short title.

This article shall be known and may be cited as the "Telecommunications Marketing Act of 1998." (Code 1981, § 46-5-180, enacted by Ga. L. 1998, p. 919, § 1.)

RESEARCH REFERENCES

ALR. — State regulation of telephone “slamming,” 92 ALR5th 1.

46-5-181. Definitions.

As used in this article, the terms “local exchange company,” “telecommunications company,” and “telecommunications services” shall have the same meaning as provided in Code Section 46-5-162; the term “local exchange carrier” shall have the same meaning as “local exchange company”; and the term “long distance service” shall include interexchange inter-LATA telecommunications service and interexchange intra-LATA telecommunications service. (Code 1981, § 46-5-181, enacted by Ga. L. 1998, p. 919, § 1.)

46-5-182. Certification of telecommunications companies which bill for or solicit intrastate telecommunications services.

No telecommunications company shall bill for intrastate telecommunications services or solicit intrastate telecommunications services within this state without a certificate of authority from the Georgia Public Service Commission; provided, however, that a certificate is not required for a telecommunications company to bill for or solicit commercial mobile services. If a telecommunications company which is certificated in Georgia uses a rebiller or other entity to render a final bill, then the name of the telecommunications company which is actually providing the telecommunications service, as the name appears on its Georgia certificate, shall appear on the bill, subject to space limitations. (Code 1981, § 46-5-182, enacted by Ga. L. 1998, p. 919, § 1.)

46-5-183. Procedures for confirmation of changes in selection of a primary local exchange or long distance carrier generated by telemarketing.

(a) No telecommunications company shall submit to a customer’s local exchange company a change order for the customer’s primary carrier of local exchange or long distance service which is generated by outbound telemarketing unless and until the order has been confirmed in accordance with one of the following procedures:

(1) The telecommunications company has obtained the customer’s written authorization in a form that meets the requirements of Code Section 46-5-184;

(2) The telecommunications company has obtained the customer’s electronic authorization, placed from the telephone number or numbers

on which the primary carrier of local exchange or long distance service is to be changed, to submit the order that confirms the information described in paragraph (1) of this subsection to confirm the authorization. Telecommunications companies electing to confirm sales electronically shall establish one or more toll-free telephone numbers exclusively for that purpose. Calls to the toll-free number or numbers shall connect a customer to a voice response unit, or similar mechanism, that automatically records the originating automatic numbering identification, records the required information regarding the change of the primary carrier of local exchange or long distance service, and records identifying information about the customer;

(3) An appropriately qualified independent third party operating in a location physically separate from the telemarketing representative has obtained the customer's oral authorization to submit the primary local exchange or long distance carrier change order that confirms and states appropriate data verifying the customer's identity; or

(4) Such other verification procedures as may be specified by the commission in rules or regulations which are consistent with rules promulgated by the Federal Communications Commission pursuant to 47 United States Code Section 258.

(b) All letters of agency, recordings, or other evidence of change orders shall be maintained by the soliciting telecommunications company for at least one year from the date the customer's service was switched. Failure to maintain such records shall constitute prima-facie evidence that consent from the customer was not obtained.

(c) Any telecommunications company's telemarketing or direct mail solicitations or confirmation cards soliciting to change a customer's primary local exchange or long distance carrier shall include the following disclosures:

(1) Identification of the telecommunications company soliciting the change;

(2) That the purpose of the call or confirmation card is to solicit a change of the customer's primary carrier of local exchange or long distance service;

(3) That the customer's local exchange or long distance service may not be changed unless and until the requested change is confirmed in accordance with this Code section and Code Section 46-5-184; and

(4) A description of any charge that may be imposed upon the customer by any party for processing the primary local exchange or long distance carrier change.

(d) Customer requests for other services, such as travel, calling card, or prepaid calling card services, do not constitute a change in the local exchange or long distance carrier.

(e) The requirements of this Code section do not apply to consumer initiated calls.

(f) A request for information by a customer shall not be considered a request for a change of a primary local exchange or long distance carrier. (Code 1981, § 46-5-183, enacted by Ga. L. 1998, p. 919, § 1; Ga. L. 1999, p. 81, § 46.)

46-5-184. Contents of letter of agency.

(a) A telecommunications company relying on a written authorization from a customer for a primary local exchange or long distance carrier change must obtain a letter of agency as specified in this Code section. Any letter of agency that does not conform with this Code section is invalid.

(b) The letter of agency shall be a separate document, or an easily separable document containing only the authorizing language described in subsection (e) of this Code section, having the sole purpose of authorizing a telecommunications company to initiate a primary local exchange or long distance carrier change. The letter of agency must be signed and dated by the subscriber to the telephone line or lines requesting the primary local exchange or long distance carrier change.

(c) The letter of agency shall not be combined with inducements of any kind on the same document.

(d) Notwithstanding subsections (b) and (c) of this Code section, the letter of agency may be combined with checks that contain only the required letter of agency language prescribed in subsection (e) of this Code section and the necessary information to make the check a negotiable instrument. The letter of agency check shall not contain any promotional language or material. The letter of agency check shall contain, on the front of the check in easily readable, boldface type at least as large and as dark as any other on the front of the check, a notice that the customer is authorizing a primary local exchange or long distance carrier change by signing the check. The letter of agency language also shall be placed near the signature line on the back of the check.

(e) At a minimum, the letter of agency must be printed in a type of a size and readability equal to at least 12 point New Roman font and must contain clear and unambiguous language that confirms:

(1) The customer's billing name and address and each telephone number to be covered by the primary local exchange or long distance carrier change order;

(2) The decision to change the customer's primary carrier of local exchange or long distance service from the current telecommunications company to the prospective telecommunications company; and the type

of service, whether local exchange, intrastate inter-LATA long distance, or intrastate intra-LATA long distance, to be changed;

(3) That the customer designates the telecommunications company to act as the customer's agent for the primary local exchange or long distance carrier change;

(4) That the customer understands that the customer may select only one primary inter-LATA long distance carrier, one primary intra-LATA long distance carrier, and one primary local exchange carrier for any one telephone number. Furthermore, that the customer understands that the primary inter-LATA long distance carrier may be different from the primary intra-LATA long distance carrier or primary local exchange carrier and that the primary intra-LATA long distance carrier may be different from the primary local exchange carrier. The letter of agency must make clear to the customer whether the customer is selecting the carrier to provide inter-LATA long distance service, intra-LATA long distance service, or local exchange service, or any combination of these services. Any carrier designated in a letter of agency as a primary local exchange or long distance carrier must be the carrier directly setting rates for the customer. One telecommunications company can be a customer's primary inter-LATA long distance carrier, a customer's primary intra-LATA long distance carrier, and a customer's primary local exchange carrier; and

(5) That the customer understands that any primary local exchange or long distance carrier selection the customer chooses may involve a charge to the customer for changing the customer's primary carrier and could involve a charge for changing back to the original primary carrier.

(f) Letters of agency shall not suggest or require that a customer take some action in order to retain the customer's current telecommunications company.

(g) If any portion of a letter of agency is translated into another language, then all portions of the letter of agency must be translated into that language. Every letter of agency must be translated into the same language as any promotional materials, oral descriptions, or instructions provided with the letter of agency. (Code 1981, § 46-5-184, enacted by Ga. L. 1998, p. 919, § 1.)

46-5-185. Investigation and reporting requirements.

(a) A customer shall first report any unwanted, unauthorized change of the customer's primary local exchange or long distance carrier to the customer's current primary local exchange or long distance carrier or the commission; and, thereafter, such carrier shall investigate this complaint along with the soliciting local exchange or long distance carrier in order to

determine if the change was authorized in accordance with the procedures specified in Code Sections 46-5-183 and 46-5-184. If the customer's current primary local exchange or long distance carrier and the soliciting local exchange or long distance carrier have exhausted all means of making a determination regarding authorization of such change, then they may employ the assistance of the commission in resolving the complaint.

(b) If the soliciting carrier subscribes to an expedited primary interexchange carrier switchback service, no investigation will be conducted by the customer's current primary local exchange carrier unless the customer specifically requests that an investigation be conducted. In these situations, the customer shall be switched back promptly to the former primary long distance carrier at no charge to the customer, consistent with this article.

(c) All local exchange companies shall maintain monthly records of the number of unauthorized changes and expedited switchbacks of a customer's primary local exchange or long distance service carrier and shall report such data to the commission on a quarterly basis within 45 days following the end of the quarter.

(d) Nothing in this Code section shall be construed to require a customer reporting any unwanted, unauthorized change to exhaust any administrative remedy or remedies that such customer may have available by law before filing an action under the provisions of Code Section 46-5-191. (Code 1981, § 46-5-185, enacted by Ga. L. 1998, p. 919, § 1.)

46-5-186. Time limit on certain actions of local exchange carrier.

The customer's current local exchange carrier shall initiate action to change the customer back to the prior local exchange or long distance carrier or to another local exchange or long distance carrier of the customer's choice within three business days after a customer's request for such a change. (Code 1981, § 46-5-186, enacted by Ga. L. 1998, p. 919, § 1.)

46-5-187. Abusive telemarketing acts or practices.

Telecommunications companies may not engage in any abusive telemarketing act or practice. Each instance of engaging in an abusive act or practice shall constitute a separate violation of this article. Abusive telemarketing acts or practices shall include but not be limited to the following conduct:

- (1) Threats, intimidation, or the use of profane or obscene language;
- (2) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person called at that number; and

(3) Engaging in outbound telephone calls to a person's residence at any time other than between 8:00 A.M. and 9:00 P.M. local time at the called person's residence unless such person has consented prior to the initiation of the call. (Code 1981, § 46-5-187, enacted by Ga. L. 1998, p. 919, § 1.)

46-5-188. Forgery or falsification prohibited.

Any employee, representative, or agent of a telecommunications company who forges a customer's signature on a letter of agency or otherwise falsifies evidence of customer authorization of a change of a primary local exchange or long distance carrier shall be guilty of a misdemeanor. Each instance of such forgery or falsification shall be a separate offense. (Code 1981, § 46-5-188, enacted by Ga. L. 1998, p. 919, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — An offense noted as one which requires fingerprinting. under O.C.G.A. § 46-5-188 would be designed as one which requires fingerprinting. 1998 Op. Att'y Gen. No. 98-20.

46-5-189. Penalty for willful violation of article.

Any willful violation of this article is subject to enforcement as provided in Code Sections 46-2-91, 46-2-92, and 46-2-93. In addition, without limiting the scope of Part 2 of Article 15 of Chapter 1 of Title 10, the "Fair Business Practices Act of 1975," any willful violation of this article shall also constitute a violation of Code Section 10-1-393. Continued willful violations of this article may also constitute grounds for revocation of a telecommunications company's authority or certificate to provide service in Georgia. Notwithstanding anything to the contrary contained elsewhere in this article, any other activity or conduct engaged in during the course of changing a customer's primary local exchange or long distance carrier which is intended to mislead, deceive, confuse, or perpetrate a fraud or unfair or deceptive act or practice shall constitute cause, within the discretion of the commission, to invoke the penalties or revocation, or both, described in this Code section. (Code 1981, § 46-5-189, enacted by Ga. L. 1998, p. 919, § 1.)

46-5-190. Factual findings by Public Service Commission.

If, after a hearing on a complaint, the commission shall determine that the complainant's selection of a primary local exchange or long distance carrier was switched in violation of this article, the commission may make factual findings regarding the amount of damages suffered by the complainant as a result of the unauthorized switch. Such damages shall be calculated as the amount of the difference between the charges for the unauthorized and the authorized service from the date of the unauthorized

switch in the complainant's service. (Code 1981, § 46-5-190, enacted by Ga. L. 1998, p. 919, § 1.)

46-5-191. Cause of action for damages resulting from violations of this article.

In the event that the remedies provided by Code Section 46-5-185 fail to restore a person or entity to that person's or entity's selected primary carrier of local exchange or long distance service and fail to reimburse the person or entity for the difference between the charges for the unauthorized and the authorized service, within 90 days of the person's or entity's report of an unwanted, unauthorized change of a primary local exchange or long distance carrier to the carriers or the commission as provided in Code Section 46-5-185, then such person or entity whose primary carrier of local exchange or long distance service has been switched in violation of this article may bring an action to recover damages from the telecommunications company responsible for the violation. The superior, magistrate, and state courts of this state shall have jurisdiction over such actions. Notwithstanding any provision of Code Section 46-2-9 to the contrary, such action may be brought in any county of this state in which the telecommunications company transacts business within 24 months of the date of the unauthorized switch of a primary carrier; provided, however, that the running of the statute of limitations shall be tolled during the 90 day period during which the matter is under investigation pursuant to Code Section 46-5-185. Such action shall proceed in all respects like other civil suits for damages, except that on the trial of such suits any findings of the commission made pursuant to Code Section 46-5-190 shall be prima-facie evidence of the facts stated therein, and damages shall be calculated as three times the amount of the difference between the charges for the unauthorized and the authorized service from the date of the unauthorized switch in the complainant's service. A prevailing plaintiff shall be awarded reasonable attorneys' fees and expenses of litigation incurred in connection with an action brought under this Code section. (Code 1981, § 46-5-191, enacted by Ga. L. 1998, p. 919, § 1.)

46-5-192. Construction.

(a) Nothing in this article shall be construed to limit or repeal the application of any state or federal law or regulation regarding telemarketing. In addition, nothing in this article shall be construed to limit the application of any such law or regulation to telecommunications companies which engage in telemarketing.

(b) Nothing in this article shall prohibit a telecommunications company from recovering the cost of conducting investigations and reporting unauthorized changes of a customer's primary local exchange or long

distance carrier through tariffed charges or through rates filed with the commission which are applicable to the carrier making such an unauthorized charge. (Code 1981, § 46-5-192, enacted by Ga. L. 1998, p. 919, § 1.)

CHAPTER 6

RADIO COMMON CARRIERS

Sec.

46-6-1 through 46-6-16 [Repealed].

46-6-1 through 46-6-16.

Repealed by Ga. L. 2001, p. 1037, § 1, effective July 1, 2001.

Editor's notes. — This chapter consisted of Code Sections 46-6-1 through 46-6-16, relating to radio common carriers, and was based on Ga. L. 1970, p. 104, § 2; Ga. L. 1972, p. 439, §§ 1, 2, 4-17; Ga. L. 1984, p. 22, § 46; Ga. L. 1992, p. 2195, § 1.

CHAPTER 7

MOTOR CARRIERS

Article 1		Sec.	
Motor Common or Contract Carriers.			
Sec.			registration permits; late registration and identification; reciprocal agreements; certificate not required.
46-7-1.	Definitions.		
46-7-2.	Power of commissioner to regulate motor common or contract carriers generally.	46-7-17.	Designation and maintenance of agents for service on nonresident carriers; service of process; venue.
46-7-3.	Requirement for certificate.	46-7-18.	Authority of commissioner to prescribe reasonable rates, fares, and charges for carriers; form, filing, and publication of tariffs; collective rate-making procedure.
46-7-4.	Issuance of certificate for full or partial exercise of privilege sought; terms and conditions of issuance.	46-7-19.	Discrimination in rates, fares, and charges; commissioner's orders as to permissible reductions in rates and waivers of charges.
46-7-5.	Authority of commissioner as to revocation, suspension, or change of certificate.	46-7-20.	Rules as to carriage of baggage; rates for carriage of baggage; limitation of liability.
46-7-6.	Certificate transfer procedure.	46-7-21.	Carriage of mail, parcels, and packages [Repealed].
46-7-7.	Considerations determining granting of certificate generally; burden of proof; protest by other carriers; issuance if application unprotested or unopposed.	46-7-22.	Maintenance by carriers of records as to vehicle and trailer use; filing of records with commission; preservation of summaries of records [Repealed].
46-7-8.	Rules as to manner and form of application for certificate.	46-7-23.	Power of commissioner to prescribe and examine books and records of carriers.
46-7-9.	Fees generally.	46-7-24.	Observance of size, weight, and speed laws; filing of schedules with commissioner.
46-7-10.	Hearing on application for certificate; notice.	46-7-25.	Railroad companies as motor common carriers [Repealed].
46-7-11.	Refusal or revocation of certificate; new application.	46-7-26.	Authority of commissioner to promulgate rules and regulations for safety.
46-7-12.	Requirement as to obtaining of security bond, indemnity insurance, or self-insurance before issuance of certificate or permit.	46-7-27.	Authority of commissioner to adopt rules and orders necessary for enforcement of article.
46-7-13.	Temporary emergency authority to operate as a motor common or contract carrier.	46-7-28.	Employment and compensation of enforcement personnel; reimbursement of Commissioners and employees for travel expenses; delegation of enforcement power to employees [Repealed].
46-7-14.	Discontinuance of service by carrier.		
46-7-15.	Registration and licensing of carriers; cities and counties barred from levying taxes on carriers.		
46-7-15.1.	Motor carrier of property permit.		
46-7-16.	Registration and insurance for carriers engaged solely in interstate commerce; emergency, temporary, or trip-lease vehicle		

- Sec.
 46-7-29. Power of commission to delegate to its employees authority to hear cases; appeal of decisions to full commission [Repealed].
 46-7-30. Enforcement of article.
 46-7-31. Injunctions.
 46-7-32. No vested right or perpetual franchise in use of public highways.
 46-7-33. Proceedings before commissioner generally; appeal from orders.
 46-7-34. Effect of certificates granted under prior laws.
 46-7-35. Applicability of article generally [Repealed].
 46-7-36. Applicability of article to carriers engaged in both interstate and intrastate commerce.
 46-7-37. Private carriers excepted from application of article; safety rules authorized; certificates or permits not required.
 46-7-38. Acceptance of rebates, drawbacks, or unauthorized free transportation passes; possession of goods without authority evidence of intentional violation; burden of proof as to exceptions under article.
 46-7-39. Penalty.

Article 2

Motor Contract Carriers

46-7-50 through 46-7-79 [Repealed].

Article 3

Limousine Carriers

- 46-7-85.1. Definitions.
 46-7-85.2. Compliance with article.
 46-7-85.3. Requirement for certificate.

- Sec.
 46-7-85.4. Application for issuance of certificate.
 46-7-85.5. Safety and mechanical inspections.
 46-7-85.6. Transferability of certificates; authorization needed to encumber.
 46-7-85.7. Grounds for cancellation, revocation, or suspension of certificate.
 46-7-85.8. Operations unlawful after cancellation, revocation, or suspension of certificate.
 46-7-85.9. Chauffeur's permit; form; possession requirement; fee; term.
 46-7-85.10. Chauffeur's permit; requirements.
 46-7-85.11. Preemption of regulation by general law; local fees authorized.
 46-7-85.12. Tariff of rates and charges.
 46-7-85.13. Hearings on orders, regulations, or requirements.
 46-7-85.14. Temporary permits.
 46-7-85.15. License plates.
 46-7-85.16. Eligibility for certificates of carriers operating on May 1, 1994 [Repealed].
 46-7-85.17. Rules and regulations.

Article 4

Penalties

- 46-7-90. Violation of laws administered by commissioner; judicial review.
 46-7-91. Penalty for holding oneself out as household goods carrier for hire without valid certificate of authority; penalty for advertising services falsely.

Article 5

Motor Vehicle Safety Inspections

46-7-100 and 46-7-101. [Repealed].

Cross references. — Requirement that hazardous wastes transported across, within, or through state be accompanied by manifest, § 12-8-67. Prohibition against payments to labor organizations by carriers or shippers for transportation of motor vehicle, etc., by rail if such vehicle is also capable of being

moved or propelled on highways, § 34-6-8. Authority of commission to promulgate safety rules and regulations for motor vehicles within its jurisdiction, § 40-8-2. Transportation of motor fuel by transport tank trucks or vessels, § 48-9-9. As to road tax on motor carriers, § 48-9-30 et seq. Creation of

Railway Passenger Service Corridor System,
Ch. 9A, T. 46.

ARTICLE 1

MOTOR COMMON OR CONTRACT CARRIERS.

Cross references. — Standard of care to be observed by common carriers generally, § 46-9-1.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Civil Code 1910, §§ 2767 and 2769; former Code 1933, § 68-504; former Art. 2, Ch. 7, T. 46 are included in the annotations under this article.

General rule stated. — Where livestock is properly tendered for transportation to a common carrier, it is bound, under the common law as enlarged by former Civil Code 1910, §§ 2767 and 2769 to receive and transport it with due diligence, and a breach of such duty will render the carrier liable for all proximate damages flowing from the breach of such duty. *Youmans v. Georgia & F. Ry.*, 142 Ga. 781, 83 S.E. 784 (1914) (decided under former Civil Code 1910, §§ 2767 and 2769).

Preemption by federal law. — Georgia law is preempted by federal law when the suit involves a passenger or property being transported in interstate commerce; Georgia law is not preempted by federal law when a member of the public (i.e., a person other than a passenger or property-owner whose

property is being transported in interstate commerce) sues a carrier that has qualified to conduct both inter- and intrastate commerce in Georgia; Georgia law is not preempted by federal law when such member of the public sues a carrier engaged solely in intrastate commerce. *Westport Trucking Co. v. Griffin*, 254 Ga. 361, 329 S.E.2d 487 (1985) (decided under former OCGA Art. 2, Ch. 7, T. 46).

Operation by nonprofit association as motor carrier for hire required certificate. — Where nonprofit association used trucks owned and operated by association to haul products of association members to and from location in state, and at end of year amount of fees in excess of costs were refunded to members, association was operating as a motor carrier for hire, and was required to obtain a certificate of public convenience and necessity. *Southeast Shippers Ass'n v. Georgia Pub. Serv. Comm'n*, 211 Ga. 550, 87 S.E.2d 75 (1955) (decided under former Code 1933, § 68-504).

46-7-1. Definitions.

As used in this chapter, the term:

- (1) "Commissioner" means the commissioner of motor vehicle safety.
- (2) "Department" means the Department of Motor Vehicle Safety. (Code 1981, § 46-7-1, enacted by Ga. L. 2000, p. 951, § 9-4.)

Editor's notes. — The former version of this Code section, relating to definitions for motor common carriers, which was repealed by Ga. L. 1986, p. 1283, § 2, effective April 9, 1986, was reserved by Ga. L. 1996, p. 950, § 3, effective April 15, 1996.

Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing

certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than

July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-2. Power of commissioner to regulate motor common or contract carriers generally.

Unless expressly prohibited by federal law, the commissioner is vested with power to regulate the business of any person engaged in the transportation as a common or contract carrier of persons or property, either or both, for hire by motor vehicle on any public highway of this state. (Ga. L. 1931, p. 199, § 3; Code 1933, § 68-603; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4.)

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that

the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

Law reviews. — For article, "Local Government Law," see 53 Mercer L. Rev. 389 (2001).

JUDICIAL DECISIONS

Some of the decisions cited below were decided under former Ga. L. 1929, p. 293.

Applicability of term "motor carrier". — The term "motor carrier," applies to those operating on a regular route on regular schedules or between fixed termini, and to whom the commission has power to prescribe schedules, fix rates, and issue order relative to their operation. *Cherry v. City of Atlanta*, 47 Ga. App. 719, 171 S.E. 463 (1933), *aff'd*, 179 Ga. 249, 175 S.E. 563 (1934) (decided under former Ga. L. 1929, p. 293).

Extent of regulatory supervision given to commission by Legislature. — The legislature having given to the commission regulatory supervision, as provided in the acts relating thereto, over motortruck freight transportation for hire by common carriers, and the legislature having power to regulate the operation of motortrucks over the highways of this state, it could enact such laws regulating speed, size, brakes, lights, etc., of

such vehicles as tended to promote the general safety of the public in the use of the highways of this state by such vehicles. The legislature could clearly designate the commission to act for it in seeing that public service motor vehicles conformed to the regulatory laws applicable to them, leaving to that body the working out of the minor details regarding such regulations. *Maner v. Dykes*, 55 Ga. App. 436, 190 S.E. 189 (1937).

Rule of commission is not "law of the State" within the meaning of that term as used in the provisions of the Constitution giving exclusive jurisdiction on appeal to Supreme Court to pass on constitutionality of state law. *Reliable Transf. Co. v. May*, 70 Ga. App. 613, 29 S.E.2d 187 (1944).

Carrier without right to review of revocation judgment by writ of certiorari in superior court. — Where a certificate of public convenience and necessity has been granted by the commission to a motor common carrier, under and subject to the provisions

of the motor common carrier act of 1931, to operate a passenger, baggage, and express service by motor vehicles over a specific route between named cities, and thereafter, by order of the commission, and after a hearing such certificate is revoked and canceled because the evidence adduced such hearing showed that such motor common carrier had abandoned the passenger service along the route in question, the motor common carrier, whose certificate of public convenience has thus been revoked and canceled by the commission does not have the right to review such judgment or order of the commission by the writ of certiorari in the superior court having jurisdiction. *Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n*, 181 Ga. 75, 181 S.E. 834 (1935).

City's ordinances prohibiting the use of

amphibious vehicles as tour vehicles in parts of the city were not preempted by the state law giving the Public Service Commission the authority to issue certificates of public convenience and necessity; the ordinances fall within the constitutional exception to the doctrine of preemption since the General Assembly enacted general laws authorizing the local government to exercise its police powers and enact the local laws at issue. *Old S. Duck Tours, Inc. v. Mayor of Savannah*, 272 Ga. 869, 535 S.E.2d 751 (2000).

Cited in *Bass v. Georgia Public-Service Comm'n*, 192 Ga. 106, 14 S.E.2d 740 (1941); *Georgia Pub. Serv. Comm'n v. Smith Transf. Co.*, 207 Ga. 658, 63 S.E.2d 653 (1951); *Evanston Ins. Co. v. Stonewall Surplus Lines Ins. Co.*, 111 F.3d 852 (11th Cir. 1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 1, 2, 3, 5, 21 et seq.

C.J.S. — 60 C.J.S., Motor Vehicles, § 24 et seq.

ALR. — Power of municipality to deny the use of its street to public carrier which has

obtained from state commission certificate of public convenience, 66 ALR 847.

Jurisdiction of public service commission over carriers transporting by motor trucks or busses, 103 ALR 268.

46-7-3. Requirement for certificate.

No motor common or contract carrier of passengers or household goods shall, except as otherwise provided in this article, operate without first obtaining from the commissioner a certificate. (Ga. L. 1931, p. 199, § 4; Code 1933, § 68-604; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 366, § 3.)

The 2004 amendment, effective July 1, 2004, deleted "of public convenience and necessity, pursuant to findings to the effect that the public interest requires such operation" following "certificate" at the end of this Code section.

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000,

for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

In light of the similarity of the provisions, decisions under former Ga. L. 1929, p. 293 former Code 1933, § 68-504, and former Code Section 46-7-53, are included in the annotations under this Code section.

Construction with Code Section 46-7-7. — Provisions of former Code 1933, § 68-504 were the same as provisions of former Code 1933, § 68-609 (see O.C.G.A. § 46-7-7) with respect to the enumerated five elements that the commission must consider. Therefore, the decisions of the Supreme Court dealing with former Code 1933, § 68-609 (see O.C.G.A. § 46-7-7) were directly applicable and controlling on the construction of former Code 1933, § 68-504. Both sections add to the five enumerated considerations the following: "among other things." This quoted provision cannot be ignored, and its proper recognition required a construction that the commission's judgment need not rest upon any or all of the five fields enumerated. *J. & M. Transp. Co. v. Georgia Pub. Serv. Comm'n*, 217 Ga. 296, 122 S.E.2d 227 (1961) (decided under former Code 1933, § 68-504).

Public interest more than five elements contained in subsection (f). — Both former Code 1933, § 68-504, which related to "motor contract carriers" and former Code 1933, § 68-609 (see O.C.G.A. § 46-7-7), which related to "motor common carriers" require the procurement of a certificate of public convenience and necessity from the commission after a hearing pursuant to findings by the commission to the effect that "the public interest requires such operation." The public interest, while embracing the five elements yet comprehends much more. *J. & M. Transp. Co. v. Georgia Pub. Serv. Comm'n*, 217 Ga. 296, 122 S.E.2d 227 (1961) (decided under former Code 1933, § 68-504).

No right to be free from competition. — Former Code 1933, § 68-504 did not afford the right to be free from competition. *Wells Fargo Armored Serv. Corp. v. Georgia Pub. Serv. Comm'n*, 547 F.2d 938 (5th Cir. 1977) (decided under former Code 1933, § 68-504).

Operation by nonprofit association as motor carrier for hire requires certificate. — Where nonprofit association used trucks

owned and operated by association to haul products of association members to and from location in state, and at end of year amount of fees in excess of costs were refunded to members, association was operating as a motor carrier for hire, and was required to obtain a certificate of public convenience and necessity. *Southeast Shippers Ass'n v. Georgia Pub. Serv. Comm'n*, 211 Ga. 550, 87 S.E.2d 75 (1955) (decided under former Code Section 46-7-53).

Publisher not liable for unknowingly using unlicensed distributor. — Since there is no duty on the part of a newspaper publisher to inquire and ascertain if a distributor is properly licensed by the Public Service Commission, a publisher cannot be held liable for the negligent driving of its distributor's delivery vehicle on the ground that the driver was not licensed. *Tanner v. USA Today*, 179 Ga. App. 722, 347 S.E.2d 690 (1986) (decided under former Code Section 46-7-53).

Power to select, limit and prohibit uses of highways by carriers for hire, which is implied in the requirement of a certificate of public convenience and necessity, is justified both as a regulation of the business, and as a regulation for the protection and safety of the highways. There is thereby no unequal protection of law, but a reasonable classification. *Southern Motorways, Inc. v. Perry*, 39 F.2d 145 (N.D. Ga. 1930) (decided under former Ga. L. 1929, p. 293).

Doing business on highways is privilege which may be conditioned or withheld. — Motor carriers are engaged in a business that is regulatable, and doing that business on the highways by a privilege which may be conditioned or withheld. *Southern Motorways, Inc. v. Perry*, 39 F.2d 145 (N.D. Ga. 1930) (decided under former Ga. L. 1929, p. 293).

Certificate and annual license fee are legally demandable by state. — A certificate of public convenience and necessity, with a reasonable fee therefor, and an annual license fee for the trucks, are legally demandable by a state as a nondiscriminatory prerequisite of the use of the highway for carrier purposes, even though the commerce involved is wholly interstate. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931) (decided under former Ga. L. 1929, p. 293).

Authority of state to regulate use of roads.

— The state may license or refuse to license, may condition or charge for, the use of its improved roads, when they are turned from their common uses and purposes to the carrier's business. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931) (decided under Ga. L. 1929, p. 293).

Interstate carrier to pay for use of highway. — An interstate carrier has no better right than any other to use the state's improved highway without its consent, or without paying for it. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931) (decided under former Ga. L. 1929, p. 293).

Directory or advisory nature of statutory elements of proof of public convenience and necessity. — In determining whether the public interest required the service and whether the certificate should be granted, the commission was directed by statute to consider the five subjects set out in former Code 1933, § 68-609 (see O.C.G.A. § 46-7-7). While these provisions were only directory or advisory, and it was not mandatory that each be proved before the commission was authorized to grant a certificate, reviewing courts recognize that this was a pronouncement by the General Assembly of principles of law generally accepted as ele-

ments of proof of public convenience and necessity. *Tamiami Trail Tours, Inc. v. Georgia Pub. Serv. Comm'n*, 213 Ga. 418, 99 S.E.2d 225 (1957).

Notice of cancellation. — O.C.G.A. § 46-7-3 requires motor carriers to obtain a certificate of public convenience which may not be issued until a surety bond or evidence of a policy of indemnity insurance is filed with the Public Service Commission (PSC). Under PSC Rule 1-8-1-.07, policies of insurance evidenced by a Form E certificate filed with the PSC remain in effect until cancelled as prescribed by that rule. The filing of a Form E certificate of insurance establishes that a specified policy of insurance has been issued to the motor carrier and that the policy continues in effect until canceled by giving notice to the PSC. *Progressive Preferred Ins. Co. v. Ramirez*, 277 Ga. 392, 588 S.E.2d 751 (2003).

Cited in *Phillips v. International Agric. Corp.*, 54 Ga. App. 751, 189 S.E. 54 (1936); *Bass v. Georgia Public-Service Comm'n*, 192 Ga. 106, 14 S.E.2d 740 (1941); *Gallahar v. George A. Rheman Co.*, 50 F. Supp. 655 (S.D. Ga. 1943); *Georgia Pub. Serv. Comm'n v. Smith Transf. Co.*, 207 Ga. 658, 63 S.E.2d 653 (1951).

OPINIONS OF THE ATTORNEY GENERAL

Exception to requirements of this section.

— The temporary emergency authority granted under former Code 1933, § 68-611.1 (see O.C.G.A. § 46-7-13) was an exception to the general requirement of

former Code 1933, § 68-604 (see O.C.G.A. § 46-7-3) that no motor common carrier can operate without first obtaining a certificate. 1973 Op. Att'y Gen. No. 73-85.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 125 et seq.

C.J.S. — 60 C.J.S., Motor Vehicles, § 187 et seq.

46-7-4. Issuance of certificate for full or partial exercise of privilege sought; terms and conditions of issuance.

The commissioner may issue the certificate applied for or issue it for the partial exercise of the privilege sought and may attach to the exercise of the rights granted by such certificate such terms and conditions as, in his or her judgment, may be required. (Ga. L. 1931, p. 199, § 4; Code 1933, § 68-605; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 366, § 4.)

The 2004 amendment, effective July 1, 2004, deleted "the public interest" preceding "may require" near the end of this Code section.

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in

full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2004, "sought and" was substituted for "sought, and" and "may be required" was substituted for "may require".

JUDICIAL DECISIONS

In light of the similarity of the provisions, decisions under former Ga. L. 1929, p. 293, are included in the annotations under this Code section.

Certificate and annual license fee legally demandable by state. — A certificate of public convenience and necessity, with a reasonable fee therefor, and an annual license fee for the trucks, are legally demandable by a state as a nondiscriminatory prerequisite of the use of the highway for carrier purposes, even though the commerce involved is wholly interstate. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931) (decision under former Ga. L. 1929, p. 293).

Interstate carrier to pay for use of highway. — An interstate carrier has no better right than any other to use the state's improved highway without its consent, or without paying for it. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931) (decided under former Ga. L. 1929, p. 293).

Cited in *Bass v. Georgia Public-Service Comm'n*, 192 Ga. 106, 14 S.E.2d 740 (1941); *Georgia Pub. Serv. Comm'n v. Smith Transf. Co.*, 207 Ga. 658, 63 S.E.2d 653 (1951); *Tamiami Trail Tours, Inc. v. Georgia Pub. Serv. Comm'n*, 213 Ga. 418, 99 S.E.2d 225 (1957).

OPINIONS OF THE ATTORNEY GENERAL

Unconstitutional delegation of authority. — If the commission issued a certificate of public convenience and necessity which automatically terminated upon the decision of the municipality to terminate the contract

with the certificate holder, the commission would have unlawfully delegated its authority to issue certificates to that municipality. 1980 Op. Att'y Gen. No. 80-162.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 126.

C.J.S. — 60 C.J.S., Motor Vehicles, §§ 174, 175 et seq., 192 et seq., 206, 208.

ALR. — State regulation of carriers by motor vehicle as affected by interstate com-

merce clause, 47 ALR 230; 49 ALR 1203; 62 ALR 52; 85 ALR 1136; 109 ALR 1245; 135 ALR 1358.

When granting or refusing certificate of necessity or convenience for operation of motorbuses justified, 67 ALR 957.

46-7-5. Authority of commissioner as to revocation, suspension, or change of certificate.

The commissioner may, at any time after notice and opportunity to be heard and for reasonable cause, suspend, revoke, alter, or amend any certificate issued under this article, under the “Motor Carrier Act of 1929,” under the “Motor Carrier Act of 1931,” or under prior law, if it shall be made to appear that the holder of the certificate has willfully violated or refused to observe any of the lawful and reasonable orders, rules, or regulations prescribed by the commissioner or any of the provisions of this article or any other law of this state regulating or taxing motor vehicles, or both, or if in the opinion of the commissioner the holder of the certificate is not furnishing adequate service. (Ga. L. 1931, p. 199, § 4; Code 1933, § 68-607; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 366, § 5.)

The 2004 amendment, effective July 1, 2004, deleted the subsection (a) designation; deleted “, or if the continuance of said certificate in its original form is incompatible with the public interest” following “adequate service” at the end of this Code section; and deleted former subsection (b) which read: “(b) If and when the commissioner shall undertake to revoke or modify any certificate on account of the public interest on the ground that the traffic conditions are such as not to justify the number of motor carriers which have been granted certificates over the route or routes in question, the preference shall be given to certificates in order of the time of their issuance, so that those which have been issued later in time shall, other things being equal, be canceled rather than those issued earlier in time.”

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

Commission should predicate its action upon its “opinion.” — In dealing with the paramount consideration of the grant of the certificate, that is, the convenience and necessities of the public in the use and enjoyment and protection of their highways, and fully sensible of the hardship or harm that might result from tying up the administration of the commission in so vital a matter by review, the General Assembly affirmatively provided that, as to a revocation of such certificate, the commission should predicate its action only upon its “opinion.” South-

eastern Greyhound Lines v. Georgia Pub. Serv. Comm’n, 181 Ga. 75, 181 S.E. 834, answer conformed to, 52 Ga. App. 35, 182 S.E. 204 (1935).

Distinction between exercise of executive or legislative powers from judicial powers. — Even where it is essential to maintain strictly the distinction between the judicial and other branches of the government, it must still be recognized that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may

be entirely proper in the exercise of executive or legislative, as distinguished from judicial powers. *Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n*, 181 Ga. 75, 181 S.E. 834, answer conformed to, 52 Ga. App. 35, 182 S.E. 204 (1935).

A body does not necessarily exercise judicial powers because it may make an investigation or use discretion in acting in a given case. *Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n*, 181 Ga. 75, 181 S.E. 834, answer conformed to, 52 Ga. App. 35, 182 S.E. 204 (1935).

Authority of commission where carrier not furnishing adequate service. — The commission is authorized, for reasonable cause and after notice and opportunity to be heard, to suspend, revoke, alter or amend a certificate when, in its opinion, the holder thereof is not furnishing adequate service. *Tamiami Trail Tours, Inc. v. Georgia Pub. Serv. Comm'n*, 213 Ga. 418, 99 S.E.2d 225 (1957).

Commission has power to cancel certificate where holder without liability insurance. — Where holder of certificate of convenience and necessity allowed its liability insurance to be canceled, the commission was within its power when it canceled the certificate. *House, Inc. v. Georgia Pub. Serv. Comm'n*, 217 Ga. 625, 124 S.E.2d 75 (1962).

No right to review revocation order of commission by writ of certiorari. — Where a certificate of public convenience and necessity has been granted by the commission to a motor common carrier to operate a passenger, baggage, and express service by motor vehicles over a specified route between certain named cities in this state, and, thereafter such certificate is revoked and canceled by order of the commission, after hearing pursuant to a rule nisi, because of the carrier's failure to operate passenger bus service under said certificate, the motor common carrier has not the right to review such order

or judgment of the commission by writ of certiorari from the superior court, as the act of the commission in the revocation of such certificate was not a judicial function, but was the exercise of administrative power, to which action the writ of certiorari does not lie. *Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n*, 181 Ga. 75, 181 S.E. 834, answer conformed to, 52 Ga. App. 35, 182 S.E. 204 (1935).

Authority of commission to transfer truck operations. — Where a Class "B" certificate authorizing holder to transport household, kitchen, office furniture, and store fixtures between all points in Georgia, which, under former Code 1933, § 68-607 (see O.C.G.A. § 46-7-3), the commission was authorized to "suspend, revoke, alter, or amend," and under former Code 1933, § 68-608 (see O.C.G.A. § 46-7-6), was authorized to transfer, was altered or amended and transferred, being limited to between all points within a 20 mile radius of Atlanta, there was no merit in contention that the commission was without authority to transplant a one-truck operation from the outskirts of Calhoun to an eleven-truck operation in the metropolis of Atlanta. *Woodside Transf. & Storage Co. v. Georgia Pub. Serv. Comm'n*, 212 Ga. 625, 94 S.E.2d 706 (1956).

Control of pedestrians and motor vehicles within police power of municipality. — Control of pedestrians and motor vehicles on municipal streets, including those on and around school grounds is a governmental function within the police power of the municipality. *Fletcher v. Russell*, 151 Ga. App. 229, 259 S.E.2d 212 (1979), rev'd on other grounds, 244 Ga. 854, 262 S.E.2d 138 (1979).

Cited in *Georgia Pub. Serv. Comm'n v. Smith Transf. Co.*, 207 Ga. 658, 63 S.E.2d 653 (1951).

OPINIONS OF THE ATTORNEY GENERAL

Former Code 1933, § 68-607 (see O.C.G.A. § 46-7-5) was plain and unambiguous, and hence not subject to legal interpretation; it clearly authorized the commission to revoke or amend a certificate if the carrier was not furnishing adequate service. The only question to be determined in such a case was whether or not the service

was inadequate from any cause; it made no difference whether that inadequacy may have resulted from abandonment of other services by the applicant or any other carrier, or whether it arises from gradual population shifts. 1957 Op. Att'y Gen. p. 222.

Public convenience and necessity determinative factor concerning continuation of ser-

vice. — In determining whether a branch line should be discontinued, public convenience and necessity — not loss to the utility — where the operation as a whole is profitable, is the determinative factor, and the commission may consider the return from the entire system rather than just the branch line. Of course, under the guise of regulation the property of a carrier may not be taken by requiring it to furnish services or facilities not reasonably necessary to serve the public. 1957 Op. Att’y Gen. p. 222.

Effect of revocation of certificate by commission. — Where the commission, under former Code 1933, § 68-607 (see O.C.G.A. § 46-7-5), after notice and opportunity to be heard, and for reasonable cause, revoked and canceled a certificate of public convenience and necessity, such certificate be-

came forever dead and the original holder thereof had no further privileges thereunder, and before the holder of such canceled and revoked certificate can again enjoy the privileges the holder formerly enjoyed under the certificate, he must first file a new application and it then became the duty of the commission to assign the same for a hearing so that the commission may determine that the public interest requires such operations. 1945-47 Op. Att’y Gen. p. 403.

Duty of utility to furnish adequate service correlative of right to serve. — Former Code 1933, § 68-607 (see O.C.G.A. § 46-7-5) is simply one expression of the principle which permeates all public utility regulations — the duty of the utility to furnish adequate service, which is a correlative of its right to serve. 1957 Op. Att’y Gen. p. 222.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 140 et seq., 155.

C.J.S. — 60 C.J.S., Motor Vehicles, §§ 206, 239, 240.

46-7-6. Certificate transfer procedure.

Any certificate issued pursuant to this article may be transferred or hypothecated upon application to and approval by the commissioner, and not otherwise. (Ga. L. 1931, p. 199, § 4; Code 1933, § 68-608; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4.)

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in

full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

Authority of commission to transfer truck operations. — Where a Class “B” certificate authorizing holder to transport household, kitchen, office furniture, and store fixtures between all points in Georgia, which, under former Code 1933, § 68-607 (see O.C.G.A. § 46-7-5), the commission was authorized to “suspend, revoke, alter, or amend,” and under former Code 1933, § 68-608 see

O.C.G.A. § 46-7-6), was authorized to transfer was altered or amended and transferred, being limited to between all points within a 20 mile radius of Atlanta there was no merit in contention that the commission was without authority to transplant a one-truck operation from the outskirts of Calhoun to an eleven-truck operation in the metropolis of Atlanta. Woodside Transf. & Storage Co. v.

Georgia Pub. Serv. Comm'n, 212 Ga. 625, 94 S.E.2d 706 (1956).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 135 et seq.

C.J.S. — 60 C.J.S., Motor Vehicles, § 175 et seq.

ALR. — Carrier's certificate of convenience and necessity, franchise, or permit as subject to transfer or encumbrance, 15 ALR2d 883.

46-7-7. Considerations determining granting of certificate generally; burden of proof; protest by other carriers; issuance if application unprotested or unopposed.

(a) The commissioner shall issue a certificate to a person authorizing transportation as a motor common or contract carrier of passengers or household goods subject to the jurisdiction of the commissioner if he or she finds that the person is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with regulations of the commissioner. Fitness encompasses three factors:

(1) The applicant's financial ability to perform the service it seeks to provide;

(2) The applicant's capability and willingness to perform properly and safely the proposed service; and

(3) The applicant's willingness to comply with the laws of Georgia and the rules and regulations of the commissioner.

(b) The initial burden of making out a prima-facie case that an applicant is fit to provide such service rests with the applicant.

(c) Upon an applicant making out a prima-facie case as to the carrier's ability to provide the service, the burden shifts to protestant to show that the authority sought should not be granted.

(d) A protest of a motor carrier of passengers or of household goods to an application will not be considered unless the protesting carrier:

(1) Possesses authority from the commissioner to handle, in whole or in part, the authority which is being applied for and is willing and able to provide service and has performed service during the previous 12 month period or has actively in good faith solicited service during such period;

(2) Has pending before the commissioner an application previously filed with the commissioner for substantially the same authority; or

(3) Is granted by the commissioner leave to intervene upon a showing of other interests which in the discretion of the commissioner would warrant such a grant.

(e) The commissioner may issue a certificate without a hearing if the application is unopposed or unopposed. (Ga. L. 1931, p. 199, § 4; Code 1933, § 68-609; Ga. L. 1950, p. 186, § 1; Ga. L. 1986, p. 1283, § 3; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 366, § 6.)

The 2004 amendment, effective July 1, 2004, in subsection (a), deleted “of public convenience and necessity” following “certificate” near the beginning, substituted “that the person” for “that: (1) The person” near the middle, redesignated former subparagraphs (a)(1)(A) through (a)(1)(C) as present paragraphs (a)(1) through (a)(3), respectively, substituted a period for “; and” at the end of paragraph (a)(3), and deleted former paragraph (a)(2) which read: “Based on evidence presented by the applicant supporting the issuance of the certificate, that the service proposed will serve a useful public purpose and be responsive to a public demand or need.”; deleted “applicant’s service is needed and that the” preceding “applicant” in the middle of subsection (b); in subsection (c), deleted “the need for the service and” following “case as to” near the beginning and substituted “should not be granted” for “would not be consistent with the public convenience and necessity” at the end; deleted former subsection (d) which read: “(d) The commissioner shall not consider diversion of revenue or traffic from an existing motor carrier to be grounds for denial of an application.”; redesignated former subsections (e) and (f) as present subsections (d) and (e), respectively; in

paragraph (d)(1), substituted “authority which is being applied for” for “commodity for which authority is applied” near the beginning, deleted “that meets the reasonable needs of the shippers involved” following “provide service”, deleted “within the scope of the application” following “performed service” near the middle, and deleted “within the scope of application” following “solicited service” near the end; and deleted “of public convenience and necessity” following “certificate” near the middle of subsection (e).

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

Principles generally accepted as elements of proof of public convenience and necessity. — In determining whether the public interest requires the service and whether the certificate shall be granted, the commission is directed by statute to consider the five subjects set out in former Code 1933, § 68-609 (see O.C.G.A. § 46-7-7). While these provisions are only directory or advisory, and it is not mandatory that each be proved before the commission is authorized to grant a certificate, this court recognizes that this is a pronouncement by the General Assembly of principles of law generally accepted as elements of proof of public convenience and necessity. *Tamiami Trail Tours,*

Inc. v. Georgia Pub. Serv. Comm’n, 213 Ga. 418, 99 S.E.2d 225 (1957).

Provisions of this section are advisory. — Each of the five specific subjects set forth in former Code 1933, § 68-609 (see O.C.G.A. § 46-7-7), which the law says the commission must consider, is intended for the guidance of the commission and to define the fields in which the commission shall give consideration, but is merely advisory, irrespective of what the evidence might disclose in respect to each of the five subjects. *Petroleum Carrier Corp. v. Davis*, 210 Ga. 568, 81 S.E.2d 805 (1954).

Provisions not applicable to grant or denial of Class “B” certificates. — The provi-

sions of former Code 1933, § 68-609 (see O.C.G.A. § 46-7-7) declaring that the commission must consider whether existing transportation service of all kinds is adequate to meet the reasonable public needs, the volume of existing traffic over such route, and whether such traffic and that reasonably to be anticipated in the future can support already existing transportation agencies and also the applicant, the effect on existing transportation revenues and service of all kinds, and particularly whether the granting of such certificate will or may seriously impair essential existing public service, is advisory only and, irrespective of what the evidence might be upon the subjects there mentioned, the commission may grant or deny a Class "B" certificate without offending the law. *Petroleum Carrier Corp. v. Davis*, 210 Ga. 568, 81 S.E.2d 805 (1954); *Woodside Transf. & Storage Co. v. Georgia Pub. Serv. Comm'n*, 212 Ga. 625, 94 S.E.2d 706 (1956).

The 1950 amendment to former Code 1933, § 68-609 (see O.C.G.A. § 46-7-7) was expressly limited to certificates over fixed routes, and has no application to Class "B" certificates. *Petroleum Carrier Corp. v. Davis*, 210 Ga. 568, 81 S.E.2d 805 (1954); *Woodside Transf. & Storage Co. v. Georgia Pub. Serv. Comm'n*, 212 Ga. 625, 94 S.E.2d 706 (1956).

Use of term "public." — The use of the term "public" in O.C.G.A. § 46-7-7 is intended to distinguish private carriage operations which require no certificate of public convenience and necessity. *Georgia Messenger Serv., Inc. v. Georgia Pub. Serv. Comm'n*, 194 Ga. App. 340, 390 S.E.2d 283, cert. vacated, 260 Ga. 470, 397 S.E.2d 709 (1990).

Primary concern is public interest and welfare and grant of certificate is discretionary. — In the hearing on an application for a certificate, the commission merely conducts an investigation of fact, authorized by statute, in the determination of which the primary concern is the public interest and welfare. Whether or not it grants an application for a certificate is purely a matter of discretion and not one of absolute right. *Tamiami Trail Tours, Inc. v. Georgia Pub. Serv. Comm'n*, 213 Ga. 418, 99 S.E.2d 225 (1957).

Five factors enumerated to be considered by commission. — O.C.G.A. § 46-7-7 enumerates five factors, among others, that the

Public Service Commission must consider in determining whether a certificate of public convenience and necessity should be granted. *RTC Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 165 Ga. App. 539, 301 S.E.2d 896 (1983).

Public interest comprehends much more than five elements contained in this section.

— Both former Code 1933, § 68-504, which related to "motor contract carriers" and former Code 1933, § 68-609 (see O.C.G.A. § 46-7-7), which related to "motor common carriers" require the procurement of a certificate of public convenience and necessity from the commission after a hearing pursuant to findings by the commission to the effect that "the public interest requires such operation." The public interest, while embracing the five elements, comprehends much more. *J. & M. Transp. Co. v. Georgia Pub. Serv. Comm'n*, 217 Ga. 296, 122 S.E.2d 227 (1961) (decided prior to 1996 amendment).

No error to refuse injunction where evidence supports discretion of commission.

— Where it appears that the commission had evidence authorizing it in the exercise of its discretion to issue the certificate applied for, the trial judge did not err in refusing to enjoin the commission or the applicant. *J. & M. Transp. Co. v. Georgia Pub. Serv. Comm'n*, 217 Ga. 296, 122 S.E.2d 227 (1961).

Commission free to exercise its judgment to grant or deny applications.

— The commission, as respects Class "B" certificates, is free to exercise its own judgment and to grant or deny the applications for such certificates. *Petroleum Carrier Corp. v. Davis*, 210 Ga. 568, 81 S.E.2d 805 (1954).

Error for trial judge to enjoin certificate holder from operating.

— It was error for the trial judge to enjoin the holder of a Class "B" certificate from operating thereunder, upon the theory that the evidence failed to show inadequacy of existing transportation service. *Petroleum Carrier Corp. v. Davis*, 210 Ga. 568, 81 S.E.2d 805 (1954).

No interference with order of commission unless showing of unreasonableness.

— Neither the trial court, nor a court on review, will substitute its own discretion and judgment for that of the commission where it has exercised its discretion in a matter over which it has jurisdiction, and will not inter-

fere with a valid order of the commission unless it be clearly shown that the order is unreasonable, arbitrary or capricious. *Brown Transp. Corp. v. Pilcher*, 222 Ga. 276, 149 S.E.2d 670 (1966).

Commission's order supported by some evidence will not be overturned on appeal.

— Where the record reflects that the Public Service Commission's order denying the requested certificates is supported by some evidence and is not unreasonable, arbitrary, or capricious, the Court of Appeals will not substitute its own decision for that of the commission. *RTC Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 165 Ga. App. 539, 301 S.E.2d 896 (1983).

Applicability of decisions of Supreme Court construing this section to § 46-7-53.

— The provisions of former Code 1933, § 68-504 were in all respects the same as the provisions of former Code 1933, § 68-609 (see O.C.G.A. § 46-7-7) with respect to the enumerated five elements that the commission must consider. Therefore, the decisions of the Supreme Court dealing with former Code 1933, § 68-609 (see O.C.G.A. § 46-7-7), were directly applicable and controlling on the construction of former Code 1933, § 68-504. Both sections add to the five enumerated considerations the following: "among other things." This quoted provision cannot be ignored, and its proper recognition required a construction that the commission's judgment need not rest upon any or all of the five fields enumerated. *J. & M. Transp. Co. v. Georgia Pub. Serv. Comm'n*, 217 Ga. 296, 122 S.E.2d 227 (1961).

So long as certificate remained unrevoked, commission could authorize its transfer. — The question of public convenience and necessity having been determined by the commission at the time the certificate was issued, the commission would not be required on an application for transfer to consider that question again before granting a transfer of the certificate. *Tamiami Trail Tours, Inc. v. Georgia Pub. Serv. Comm'n*, 213 Ga. 418, 99 S.E.2d 225 (1957).

When existing certificate holder not entitled to notice and opportunity required by this section. — Where the proposed route was not the same as that used by a certificate

holder, that company was not entitled to notice and opportunity to remedy inadequate service as required by former Code 1933, § 68-609 (see O.C.G.A. § 46-7-7). *Tamiami Trail Tours, Inc. v. Georgia Pub. Serv. Comm'n*, 213 Ga. 418, 99 S.E.2d 225 (1957).

Existing certificate holder must have opportunity to improve service. — A competing motor carrier certificate cannot be granted until after the existing certificate holder has had an opportunity to improve service. *Statesboro Tel. Co. v. Georgia Pub. Serv. Comm'n*, 235 Ga. 179, 219 S.E.2d 127 (1975).

"Route" defined. — The word "route," as used in former Code 1933, U 68-609 (see O.C.G.A. § 46-7-7), means the particular highway or road, or series of highways or roads, over which a carrier is authorized by the commission to operate its vehicles between terminal points. *Tamiami Trail Tours, Inc. v. Georgia Pub. Serv. Comm'n*, 213 Ga. 418, 99 S.E.2d 225 (1957).

"Route" and "highway" distinguished. — A "route" is a direction of travel from one place to another. It may be over one or more named or numbered highways or paths. A "highway" is a road for travel, and may be a portion of one or more different routes. When numbered or named as a highway running from one point to another, it becomes a route. *Brown Transp. Corp. v. Pilcher*, 222 Ga. 276, 149 S.E.2d 670 (1966).

When two routes can be same route. — Two routes cannot be the same unless the highways, the certificates of convenience and necessity, and the terminal points are the same. *Brown Transp. Corp. v. Pilcher*, 222 Ga. 276, 149 S.E.2d 670 (1966).

Certificate amendment based on need expressed by single shipper. — Certificate amendment, which was sought on the basis of a need expressed by a single shipper, was properly granted, where the evidence established that the proposed service would serve a useful public purpose and be responsive to a public demand or need. *Georgia Messenger Serv., Inc. v. Georgia Pub. Serv. Comm'n*, 194 Ga. App. 340, 390 S.E.2d 283, cert. vacated, 260 Ga. 470, 397 S.E.2d 709 (1990).

Cited in Georgia Pub. Serv. Comm'n v. Smith Transf. Co., 207 Ga. 658, 63 S.E.2d 653 (1951).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 130 et seq.

C.J.S. — 60 C.J.S., Motor Vehicles, §§ 174, 187 et seq., 192 et seq.

ALR. — State regulation of carriers by motor vehicle as affected by interstate com-

merce clause, 47 ALR 230; 49 ALR 1203; 62 ALR 52; 85 ALR 1136; 109 ALR 1245; 135 ALR 1358.

When granting or refusing certificate of necessity or convenience for operation of motorbuses justified, 67 ALR 957.

46-7-8. Rules as to manner and form of application for certificate.

The commissioner shall adopt rules prescribing the manner and form in which motor carriers of passengers or household goods shall apply for certificates required by this article. Such rules shall require that the application be in writing, under oath, and that the application:

(1) Contain full information concerning the applicant's financial condition, the equipment proposed to be used, including the size, weight, and capacity of each vehicle to be used, and other physical property of the applicant;

(2) State the complete route or routes over which the applicant desires to operate and the proposed time schedule of the operation; and

(3) Contain any such other or additional information as the commissioner may order or require. (Ga. L. 1931, p. 199, § 5; Code 1933, § 68-610; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 366, § 7.)

The 2004 amendment, effective July 1, 2004, added "and" at the end of paragraph (2), deleted former paragraph (3) which read: "(3) Set forth all existing transportation in the territory proposed to be served, and wherein the public needs additional service, and why; and", and redesignated former paragraph (4) as present paragraph (3).

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully

effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

Cited in *Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n*, 181 Ga. 75, 181 S.E. 834 (1935).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 128, 129.

C.J.S. — 60 C.J.S., Motor Vehicles, § 192 et seq.

46-7-9. Fees generally.

The commissioner shall collect the following fees pursuant to this article:

(1) A fee of \$75.00 to accompany each application for a certificate, or amendment to an existing certificate, where the applicant owns or operates fewer than six motor vehicles;

(2) A fee of \$150.00 to accompany each application for a certificate, or amendment to an existing certificate, where the applicant owns or operates six to 15 motor vehicles;

(3) A fee of \$200.00 to accompany each application for a certificate, or amendment to an existing certificate, where the applicant owns or operates more than 15 motor vehicles;

(4) A fee of \$75.00 to accompany each application for transfer of a certificate;

(5) A fee of \$50.00 to accompany each application for intrastate temporary emergency authority under Code Section 46-7-13; and

(6) A fee of \$50.00 to accompany each application for a motor carrier of property permit. (Ga. L. 1931, p. 199, § 17; Code 1933, § 68-622; Ga. L. 1980, p. 618, § 2; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 366, § 8.)

The 2004 amendment, effective July 1, 2004, deleted “of public convenience and necessity” following “certificate” in paragraphs (1) through (3).

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials,

adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the provisions, decisions under former Ga. L. 1929, p. 293, are included in the annotations under this Code section.

Fees charged are in nature of tax. — Fees charged motor carriers for certificate of public convenience and necessity and for

the license of each vehicle are in the nature of a tax, justified in the reasonable amounts exacted, as recompense for the special use, for the purpose of gain, of the highways. *Southern Motorways, Inc. v. Perry*, 39 F.2d 145 (N.D. Ga. 1930) (decided under former Ga. L. 1929, p. 293).

RESEARCH REFERENCES

Am. Jur. 2d. — 7A Am. Jur. 2d, Automobiles and Highway Traffic, §§ 59, 74, 80 et seq. 13 Am. Jur. 2d, Carriers, §§ 148, 149, 151.

C.J.S. — 60 C.J.S., Motor Vehicles, §§ 244, 245 et seq.

46-7-10. Hearing on application for certificate; notice.

The commissioner, upon the filing of a petition for a certificate, shall fix a time and place for hearing thereon and shall, at least ten days before the hearing, give notice thereof by advertising the same at the expense of the applicant in a newspaper in Atlanta, in which sheriffs' notices are published. If no protest is filed with the commissioner or if the protest is subsequently withdrawn, the commissioner may issue the certificate without a hearing. (Ga. L. 1931, p. 199, § 6; Code 1933, § 68-611; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 366, § 9.)

The 2004 amendment, effective July 1, 2004, deleted "of public convenience and necessity" following "certificate" near the beginning of the first sentence.

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials,

adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

Cited in Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n, 181 Ga. 75, 181 S.E. 834 (1935).

RESEARCH REFERENCES

C.J.S. — 60 C.J.S., Motor Vehicles, §§ 174 et seq., 184, 192 et seq.

46-7-11. Refusal or revocation of certificate; new application.

When a petition for a certificate under this article has been in whole or in part denied by the commissioner, or has been granted by the commissioner, and the order of the commissioner granting same has been quashed or set aside by a court of competent jurisdiction, a new application by the same petitioner or applicant therefor shall not be again considered by the commissioner within three months from the date of the order denying the same or the judgment of the court quashing or setting aside the order. (Ga.

L. 1931, p. 199, § 27; Code 1933, § 68-630; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 366, § 10.)

The 2004 amendment, effective July 1, 2004, deleted “of public convenience and necessity” following “certificate” near the beginning of this Code section.

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing

personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001. Ga. L. 1996, p. 950, § 3, effective April 15, 1996, reenacted this Code section without change.

RESEARCH REFERENCES

C.J.S. — 60 C.J.S., Motor Vehicles, §§ 184, 187 et seq., 192 et seq.

46-7-12. Requirement as to obtaining of security bond, indemnity insurance, or self-insurance before issuance of certificate or permit.

(a) No certificate or permit shall be issued or continued in operation unless there is filed with the commissioner a certificate of insurance for such applicant or holder on forms prescribed by the commissioner evidencing a policy of indemnity insurance in some indemnity insurance company authorized to do business in this state, which policy must provide for the protection, in case of passenger vehicles, of passengers and baggage carried and of the public against injury proximately caused by the negligence of such motor common carrier or motor contract carrier, its servants, or its agents; and, in the case of vehicles transporting freight, to secure the owner or person entitled to recover therefor against loss or damage to such freight for which the motor common carrier or motor contract carrier may be legally liable and for the protection of the public against injuries proximately caused by the negligence of such motor common carrier or motor contract carrier, its servants, or its agents. The commissioner shall determine and fix the amounts of such indemnity insurance and shall prescribe the provisions and limitations thereof; and such insurance shall be for the benefit of and subject to action by any person who shall sustain injury or loss protected thereby. Such certificate shall be filed by the insurer. The failure to file any form required by the commissioner shall not diminish the rights of any person to pursue an action directly against a motor common carrier’s or motor contract carrier’s insurer.

(b) The commissioner shall have power to permit self-insurance, in lieu of a policy of indemnity insurance, whenever in his or her opinion the financial ability of the motor common carrier or motor contract carrier so warrants.

(c) It shall be permissible under this article for any person having a cause of action arising under this article to join in the same action the motor common carrier or motor contract carrier and the insurance carrier, whether arising in tort or contract. (Ga. L. 1931, p. 199, § 7; Code 1933, § 68-612; Ga. L. 1937, p. 730, § 2; Ga. L. 1996, p. 950, § 3; ; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2000, p. 1583, § 1; Ga. L. 2002, p. 1378, § 9.)

The 2002 amendment, effective July 1, 2002, deleted former subsections (a) and (b) which read: “(a) No certificate or permit shall be issued or continued in operation unless the applicant or holder shall give and maintain bond, with adequate security, for the protection, in case of passenger vehicles, of the passengers and baggage carried and of the public against injury proximately caused by the negligence of such motor common or contract carrier, its servants, or its agents. In cases of vehicles transporting freight, the applicant or holder shall give bond, with adequate security, to secure the owner or person entitled to recover therefor against loss or damage to such freight for which the motor common or contract carrier may be legally liable and for the protection of the public against injuries proximately caused by the negligence of such motor carrier, its servants, or its agents. (b) The commissioner shall approve, determine, and fix the amount of such bonds and shall prescribe the provisions and limitations thereof; and such bonds shall be for the benefit of and subject to action thereon by any person who shall sustain actionable injury or loss protected thereby.”; redesignated former subsections (c) through (e) as present subsections (a) through (c), respectively; rewrote subsection (c); inserted “common carrier or motor contract” in subsections (b) and (c); deleted “bond or” preceding “policy” in subsection (b); and, in subsection (c), deleted “in tort or contract” following “article”, deleted “its surety, in the event a bond is given. If a policy of indemnity insurance is given in lieu of bond, it shall be permissible to join the motor carrier and” following “carrier and” and

deleted “in the same action” preceding “, whether arising” at the end.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2000, “commissioner” was substituted for “commission” in the last sentence of subsection (c) (now (a)).

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the first 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

Law reviews. — For article surveying recent legislative and judicial developments regarding Georgia’s insurance laws, see 31 Mercer L. Rev. 117 (1979). For article surveying developments in Georgia insurance law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 143 (1981). For annual survey of law of insurance, see 38 Mercer L. Rev. 247 (1986). For article, “Insurance,” see 53 Mercer L. Rev. 281 (2001).

For comment on *Tarrant v. Davis*, 62 Ga. App. 880, 10 S.E.2d 636 (1940), see 3 Ga. B.J. 54 (1941). For comment on *Spicer v. American Home Assurance Co.*, 292 F. Supp. 27 (N.D. Ga.), *aff’d per curiam*, 402 F.2d 988 (5th Cir. 1968), see 6 Ga. St. B.J. 225 (1969).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
DECISIONS UNDER FORMER CODE SECTION 46-7-58
PLEADINGS AND PRACTICE

1. IN GENERAL
2. PROOF REQUIREMENTS
3. JOINDER ISSUES
4. OTHER PROCEDURAL ISSUES

BOND OR INDEMNITY INSURANCE

INTERSTATE CARRIERS

General Consideration

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. L. 1929, p. 293, and former Code Section 46-7-58, are included in the annotations under this Code section.

Constitutionality. — The last sentence in subsection (e) (now subsection (c)) of former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) considered with its context, was not a special law, but a general law applicable alike to all motor carriers and indemnity-insurance companies filing bonds and insurance policies under provisions of the act in all parts of the state, and being of such character was not violative of Ga. Const. 1976, Art. I, Sec. II, Para. VII, (Ga. Const. 1983, Art. I, Sec. II, Para. X) inhibiting passage of special laws for which provision has been made by an existing general law. *Lloyds Am. v. Brown*, 187 Ga. 240, 200 S.E. 292 (1938).

Former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) was not void as violative of Ga. Const. 1976, Art. I, Sec. II, Para. III (Ga. Const. 1983, Art. I, Sec. II, Para. IV) or U.S. Const., Art. XIV, Sec. 1. *Lloyds Am. v. Brown*, 187 Ga. 240, 200 S.E. 292 (1938).

The joinder provision does not violate the equal protection clause of the Constitution of the State of Georgia of 1983. *Edwards v. Kessler*, 262 Ga. 346, 419 S.E.2d 21 (1992).

The joinder of the motor carrier and its insurer or surety in the same action does not violate the equal protection or due process clauses of the Georgia Constitution. *Grisson v. Gleason*, 262 Ga. 374, 418 S.E.2d 27 (1992).

Any issue as to the constitutionality of O.C.G.A. § 46-7-12 was in the exclusive jurisdiction of the Supreme Court on appeal and, in any case, could not be properly raised on appeal where the trial court did not expressly consider and rule upon it. *Wright v. Transus, Inc.*, 209 Ga. App. 771, 434 S.E.2d 786 (1993).

Section must be strictly construed. — O.C.G.A. § 46-7-12 is in derogation of the

common law and must be strictly construed. *National Indem. Co. v. Tatum*, 193 Ga. App. 698, 388 S.E.2d 896 (1989).

Insurer's liability for unsatisfied judgment against insured. — An insurer is absolutely liable for any unsatisfied judgment which may be obtained against its insured whether or not its insured breached the conditions of the policy. *Seawheels, Inc. v. Bankers & Shippers Ins. Co.*, 175 Ga. App. 528, 333 S.E.2d 650 (1985).

Carrier's liability for operation by lessee of truck with trailer removed. — Public policy independently intended motor carrier to bear full responsibility to public for the operation by its lessee of a "bobtailed" truck (tractor with trailer removed) which the lessee was driving on the lessee's way home. *Nationwide Mut. Ins. Co. v. Holbrooks*, 187 Ga. App. 706, 371 S.E.2d 252 (1988).

Preemption by federal law. — O.C.G.A. § 46-7-12 is not preempted by 49 U.S.C. § 10927 which provides for payment of a claim by an insurer after a final judgment has been recovered against the motor carrier it insures. *Watkins v. H.O. Croley Granary*, 555 F. Supp. 458 (N.D. Ga. 1982).

No direct action against insurer of exempt vehicle. — Where an insured commercial motor vehicle was acting as a timber hauler at the time of an accident, it was not within the definition of a common carrier or contract carrier, and no direct action could be maintained against an insurer because the insurer was outside the ambit of O.C.G.A. § 46-7-12. *Smith v. Southern Gen. Ins. Co.*, 222 Ga. App. 582, 474 S.E.2d 745 (1996).

Direct action not authorized where accident occurred outside state. — O.C.G.A. § 46-7-12 does not authorize direct causes of action when the accident giving rise to the suit occurs outside the state of Georgia. *National Union Fire Ins. Co. v. Marty*, 197 Ga. App. 642, 399 S.E.2d 260 (1990).

"Actionable injury" defined. — "Actionable injury" means an injury to a person who could sue the carrier and obtain a

General Consideration (Cont'd)

judgment for the injuries sustained. Such definition by its nature broadly includes all third-parties injured by the negligence of the motor carrier, or by the negligence of its servants, and necessarily excludes employees of the carrier who could not sue the employer. Likewise, if the motor carrier could not be liable for a failure of agency of a particular employee in the accident in question, the insurance company may be protected thereby. *Spicer v. American Home Assurance Co.*, 292 F. Supp. 27 (N.D. Ga. 1967), *aff'd*, 402 F.2d 988 (5th Cir. 1968), *cert. denied*, 394 U.S. 946, 89 S. Ct. 1275, 22 L. Ed. 2d 479 (1969), commented on in 6 Ga. St. B.J. 225 (1969).

Under the laws of this state, a master is not liable for damages for the negligence of a fellow servant generally, and if a case is such that a master is so liable at common law generally, the master would not be subject to action and judgment if the carrier and employee came under the provisions of the workers' compensation law (see O.C.G.A. Ch. 9, T. 34). *Combs v. Carolina Cas. Ins. Co.*, 90 Ga. App. 90, 82 S.E.2d 32 (1954).

No "actionable injury" against motor carrier for which insurer could be held liable. — See *Mathews v. Rail Express, Inc.*, 836 F. Supp. 873 (N.D. Ga. 1993).

Injury refers to person and loss refers to baggage or property. — In former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) the word "injury" seems to refer to the person, and the word "loss" to baggage or property. *Laster v. Maryland Cas. Co.*, 46 Ga. App. 620, 168 S.E. 128 (1933); *LaHatte v. Walton*, 53 Ga. App. 6, 184 S.E. 742 (1936).

Accident on highways not prerequisite to cause of action. — Mere reference to use of Georgia highways in some sections of the Code does not mean that a person has a cause of action under O.C.G.A. § 46-7-12 only if an injury occurs on Georgia highways. *Johnson v. Woodard*, 208 Ga. App. 41, 429 S.E.2d 701 (1993).

Until proper notice given to commission, insurance policy effective only for benefit of public. — Commission rules can only provide that until proper notice is given to the commission, an insurance policy is effective for the benefit of the public, not the insured in cases where the policy between the in-

sured and the insurer has lapsed. *Smith v. National Union Fire Ins. Co.*, 127 Ga. App. 752, 195 S.E.2d 205 (1972).

Legislature's purpose in giving commission right to fix bond amount. — Legislature's purpose to obviate necessity for double litigation by giving commission right to fix the amount of the bond and to prescribe provision thereof. *Laster v. Maryland Cas. Co.*, 46 Ga. App. 620, 168 S.E. 128 (1933).

Extent of coverage under policy issued pursuant to this section. — A provision in a policy issued pursuant to the provisions of former Code 1933, § 68-612 see O.C.G.A. § 46-7-12), that it covered the operation of automobiles and motor vehicles which were used only for the transportation of passengers for compensation purposes and operated on schedule over routes authorized by the commission covered motor vehicles not only when actually engaged in the transportation of passengers over scheduled routes, but covered such motor vehicles when used for any purpose or engaged in any act essential to the operation of the motor vehicle as a motor common carrier in the transportation of passengers for compensation over scheduled routes. *American Fid. & Cas. Co. v. McWilliams*, 55 Ga. App. 658, 191 S.E. 191 (1937).

Evidence of policy limit. — Trial court did not abuse its discretion in denying appellees' motion for mistrial where counsel incorrectly asked witness about policy limit but before witness could answer opposing counsel objected; no evidence of the insurance policy limit was introduced by the unanswered question, and the trial court gave prompt curative instructions. *Ashley v. Goss Bros. Trucking*, 269 Ga. 449, 499 S.E.2d 638 (1998).

Failure to list vehicle limited liability. — Where the truck involved in a collision was not listed as a covered auto under an insurance policy issued by the insurer that filed a certificate of insurance for a carrier, the insurer's liability was limited to the minimum compulsory liability limits as established pursuant to O.C.G.A. § 46-7-12, not the maximum limits of the policy. *Kinard v. National Indem. Co.*, 225 Ga. App. 176, 483 S.E.2d 664 (1997), *aff'd sub nom.*, *Ross v. Stephens*, 269 Ga. 266, 496 S.E.2d 705 (1998).

Former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) was designed to protect

strangers to motor carrier, not those who, although receiving paychecks from a lessor are involved in the operations of the carrier as if they were employees. *White v. Excalibur Ins. Co.*, 599 F.2d 50 (5th Cir.), cert. denied, 444 U.S. 965, 100 S. Ct. 452, 62 L. Ed. 2d 377 (1979).

Personnel deemed statutory employees to ensure carrier's responsibility for public safety. — Because the carrier now has both a legal right and duty to control vehicles operated for its benefit, the employees of the vehicle-lessor are deemed statutory employees of the lessee-carrier to the extent necessary to insure the carrier's responsibility for the public safety just as if the lessee-carrier were the owner of the vehicles. *White v. Excalibur Ins. Co.*, 599 F.2d 50 (5th Cir.), cert. denied, 444 U.S. 965, 100 S. Ct. 452, 62 L. Ed. 2d 377 (1979).

Cited in *A.G. Boone Co. v. Owens*, 54 Ga. App. 379, 187 S.E. 899 (1936); *Hodges v. Ocean Accident & Guar. Corp.*, 66 Ga. App. 431, 18 S.E.2d 28 (1941); *Gallahar v. George A. Rheman Co.*, 50 F. Supp. 655 (S.D. Ga. 1943); *American Fid. & Cas. Co. v. Farmer*, 77 Ga. App. 166, 48 S.E.2d 122 (1948); *Arnold v. Walton*, 205 Ga. 606, 54 S.E.2d 424 (1949); *Garden City Cab Co. v. Ransom*, 86 Ga. App. 247, 71 S.E.2d 443 (1952); *Cotton States Mut. Ins. Co. v. Keefe*, 215 Ga. 830, 113 S.E.2d 774 (1960); *Reeves v. South Am. Managers, Inc.*, 110 Ga. App. 49, 137 S.E.2d 700 (1964); *Wolverine Ins. Co. v. Strickland*, 116 Ga. App. 62, 156 S.E.2d 497 (1967); *Barber v. Canal Ins. Co.*, 119 Ga. App. 738, 168 S.E.2d 868 (1969); *Schaefer v. Mayor of Athens*, 120 Ga. App. 301, 170 S.E.2d 339 (1969); *St. Paul Fire & Marine Ins. Co. v. Mose Gordon Constr. Co.*, 121 Ga. App. 33, 172 S.E.2d 459 (1970); *Isom v. Schettino*, 129 Ga. App. 73, 199 S.E.2d 89 (1973); *Seaboard Coast Line R.R. v. Freight Delivery Serv., Inc.*, 133 Ga. App. 92, 210 S.E.2d 42 (1974); *Dove v. National Freight, Inc.*, 138 Ga. App. 144, 225 S.E.2d 477 (1976); *Mercer v. Braswell*, 140 Ga. App. 624, 231 S.E.2d 431 (1976); *Homick v. American Cas. Co.*, 209 Ga. App. 156, 433 S.E.2d 318 (1993); *McAdams v. United States Fire Ins. Co.*, 234 Ga. App. 324, 506 S.E.2d 679 (1998); *Raintree Trucking Co. v. First Am. Ins. Co.*, 245 Ga. App. 305, 534 S.E.2d 459 (2000); *Jackson v. Sluder*, 256 Ga. App. 812, 569 S.E.2d 893 (2002).

Decisions under Former Code Section 46-7-58

Purpose of section. — Former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) did not have as its purpose protecting the insured from loss, but in the protection of the public against carrier-inflicted injuries. *Farley v. Continental Ins. Co.*, 150 Ga. App. 389, 258 S.E.2d 8 (1979).

Constitutionality. — The joinder provision does not violate the equal protection clause of the Constitution of the State of Georgia of 1983. *Edwards v. Kessler*, 262 Ga. 346, 419 S.E.2d 21 (1992).

Nature of liability of carrier and insurer. — The liability against the insurance carrier is ex contractu and the liability against (the insured) is ex delicto. The insurer and the carrier are neither joint tort-feasors nor joint contractors. *Farley v. Continental Ins. Co.*, 150 Ga. App. 389, 258 S.E.2d 8 (1979).

Permissibility of joinder of tort and contract actions. — Former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) allowed the joinder of a tort action against a carrier with a contract action against its insurer-in-lieu-of-bond. The only condition precedent to the joinder of the latter was that there be a viable action against the former. *Farley v. Continental Ins. Co.*, 150 Ga. App. 389, 258 S.E.2d 8 (1979).

Independent action on policy itself. — An action on the policy itself against the insurer of a motor carrier is cognizable as an independent suit without joinder of the motor carrier. Such a suit is an independent ex contractu action on the policy itself and is nonancillary to the ex delicto action against the motor carrier. *Employers Ins. v. Dawson*, 194 Ga. App. 247, 390 S.E.2d 261, cert. denied, 194 Ga. App. 911, 390 S.E.2d 261 (1990).

Direct action not authorized where accident occurred outside state. — O.C.G.A. § 46-7-12 does not authorize direct causes of action when the accident giving rise to the suit occurs outside the state of Georgia. *National Union Fire Ins. Co. v. Marty*, 197 Ga. App. 642, 399 S.E.2d 260 (1990).

Even if underlying acts of negligence occur in Georgia, the purposes of O.C.G.A. § 46-7-12 and the state's interest in ensuring and expediting compensation of injured parties are not implicated where the accident does not occur in the state. *Liberty*

Decisions under Former Code Section

46-7-58 (Cont'd)

Mut. Ins. Co. v. Dehart, 206 Ga. App. 858, 426 S.E.2d 592 (1992).

Permissibility of direct action against insurer of interstate carrier. — Where a motor common carrier held certificates of public convenience and necessity from both the Interstate Commerce Commission for operation as an interstate carrier and the Georgia Public Service Commission as an intrastate carrier, an action for damages arising from an accident occurring in the carrier's intrastate operation and proceeding upon the insurance policy filed with the Georgia Public Service Commission could be brought against the motor carrier's insurer in the first instance under former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12). The requirement of 49 U.S.C. § 315 that final judgment first be obtained against the carrier was not applicable. *Tucker v. Casualty Reciprocal Exch.*, 40 F. Supp. 383 (N.D. Ga. 1941).

Amendment of complaint permissible to add liability insurer as defendant. — With leave of the court, a complaint can be amended to bring in an additional defendant, a liability insurer for a defendant motor carrier where counsel did not learn that defendant was a common carrier and required to furnish adequate security until after discovery was commenced. *Crews v. Blake*, 52 F.R.D. 106 (S.D. Ga. 1971).

Effect on insurer of improper service on carrier. — Because the action against the insurance carrier is based on contract with the public as the third party beneficiary of the contract and because subsection (e) of O.C.G.A. § 46-7-12 authorizes the joinder of the motor carrier and the insurer in the same action, it was error to dismiss the action against the insurer on the basis that the motor carrier was not properly served. *Ellerbee v. Interstate Contract Carrier Corp.*, 183 Ga. App. 828, 360 S.E.2d 280 (1987).

Burden of proving vehicle exempt from definition of "motor contract carrier". — On the question of whether a carrier was a "motor contract carrier" under O.C.G.A. § 46-1-1(8) (now paragraph (7)) such that its insurer was subject to the joinder provisions of subsection (e) of O.C.G.A. § 46-7-12, the burden of proof was on the

truck owner to show that its truck came within the exemption from the definition of "motor contract carrier" in § 46-1-1(8)(c) (now subparagraph (7)(A)) and there was no burden on plaintiffs to prove that the truck was not within the exemption. *Georgia Cas. & Sur. Co. v. Jernigan*, 166 Ga. App. 872, 305 S.E.2d 611 (1983).

Exemption from motor contract carrier status must be established prior to liability. — If at any time up to and including the time of the collision with plaintiff, any of the requirements for the exemption from motor contract carrier status under former § 46-1-1(8)(c) had not been met, that motor vehicle would not have been engaged "exclusively" in the transportation of exempted products and would not qualify the owner for exemption from application of O.C.G.A. § 46-7-12. *Georgia Cas. & Sur. Co. v. Jernigan*, 166 Ga. App. 872, 305 S.E.2d 611 (1983).

Essential elements for allowing direct action against insurer. — Proof of filing of the insurance policy and approval by the public service commission is essential to allowing a direct action against the insurer of a motor contract carrier. *Progressive Cas. Ins. Co. v. Scott*, 188 Ga. App. 75, 371 S.E.2d 881 (1988); *Kennedy v. Georgia-Carolina Refuse & Waste Co.*, 739 F. Supp. 604 (S.D. Ga. 1990).

A step van used exclusively by its owner to transport its own products, and which was never held out for hire to the public and was not used or hired by the public for the transportation of either goods or people was neither a common nor contract carrier as those terms are defined in O.C.G.A. Title 46 and used in the direct action provisions contained in O.C.G.A. § 46-7-12. *National Union Fire Ins. Co. v. Sorrow*, 202 Ga. App. 517, 414 S.E.2d 731 (1992).

Pleadings and Practice**1. In General**

Section establishes independent cause of action against insurer. — In addition to a suit in tort against a negligent motor carrier, O.C.G.A. U 46-7-12 establishes an independent cause of action against the carrier's insurer on behalf of a member of the public injured by the carrier's negligence. *Thomas v. Bobby Stevens Hauling Contractors*, 165

Ga. App. 710, 302 S.E.2d 585 (1983).

Cause of action against insurer is in contract not tort. *Gates v. L.G. DeWitt, Inc.*, 528 F.2d 405 (5th Cir.), modified, 532 F.2d 1052 (5th Cir. 1976).

Distinction between liability of common carrier and obligation of insurer to injured.

— A common carrier that negligently injures a person, and the insurance company that issues the carrier an indemnity policy under the provisions of former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12), were neither joint tort-feasors nor joint contractors, so as to bring them within the provisions of Ga. Const. 1976, Art. VI, Sec. XIV, Para. IV, (Ga. Const. 1983, Art. VI, Sec. II, Para. IV) permitting suit to be instituted against joint obligors or joint tort-feasors in the county of either, since the liability of the carrier to the injured person arose from a tort in the commission of which the insurance company was not concerned, while the insurance company's obligation to pay the damages caused by the carrier's negligence was a contractual duty not assumed by the carrier. *Bolin v. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co.*, 92 Ga. App. 726, 89 S.E.2d 831 (1955).

Venue in action where party is natural person engaged in business of common carrier. — While joinder of the carrier and insurance company in the same action was permitted by former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12, a natural person engaged in the business of a common carrier cannot be joined with the insurance company in an action instituted elsewhere than in the county where the carrier resides. *Bolin v. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co.*, 92 Ga. App. 726, 89 S.E.2d 831 (1955).

Statute of limitations commences to run at time of commission of alleged tort. — In an action based upon the insurance contract, the statute of limitation commences running at the time of the commission of the alleged tort, which is the basis of the insurer's contractual liability. *Addington v. Ohio S. Express, Inc.*, 118 Ga. App. 770, 165 S.E.2d 658 (1968).

Applicability of Ch. 11, T. 9. — Former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) was not a special statutory proceeding excluded from purview of O.C.G.A. Ch. 11, T. 9. *Continental Ins. Co. v. Mercer*,

130 Ga. App. 339, 203 S.E.2d 297 (1973).

Effect on insurer of improper service on carrier. — Fact that an interstate motor carrier has not been properly served does not mandate that its insurer also be dismissed. *Ellerbee v. Interstate Contract Carrier Corp.*, 183 Ga. App. 828, 360 S.E.2d 280 (1987).

2. Proof Requirements

Coverage must be proved in actions where insurer is joined; if not, no verdict and judgment can be sustained against the insurer. *St. Paul Fire & Marine Ins. Co. v. Fleet Transp. Co.*, 116 Ga. App. 606, 158 S.E.2d 476 (1967).

Sustaining of actionable injury is condition precedent to action on policy. — The sustaining of actionable injury is, under O.C.G.A. U 46-7-12, the only condition precedent to an action on the policy. When actionable injury is alleged in an action on the policy, the terms of the statute are complied with, and the petitioner upon proper proof of the injury is entitled to recover on the policy. The cause of action is not on the tort, but on the contract by alleging the occurrence of the condition precedent required by the statute, which statute is an integral part of the contract of insurance. *Great Am. Indem. Co. v. Vickers*, 183 Ga. 233, 188 S.E. 24 (1936); *Addington v. Ohio S. Express, Inc.*, 118 Ga. App. 770, 165 S.E.2d 658 (1968).

Proof required for direct action against insurer. — Proof that a policy was filed and approved by the Public Service Commission is required in order to maintain a direct action against the insurer of a contract motor carrier. *Canal Ins. Co. v. Farmer*, 222 Ga. App. 539, 474 S.E.2d 732 (1996).

Applicability and interstate commerce. — The direct action statute did not apply to plaintiff's cause of action because it arose out of interstate commerce, and even if the statute had applied, plaintiff would not have been able to prove that the Public Service Commission had approved the insurance policy, a prerequisite to a direct action under O.C.G.A. U 46-7-12. *Dundee Mills, Inc. v. John Deere Ins. Co.*, 248 Ga. App. 39, 545 S.E.2d 604 (2001).

In an action against the driver of a tractor-trailer and the driver's insurer, where neither a bond nor an insurance policy had

Pleadings and Practice (Cont'd)
2. Proof Requirements (Cont'd)

been filed with the commission and the driver was not registered with the commission as a motor carrier, no direct action against the insurer was allowable. *Lockhart v. Southern Gen. Ins. Co.*, 231 Ga. App. 311, 498 S.E.2d 161 (1998).

For recovery, necessary to show injury was caused by negligence of principal or agents. — In order to authorize a recovery in an action brought on a bond or insurance policy it would be necessary to show that the injury complained of was caused by the negligence of the principal in the bond, the principal's agents, or representatives, in the operation of the described automobile. *Zachry v. City Council*, 78 Ga. App. 746, 52 S.E.2d 339 (1949).

Mere proof of liability coverage insufficient. — Since O.C.G.A. § 46-7-12 creates a direct pre-judgment cause of action in contract against an insurer and does not merely provide a statutory exception to the procedural prohibition against joinder of a liability insurer as a party defendant in a tort action against its insured, it follows that mere proof that the allegedly negligent tortfeasor had liability coverage is not necessarily sufficient proof of the direct cause of action against the insurer itself. Such proof would fail to show that the injured party was a third-party beneficiary who had a direct pre-judgment cause of action in contract against the insurer itself. *Glenn McClendon Trucking Co. v. Williams*, 183 Ga. App. 508, 359 S.E.2d 351 (1987), cert. denied, 183 Ga. App. 906, 359 S.E.2d 351 (1988).

Submission of policy limits to the jury. — Since the plaintiff in a motor collision suit against a common carrier and its insurer can prove the limits of coverage so as to sustain a judgment against the insurer without submitting the policy limits to the jury and since submission of the policy limits to the jury tends to prejudice the defendants, the Supreme Court of Georgia concluded that the objection of a defendant common carrier and its insurer to the submission of policy limits to the jury should have been sustained. Unless it is necessary, the amount of insurance coverage should not be placed before the jury. *Carolina Cas. Ins. Co. v. Davalos*, 246 Ga. 746, 272 S.E.2d 702 (1980).

Status as "carrier." — A step van used exclusively by its owner to transport its own products, and which was never held out for hire to the public and was not used or hired by the public for the transportation of either goods or people, was neither a common nor contract carrier as those terms are defined in O.C.G.A. Title 46 and used in the direct action provisions contained in O.C.G.A. § 46-7-12 and § 46-7-58 (now repealed). *National Union Fire Ins. Co. v. Sorrow*, 202 Ga. App. 517, 414 S.E.2d 731 (1992).

Prescribed forms. — Summary judgment for the insurer was reversed, and the amended version of O.C.G.A. § 46-7-12(c), requiring a common carrier to file prescribed forms evidencing insurance, was applied retroactively, permitting a direct action against the insurer by an injured party for injuries suffered in a motor vehicle accident, despite the failure to file the prescribed form evidencing the insurance policy. *Devore v. Liberty Mut. Ins. Co.*, 257 Ga. App. 7, 570 S.E.2d 87 (2002).

3. Joinder Issues

Joint action against carrier and insurer permissible. — A person who has been injured by the alleged negligence of the driver of a motor common carrier truck can maintain a joint action at law against the motor common carrier and the indemnity company from which such motor common carrier has procured a policy of indemnity insurance, and such action is not controlled by the general rule that an action ex delicto cannot be joined with an action ex contractu. *LaHatte v. Walton*, 53 Ga. App. 6, 184 S.E. 742 (1936) (decided under former Ga. L. 1929, pp. 293, 297, § 5).

Former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) permitted motor carrier and its insurance company to be joined in same action as defendants. *Har-Pen Truck Lines v. Mills*, 378 F.2d 705 (5th Cir. 1967).

Responsibility of insurance carrier. — An insurer is neither a joint tortfeasor nor responsible for the carrier's negligent conduct under a theory of vicarious liability; consequently, plaintiff's attempts to impute the carrier's negligence to the insurer were improper and prejudicial, as was the argument that the jury should base its award on the insurer's treatment of plaintiff independent of the collision. *Myrick v. Stephanos*, 220 Ga.

App. 520, 472 S.E.2d 431 (1996).

Joinder not required. — While O.C.G.A. § 46-7-12 permits joinder of the carrier and the insurer in a suit by a member of the public who is injured by the negligence of a carrier, it does not require it. *Griffin v. Johnson*, 157 Ga. App. 657, 278 S.E.2d 422 (1981).

Purpose of joinder. — Erroneous dismissal of motor carrier's liability insurer did not entitle accident victim to new trial on liability and damages; provision allowing joinder of insurer is not intended to enhance value of third party's claim for damages; plaintiff has no separate claim against motor carrier's insurer; the purpose of permitting joinder of the insurer in a claim against the carrier is to further the policy of the Motor Carrier Act to protect the public against injuries caused by the carrier's negligence. *Andrews v. Yellow Freight Sys.*, 262 Ga. 476, 421 S.E.2d 712 (1992).

Joinder of insurer permitted but no limitation on amount of damages pleaded. — Former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) allowed the commission to fix the amount of bond or insurance coverage required of a carrier and it allows a plaintiff to join as a party the insurance carrier who has issued a policy to meet the coverage requirement. However, where an insurer is joined as a party in an action against a carrier, the section does not limit the amount of damages which can be pleaded against the insurer to the minimum coverage required of carriers by the commission. *Herring v. Rabun Trucking Co.*, 147 Ga. App. 713, 250 S.E.2d 167 (1978).

Existence of approved policy necessary for joinder. — Unless the applicability of O.C.G.A. § 46-7-12 is shown by evidence of the existence of a policy issued with the approval of the Public Service Commission, the general rule, that an insurer may not be joined as a party defendant with its insured where there has been no judgment previously obtained against the insured, is applicable. *Glenn McClendon Trucking Co. v. Williams*, 183 Ga. App. 508, 359 S.E.2d 351 (1987), cert. denied, 183 Ga. App. 906, 359 S.E.2d 351 (1988).

Joinder for out-of-state collision. — Joinder is not prohibited merely because a collision occurred on a highway in another state. *Johnson v. Woodard*, 208 Ga. App. 41, 429 S.E.2d 701 (1993).

Joinder of interstate carrier. — Insurer of motor carrier was joined in an action against a carrier operating under a certificate of convenience issued by the state and who was required to be, or could have been sued in Georgia. *Johnson v. Woodard*, 208 Ga. App. 41, 429 S.E.2d 701 (1993).

When joinder of motor carrier's insurer is authorized. — In actions against a motor carrier, required by former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) to file such bond or insurance with the commission, joinder of the motor carrier's insurer was authorized, regardless of whether the carrier was operating in interstate or intrastate commerce at the time of the injury. *Harper Motor Lines v. Roling*, 218 Ga. 812, 130 S.E.2d 817 (1963).

Motor carrier not exempt. — Insurer was properly joined in action against transportation company where the truck involved in the accident was registered as a motor carrier and at times hauled loads which were not exempt despite the truck's exempt cargo of produce at the time of the accident. *Smith v. Commercial Transp., Inc.*, 220 Ga. App. 866, 470 S.E.2d 446 (1996).

Joinder not authorized. — Truck which was engaged exclusively in the transportation of potting soil was not a "motor common carrier" and O.C.G.A. § 46-7-12(e) did not, therefore, authorize joinder of the truck's insurer as a defendant in a suit against the insured. *National Indem. Co. v. Tatum*, 193 Ga. App. 698, 388 S.E.2d 896 (1989).

Truck which was engaged exclusively in the transportation of gravel, crushed stone, plant mix road material or road base materials was not a "motor common carrier" and [O.C.G.A. § 46-7-12(e)] did not, therefore, afford plaintiff the right to join the truck's insurer as a defendant in a suit against the insured. *Bailey v. Occidental Fire & Cas. Co.*, 193 Ga. App. 710, 388 S.E.2d 899 (1989).

Although O.C.G.A. § 46-7-12 provides for joinder of an insurer where that insurer has potential liability under an insurance policy, it does not create a cause of action against an insurer which, under the terms of its policy, cannot be liable with respect to the accident in question. *McMillon v. Empire Fire & Marine Ins. Co.*, 209 Ga. App. 378, 433 S.E.2d 429 (1993).

An injured person could not join a motor

Pleadings and Practice (Cont'd)**3. Joinder Issues (Cont'd)**

carrier's insurer in an action against the carrier where the carrier was not registered in Georgia and had not filed an insurance policy with the commission. *Caudill v. Strickland*, 230 Ga. App. 644, 498 S.E.2d 81 (1998).

When joinder of parties not permissible.

— In the absence of statutory provision to the contrary, an insurance company, issuing an ordinary indemnity policy, cannot be joined as a party defendant with a tort-feasor in order to "fix the liability" of the insurance company. *Arnold v. Walton*, 205 Ga. 606, 54 S.E.2d 424 (1949).

No joinder of defendant not in privity with insurance company where carrier and company joined. — Where a motor carrier and its insurance company are joined as defendants, no other defendant may be joined who is not in privity with the insurance company. *Har-Pen Truck Lines v. Mills*, 378 F.2d 705 (5th Cir. 1967).

No joinder of insurer in action against carrier for injuries caused in another state. — An insurance carrier may not be joined under former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) as a defendant with a motor common carrier licensed to do intrastate and interstate business in an action brought in this state by a passenger on an interstate journey for personal injuries caused by the carrier's negligence in another state. *Rogers v. Atlantic Greyhound Corp.*, 50 F. Supp. 662 (S.D. Ga. 1943).

Petition not subject to dismissal on misjoinder grounds. — The petition for damages joining as defendants a common carrier for hire by motor truck, its driver, and its insurer, under former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12), was not subject to demurrer (now motion to dismiss) on the ground that there was a misjoinder of parties and causes of action. *Pilot Freight Carriers, Inc. v. Parks*, 80 Ga. App. 137, 55 S.E.2d 746 (1949).

No misjoinder where action against proper parties. — It being alleged that the driver of the motor vehicle was engaged in carrying out the duties of the driver's employment as a driver for common carrier at the time of the accident, and it appearing that the casualty company was the insurance

carrier of the motor carrier, the action was properly brought against the three named defendants, and there was no misjoinder. *Atlanta-Asheville Motor Express v. Dooley*, 78 Ga. App. 265, 50 S.E.2d 822 (1948).

Construction of joinder provisions of this section. — The 1937 amendment (Ga. L. 1937, p. 730) to the original statute must also be strictly construed, and it does not expressly or otherwise provide for the joining in one action of an action ex contractu against an insurance company and an action in tort against a third person in no way connected with the insurance company. *Reeves v. McHan*, 78 Ga. App. 305, 50 S.E.2d 787 (1948).

4. Other Procedural Issues

Suing insurance carrier first despite policy provisions to contrary. — Insurance carrier could be sued without first obtaining judgment against common carrier notwithstanding provisions in the policy to the contrary. *Maryland Cas. Co. v. Dobson*, 57 Ga. App. 594, 196 S.E. 300 (1938).

Bringing suit against carrier's insurer. — Member of public who is injured by negligence of motor common carrier need not obtain judgment against the carrier as condition precedent to bringing suit against carrier's insurer, any contractual agreement between the insurer and the carrier to the contrary notwithstanding. *Griffin v. Johnson*, 157 Ga. App. 657, 278 S.E.2d 422 (1981).

Suit against insurer does not require joinder of motor carrier. — An action on the policy itself against the insurer of a motor carrier is cognizable as an independent suit without joinder of the motor carrier. *Thomas v. Bobby Stevens Hauling Contractors*, 165 Ga. App. 710, 302 S.E.2d 585 (1983).

Insurer subject to action on policy by injured member of public directly. — Since bond or policy under former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) was given for the protection of the public, and the policy was one against liability, and since the intent and meaning of the statute permitted an action thereon jointly against the motor carrier and the surety on the bond or the insurer in the policy, the provisions of the section were read into the policy and supersede any provision therein to the contrary. Accordingly, the insurer was subject to action by an injured member of the public

directly on the policy, without the necessity of first suing and obtaining judgment against the carrier. *Great Am. Indem. Co. v. Durham*, 54 Ga. App. 353, 187 S.E. 891 (1936).

Joint or separate actions against parties.

— All three parties — the driver, the carrier, and the insurance company — may be joined and any one of such parties may be sued alone and thereby bind the company for payment of eventual judgment. *Spicer v. American Home Assurance Co.*, 292 F. Supp. 27 (N.D. Ga. 1967), *aff'd*, 402 F.2d 988 (5th Cir. 1968), *cert. denied*, 394 U.S. 946, 89 S. Ct. 1275, 22 L. Ed. 2d 479 (1969), commented on in 6 Ga. St. B.J. 225 (1969).

Breach of policy conditions may not defeat claims where actual notice to company of actions.

— Under former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) a breach of the policy conditions between the insured and the company, may not defeat the public third-parties claims, when there was actual notice to the company of the actions. *Spicer v. American Home Assurance Co.*, 292 F. Supp. 27 (N.D. Ga. 1967), *aff'd*, 402 F.2d 988 (5th Cir. 1968), *cert. denied*, 394 U.S. 946, 89 S. Ct. 1275, 22 L. Ed. 2d 479 (1969), commented on in 6 Ga. St. B.J. 225 (1969).

An insurer is absolutely liable for any unsatisfied judgment which may be obtained against its insured whether or not its insured breached the conditions of the policy. *Seawheels, Inc. v. Bankers & Shippers Ins. Co.*, 175 Ga. App. 528, 333 S.E.2d 650 (1985).

Bond or Indemnity Insurance

Filing of bond or indemnity insurance with commissioner required. — Former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) required motor common carrier to file bond or policy of indemnity insurance with commission to protect the public against injury caused by its negligence, and permits suit against the motor carrier and the insurer in the same action. *Gates v. L.G. DeWitt, Inc.*, 528 F.2d 405 (5th Cir.), modified, 532 F.2d 1052 (5th Cir. 1976).

Approved policy is in nature of substitute surety bond. — If the carrier's insurance policy is approved by the commission in accordance with O.C.G.A. § 46-7-12, the policy is in the nature of a substitute surety bond, and the insurer is absolutely liable for

any loss occasioned by its insured, any provisions in the policy, or in any rider attached thereto, to the contrary notwithstanding. *American Motorists Ins. Co. v. King Shrimp Co.*, 199 Ga. App. 847, 406 S.E.2d 273 (1991).

Independent cause of action against insurer.

— In addition to a suit in tort against a negligent motor carrier, O.C.G.A. § 46-7-12 establishes an independent cause of action against the carrier's insurer on behalf of a member of the public injured by the carrier's negligence. *Thomas v. Bobby Stevens Hauling Contractors*, 165 Ga. App. 710, 302 S.E.2d 585 (1983).

Purpose of section. — Purposes of former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) were to protect the members of the public who were injured by the operation of the common carrier's vehicles and the insurance contract may not defeat this public policy by conditions to which the state and public are not a party. This is a prerequisite to doing business in this state and on its highways either directly or by agent employees. *Spicer v. American Home Assurance Co.*, 292 F. Supp. 27 (N.D. Ga. 1967), *aff'd*, 402 F.2d 988 (5th Cir. 1968), *cert. denied*, 394 U.S. 946, 89 S. Ct. 1275, 22 L. Ed. 2d 479 (1969), commented on in 6 Ga. St. B.J. 225 (1969).

The indemnity insurance policy is not for the benefit of the insured but for the sole benefit of those who may have a cause of action for damages for the negligence of the motor common carrier. Such a policy is in the nature of a substitute surety bond and creates liability in the insurer regardless of the insured's breach of the conditions of the policy. *Progressive Cas. Ins. Co. v. Bryant*, 205 Ga. App. 164, 421 S.E.2d 329 (1992).

Three classes of protection. — Former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) was designed to protect three classes against financial liability of motor common carriers to respond in damages for the negligent conduct of the business of motor common carriers. First, motor common carriers of passengers; second, motor common carriers of freight; and third, the public (when neither the relationship of carrier and passenger or carrier and shipper exists). *American Cas. Co. v. Southern Stages*, 70 Ga. App. 22, 27 S.E.2d 227 (1943).

Protection of public is primary purpose of requiring bond or security. — The primary

Bond or Indemnity Insurance (Cont'd)

purpose of requiring a bond, policy of insurance, or other security as a condition to the operation of public service motor vehicles for hire was for the protection of the public, by assuring those who were injured, in person or property, through the negligent operation of such vehicles, compensation for the injuries or damages sustained. *Spicer v. American Home Assurance Co.*, 292 F. Supp. 27 (N.D. Ga. 1967), *aff'd*, 402 F.2d 988 (5th Cir. 1968), *cert. denied*, 394 U.S. 946, 89 S. Ct. 1275, 22 L. Ed. 2d 479 (1969), commented on in 6 Ga. St. B.J. 225 (1969).

Bonds provided for in this section for benefit of public. — Bond or indemnity insurance is required for benefit of passengers and public; the passengers and the public being beneficiaries which the statute seeks to protect and insure, the indemnity insurance policy required by former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) was one of insurance against liability, and not insurance against loss by common carrier. *Laster v. Maryland Cas. Co.*, 46 Ga. App. 620, 168 S.E. 128 (1933); *LaHatte v. Walton*, 53 Ga. App. 6, 184 S.E. 742 (1936).

According to the language and patent intentment of former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12), the bonds provided for herein are solely for the benefit of those persons who by reason of the negligence of the carrier, its servants or agents, may have a cause of action for damages, such bonds being "for the benefit of and subject to action thereon by any person who shall sustain actionable injury or loss protected thereby." *Great Am. Indem. Co. v. Vickers*, 183 Ga. 233, 188 S.E. 24 (1936).

Definition of indemnity insurance policy under this section. — The policy of insurance under former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) was not one of indemnity against loss as that term was generally understood; but was a direct and primary obligation to any person who shall sustain actionable injury or loss by reason of the negligence of the insured in the operation of the insured's motor vehicles insured under the policy. The sustaining of actionable injury is, under the statute, the only condition precedent to an action on the policy. *Great Am. Indem. Co. v. Vickers*, 183 Ga. 233, 188 S.E. 24 (1936); *Shapiro v. Aetna*

Cas. & Sur. Co., 234 F. Supp. 41 (N.D. Ga. 1963), *aff'd*, 337 F.2d 237 (5th Cir. 1964); *Spicer v. American Home Assurance Co.*, 292 F. Supp. 27 (N.D. Ga. 1967), *aff'd*, 402 F.2d 988 (5th Cir. 1968), *cert. denied*, 394 U.S. 946, 89 S. Ct. 1275, 22 L. Ed. 2d 479 (1969), commented on in 6 Ga. St. B.J. 225 (1969).

Indemnity and not liability insurance required by this section. — If the insurer issues a single policy for more than the statutory minimum, the plaintiff suing under former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) was not limited to a judgment against that insurer for the minimum. The insurance required by that section was indemnity insurance, not liability insurance. It would create multiple litigation to require the plaintiffs to recover from the indemnitor the statutory minimum in the initial action and file later actions for excess amounts. *Herring v. Rabun Trucking Co.*, 147 Ga. App. 713, 250 S.E.2d 167 (1978).

This section refers to direct liability policy. — In spite of the use of the phrase "indemnity insurance," former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) referred to a direct liability policy rather than indemnity in the true sense. *Spicer v. American Home Assurance Co.*, 292 F. Supp. 27 (N.D. Ga. 1967), *aff'd*, 402 F.2d 988 (5th Cir. 1968), *cert. denied*, 394 U.S. 946, 89 S. Ct. 1275, 22 L. Ed. 2d 479 (1969).

Policy issued under this section is policy of insurance against liability. — An insurance policy issued to a motor common carrier, with the approval of the commission, under the provisions of former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12), which provided that the policy was one "for the protection of the public against injuries proximately caused by the negligence of such motor carrier, its servants or agents," was a policy of insurance against liability, any provisions in the policy, or in any rider attached thereto, to the contrary notwithstanding, and an action may be brought upon the policy directly against the insurer by any member of the public, for the recovery of damages proximately caused by the negligence of the motor common carrier in the operation of one of its motor trucks along a public highway of this state, without first having obtained a judgment establishing liability for such negligence against the

motor carrier, and without making the motor carrier a party to the action. *Great Am. Indem. Co. v. Vickers*, 53 Ga. App. 101, 185 S.E. 150, aff'd, 183 Ga. 233, 188 S.E. 24 (1936).

Extent of coverage of security bond or policy. — The security bond or policy ordinarily covers only injuries or damages which result from the careless, negligent, or improper operation of the motor carrier's vehicles. *Spicer v. American Home Assurance Co.*, 292 F. Supp. 27 (N.D. Ga. 1967), aff'd, 402 F.2d 988 (5th Cir. 1968), cert. denied, 394 U.S. 946, 89 S. Ct. 1275, 22 L. Ed. 2d 479 (1969), commented on in 6 Ga. St. B.J. 225 (1969).

Obligations of former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) clearly superseded any policy provision. *Spicer v. American Home Assurance Co.*, 292 F. Supp. 27 (N.D. Ga. 1967), aff'd, 402 F.2d 988 (5th Cir. 1968), cert. denied, 394 U.S. 946, 89 S. Ct. 1275, 22 L. Ed. 2d 479 (1969), commented on in 6 Ga. St. B.J. 225 (1969).

No impairment of public's statutory rights by stipulations between parties to security contract. — Under the bond or policy, the public has statutory rights which cannot be impaired by stipulations between the immediate parties to the security contract. *Spicer v. American Home Assurance Co.*, 292 F. Supp. 27 (N.D. Ga. 1967), aff'd, 402 F.2d 988 (5th Cir. 1968), cert. denied, 394 U.S. 946, 89 S. Ct. 1275, 22 L. Ed. 2d 479 (1969), commented on in 6 Ga. St. B.J. 225 (1969).

Incorporation of provisions of this section into insurance policy. — A policy with a rider upon it placed there by the commission pursuant to the provisions of former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12), becomes a statutory policy, and the provisions of that section respecting the character of the policy and the liability of the parties, were read into the policy and supersede any provisions, if any, to the contrary, either in the policy or in the rider attached thereto. *Great Am. Indem. Co. v. Vickers*, 53 Ga. App. 101, 185 S.E. 150, aff'd, 183 Ga. 233, 188 S.E. 24 (1936).

Incorporation of provisions into bond filed under this section. — The provision that the bond given by the carrier must be for the protection of the public against injuries proximately caused by the carriers' negligence, must, where the bond was ap-

proved by the commission as required by former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) as a condition precedent to the issuance of the certificate to the carrier, be read into the bond and become one of the provisions thereof, anything in the bond or riders attached thereto to the contrary notwithstanding. *Great Am. Indem. Co. v. Vickers*, 53 Ga. App. 101, 185 S.E. 150, aff'd, 183 Ga. 233, 188 S.E. 24 (1936).

Bond or insurance provisions contrary to this section without force or effect. — Bond or policy of indemnity insurance given under former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) must conform to its requirements, and a provision contained therein contrary to such requirements was without force and effect. *Maryland Cas. Co. v. Dobson*, 57 Ga. App. 594, 196 S.E. 300 (1938).

Substitution of indemnity policy by carrier. — Where a carrier is allowed to substitute a policy of indemnity insurance, such policy must substantially conform to all of the provisions of the statute relating to bonds. *Seawheels, Inc. v. Bankers & Shippers Ins. Co.*, 175 Ga. App. 528, 333 S.E.2d 650 (1985).

Legislative intent that insurer stand in shoes of motor common carrier. — It was the legislative intent in passing former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) that the insurer carrier is to stand in the shoes of the motor common carrier and be liable in any instance of negligence where the motor common carrier is liable. *St. Paul Fire & Marine Ins. Co. v. Fleet Transp. Co.*, 116 Ga. App. 606, 158 S.E.2d 476 (1967).

When judgment creditor may recover. — One who obtains a judgment against the insured and then seeks to enforce it against the insurer occupies a like status to the insured; one derives one's rights under the policy through the insured, and one is entitled to recover under the policy only if it appears that all conditions precedent have been complied with. *Commercial Union Ins. Co. v. Bradley Co.*, 186 Ga. App. 610, 367 S.E.2d 820 (1988).

Liability of surety or insurer is joint and several with the liability of the owner or operator of the motor vehicle. *Spicer v. American Home Assurance Co.*, 292 F. Supp. 27 (N.D. Ga. 1967), aff'd, 402 F.2d 988 (5th Cir. 1968), cert. denied, 394 U.S. 946, 89 S.

Bond or Indemnity Insurance (Cont'd)

Ct. 1275, 22 L. Ed. 2d 479 (1969), commented on in 6 Ga. St. B.J. 225 (1969).

Liability of insurance carrier extends to existence of relation of common carrier and passenger. — Where an indemnity insurance policy was executed under the provisions of former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12), containing the words, “resulting from the negligent operation, maintenance or use of motor vehicles,” such words will not be construed to limit liability for negligence of the driver of a passenger vehicle while such vehicle was in motion only. This being a statutory provision, the provisions of the policy are superseded by the terms of the statute. The endorsement of the commission of such words in a rider attached to the policy is construed to mean that the liability of the insurance carrier extends to and includes injuries received by a passenger, caused by the negligence of such motor carrier, its servants or agents, during the existence of the relation of common carrier and passenger, and until such relation was terminated in some manner provided by law. *American Cas. Co. v. Southern Stages*, 70 Ga. App. 22, 27 S.E.2d 227 (1943).

Liability of insurance carrier not limited to negligence of carrier only when vehicle in motion. — Former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) nowhere provided that the liability of the insurance carrier be limited to the negligence of the motor common carrier, its servants or agents, only when the vehicle was in motion. *American Cas. Co. v. Southern Stages*, 70 Ga. App. 22, 27 S.E.2d 227 (1943).

No insurance required for carrier's vehicles while being used outside employment. — A plain reading of the statute will not support a holding that a carrier must provide individual liability coverage for its servants or agents while those agents are operating the carrier's vehicles outside the scope of their employment. *Great W. Cas. Co. v. Norris*, 734 F.2d 697 (11th Cir. 1984).

Liability of insurance carrier on policy is ancillary to that of common carrier. — While the “cause of action” (or statement of a claim, as it is now called) is not on the tort, nevertheless, the tort constitutes the real cause of action, and the liability of the insurance carrier on its policy, issued as

required by law, is merely ancillary to that of the common carrier. *Addington v. Ohio S. Express, Inc.*, 118 Ga. App. 770, 165 S.E.2d 658 (1968).

Insurance carrier may not contract for less liability than imposed by this section. — Under former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) it was the legislative intent that the insurance carrier was to stand in the shoes of the motor common carrier of passengers and be liable to the passenger in any instance of negligence where the motor common carrier was liable. The statute nowhere remotely expresses or implies that where an insurance carrier undertakes for hire to stand sponsor for the negligent acts of a motor common carrier of passengers under the general law governing this relationship such insurance carrier may contract for a less liability than that which the statute imposes upon the motor common carrier itself. To give the statute such a construction would be to render the statute subservient to the conditions of the insurance policy and not the insurance policy subservient to the provisions of the statute. *American Cas. Co. v. Southern Stages*, 70 Ga. App. 22, 27 S.E.2d 227 (1943).

Nothing in former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) limited direct liability of insurer of carrier, when joined as a defendant in an action against a carrier to the minimum bond or insurance coverage required of carriers by the commission. *Herring v. Rabun Trucking Co.*, 147 Ga. App. 713, 250 S.E.2d 167 (1978).

No liability of insurer where insured carrier not liable. — It was not the purpose of former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) to make an insurance company, which had issued the carrier a policy of indemnity insurance in lieu of a bond, liable where the insured carrier itself was not liable. *Robbins v. Liberty Mut. Ins. Co.*, 113 Ga. App. 393, 148 S.E.2d 172 (1966).

Liability probably does not extend to punitive damages. — Liability under former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) would probably not extend to punitive damages. As a factual probability, attorneys fees would logically fall into the same classification as being uncollectible from the company. *Spicer v. American Home Assurance Co.*, 292 F. Supp. 27 (N.D. Ga. 1967), *aff'd*, 402 F.2d 988 (5th Cir.

1968), cert. denied, 394 U.S. 946, 89 S. Ct. 1275, 22 L. Ed. 2d 479 (1969).

Duty of issuer of liability surety bond. — The liability surety bond, when not supplanted by an insurance policy, is similar to a motor vehicle liability insurance policy in that it also provides protection to the general public for damage to person or property arising from negligent acts or omissions of the motor carrier for whom it is issued. The issuer of the bond is obligated to provide the minimum no-fault coverage afforded under O.C.G.A. § 33-34-4, notwithstanding any provisions of the contract or bond. *Homick v. American Cas. Co.*, 202 Ga. App. 831, 415 S.E.2d 669, cert. denied, 202 Ga. App. 906, 415 S.E.2d 669 (1992).

Liability of insurance carrier limited. — The liability of an insurer of a motor common carrier for an actionable loss caused by a vehicle not specifically described in the insurance policy was limited to the minimum limits established by rule of the commission. *Ross v. Stephens*, 269 Ga. 266, 496 S.E.2d 705 (1998).

Bond or indemnity insurance. — The minimum compulsory liability limits established by a rule of the Public Service Commission were applicable to personal injury claims asserted by passengers in a tractor-trailer, where the passengers sought recovery up to minimum limits of \$100,000/\$300,000 as established by the rule; the claims were not subject to the lower limits established by O.C.G.A. § 40-9-2(5)(A), even though the tractor-trailer was a freight carrier and not a passenger carrier. *Guinn Transp., Inc. v. Canal Ins. Co.*, 234 Ga. App. 235, 507 S.E.2d 144 (1998).

Notice of cancellation. — When a Form E endorsement filed with the Georgia Public Service Commission provides that an insurance company has issued its insured an insurance policy and the policy lapses before an incident giving rise to liability on the part of the insured and before proper notice of cancellation is given to the Commission, the insurer's liability to a third party injured by the insured is based on the policy itself as opposed to liability based on the minimum coverage imposed by law. *Progressive Preferred Ins. Co. v. Ramirez*, 277 Ga. 392, 588 S.E.2d 751 (2003).

Interstate Carriers

Section applicable to interstate carriers. — Subsection (e) of O.C.G.A. § 46-7-12 applies to interstate as well as intrastate carriers; thus, a motorist injured in an accident with a tractor trailer owned by a motor carrier engaged solely in interstate commerce could maintain a direct action against the insurer of the motor carrier. *Williams v. Southern Drayage, Inc.*, 213 Ga. App. 895, 446 S.E.2d 758 (1994).

A carrier registered with the Public Service Commission was not exempt from subsection (e) of O.C.G.A. § 46-7-12 simply because it engaged only in interstate commerce. Additionally, the federal law did not preempt the Georgia definition of motor carrier for purposes of a personal injury action against the carrier. *Xpress Cargo Sys. v. McMath*, 225 Ga. App. 32, 481 S.E.2d 885 (1997).

Section inapplicable to causes arising out of interstate commerce. — Although O.C.G.A. § 46-7-12 authorizes a shipper to bring a direct action against the insurer who provides liability coverage to a motor common carrier, the section does not apply to a cause of action which arises out of interstate commerce. *Commercial Union Ins. Co. v. Bradley Co.*, 186 Ga. App. 610, 367 S.E.2d 820 (1988).

No conflict with congressional regulation of motor carriers. — Former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) did not conflict with congressional regulation of motor carriers engaged in interstate commerce, but was a reasonable and valid requirement imposed upon those who seek to do an intrastate motor carrier business in Georgia. *Acme Freight Lines v. Blackmon*, 131 F.2d 62 (5th Cir. 1942).

Federal Aviation Administration Authorization Act does not preempt statute. — The Federal Aviation Administration Authorization Act prohibits a state from enacting or enforcing a law or regulation related to "a price, route, or service" of any motor carrier, but does not invalidate insurance requirements imposed by the statute and Public Service Commission Rule 1-8-1-.01 as the act does not restrict a state's authority to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements. *Driskell v.*

Interstate Carriers (Cont'd)

Empire Fire & Marine Ins. Co., 249 Ga. App. 56, 547 S.E.2d 360 (2001).

Section designed to protect public. — Former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) was designed to protect the “public” whose safety may be endangered by the carrier’s operations as distinguished from those having an interstate relationship. It cannot be assumed that the state attempted to enact legislation having an extraterritorial effect by applying to interstate passengers and cargoes. *Rogers v. Atlantic Greyhound Corp.*, 50 F. Supp. 662 (S.D. Ga. 1943).

Provision allowing for direct actions against insurance carriers applies to interstate carriers. — A proper interpretation of the provision in former Code 1933, § 68-612

(see O.C.G.A. § 46-7-12) allowing for direct actions against insurance carriers, in conjunction with former Code 1933, § 68-633 (see O.C.G.A. § 46-7-16), was that it applied to interstate carriers as well as intrastate carriers. *Kimberly v. Bankers & Shippers Ins. Co.*, 490 F. Supp. 93 (N.D. Ga. 1980).

Persons injured by negligence of carrier are entitled to rely upon required protection of section. — Where persons are injured upon the highways of this state by the negligence of a carrier, they are properly entitled to rely upon the protection required by former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12), and this was true whether the particular vehicle was at the time of the accident engaged in interstate or intrastate commerce. *Acme Freight Lines v. Blackmon*, 131 F.2d 62 (5th Cir. 1942).

OPINIONS OF THE ATTORNEY GENERAL

Purpose of section. — It was the purpose of former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) to protect the public against injury which may be caused by the negligence of the motor common carrier, its servants or agents. 1948-49 Op. Att’y Gen. p. 585.

Commission has discretion concerning

bond or indemnity insurance. — Former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) placed a discretion in the commission as to whether or not a bond or a policy of indemnity insurance shall be required of carriers coming under its jurisdiction. 1948-49 Op. Att’y Gen. p. 585.

RESEARCH REFERENCES

C.J.S. — 60 C.J.S., Motor Vehicles, §§ 192 et seq., 226.

ALR. — Validity of municipal ordinance requiring indemnity insurance as condition of operating taxicab, 95 ALR 1224.

Territorial coverage of motor carrier’s public liability policy required by statute or ordinance as coextensive with area of authorized operation, 154 ALR 520.

Liability of motor carrier for injuries to passengers from accident occasioned by blowout or other failure of tire, 44 ALR2d 835.

Owning, leasing, or otherwise engaging in business of furnishing services for taxicabs as basis of tort liability for acts of taxi driver under respondeat superior doctrine, 8 ALR3d 818.

46-7-13. Temporary emergency authority to operate as a motor common or contract carrier.

Notwithstanding any other provision of law to the contrary, in order to authorize the provision of passenger or household goods service for which there is an immediate and urgent need to a point or points, or within a territory, with respect to which there is no motor common or contract carrier service capable of meeting such need, upon receipt of an application for temporary emergency authority and upon payment of the appropriate fee as fixed by statute, the commissioner, under the authority of this

Code section, may, in his or her discretion and without a hearing or other prior proceeding, grant to any person temporary motor carrier authority for such service. The order granting such authority shall contain the commissioner's findings supporting his or her determination under the authority of this Code section that there is an unmet immediate and urgent need for such service and shall contain such conditions as the commissioner finds necessary with respect to such authority. Unless otherwise provided in this Code section, such emergency temporary motor carrier authority, unless suspended or revoked for good cause within such period, shall be valid for such time as the commissioner shall specify but not for more than an aggregate of 30 days. Such authority shall in no case be renewed and shall create no presumption that corresponding permanent authority will be granted thereafter, except that, where a motor carrier granted temporary emergency motor carrier authority under the provisions of this Code section makes application during the period of said temporary emergency authority for permanent motor common or contract carrier authority corresponding to that authorized in its temporary emergency authority, the temporary emergency motor carrier authority will be extended to the finalization of the permanent authority application unless sooner suspended or revoked for good cause within the extended period. (Code 1933, § 68-611.1, enacted by Ga. L. 1973, p. 641, § 1; Ga. L. 1980, p. 475, § 1; Ga. L. 1983, p. 462, § 1; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4.)

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in

full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

OPINIONS OF THE ATTORNEY GENERAL

Prior application for certificate of public necessity not required. — Applicant for this authority is not required to first make application for certificate of public convenience and necessity. 1973 Op. Att'y Gen. No. 73-85.

Commission need not issue certificate of public necessity. — Commission need not issue certificate of public convenience and necessity to applicant for temporary authority. 1973 Op. Att'y Gen. No. 73-85.

Construction with Code Section 46-7-3. — Temporary emergency authority granted under former Code 1933, § 68-611.1 (see O.C.G.A. § 46-7-13) was exception to general requirement of former Code 1933, § 68-604 (see O.C.G.A. § 46-7-3) that no motor common carrier can operate without first obtaining a certificate. 1973 Op. Att'y Gen. No. 73-85.

46-7-14. Discontinuance of service by carrier.

A motor common or contract carrier of passengers may discontinue its entire service on any route upon 30 days' published notice to be prescribed by the commissioner, and thereupon its certificate therefor shall be canceled. A motor common or contract carrier of passengers may discontinue any part of its service on any route upon 30 days' published notice, subject, however, to the right of the commissioner to withdraw its certificate for such route if, in the opinion of the commissioner, such diminished service is not adequate or is no longer compatible with the public interest. (Ga. L. 1931, p. 199, § 14; Code 1933, § 68-619; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4.)

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in

full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

Cited in *Gallahar v. George A. Rheman Co.*, 50 F. Supp. 655 (S.D. Ga. 1943).

RESEARCH REFERENCES

C.J.S. — 60 C.J.S., Motor Vehicles, § 146 et seq.

46-7-15. Registration and licensing of carriers; cities and counties barred from levying taxes on carriers.

(a) Except as otherwise provided in this Code section, before any motor common or contract carrier engaged in exempt passenger intrastate commerce as provided for in subparagraph (C) of paragraph (9) of Code Section 46-1-1 shall operate any motor vehicle on or over any public highway of this state, it shall first secure a registration permit from the commissioner by making application therefor on forms supplied by the commissioner and paying a \$25.00 filing fee. The application shall show the operations claimed to be exempt. A carrier's registration permit shall be valid so long as there is no change in its operating authority but may be amended to reflect any changes by application to the commissioner on a form provided by the commissioner and payment of a \$5.00 filing fee.

(b) Every motor common or contract carrier operating pursuant to a certificate or permit shall annually on or before the thirty-first day of

December of each calendar year, but not earlier than the preceding first day of October or, as to a vehicle put into use during the course of the year, before the vehicle is put into use, make application to the commissioner for the issuance of an annual identification and registration stamp or stamps, make application for the registration of all motor vehicles to be operated under such certificate or permit, in such manner and form as the commissioner may by rule or regulation prescribe, and shall pay to the commissioner a fee of \$5.00 for the registration of each vehicle and issuance of identification and registration stamp to operate same. Each annual identification and registration stamp shall be valid for a period of 16 months extending from the first day of October of any year through the thirty-first day of January of the next succeeding year.

(c) Motor carriers operating pursuant to a certificate or permit as provided for in this article may, in lieu of other vehicle registration provisions contained in this Code section, register vehicles operated as an emergency, temporary, or trip-lease vehicle for a period not exceeding 15 days by payment to the commissioner of a fee of \$8.00 for each vehicle so registered. Upon such registration, the commissioner shall issue an emergency, temporary, or trip-lease vehicle registration permit.

(d) Whenever any motor vehicle is operated on or over any public highway of this state without the motor common or contract carrier operating such vehicle first having obtained the annual registration and license or temporary vehicle registration permit provided for in this Code section, the motor common or contract carrier operating such vehicle shall be required to pay a fee of \$25.00 for the late registration of such vehicle.

(e) No subdivision of this state, including cities, townships, or counties, shall levy any excise, license, or occupation tax of any nature on a motor common or contract carrier, or on the equipment of a motor common or contract carrier, or on the right of a motor common or contract carrier to operate such equipment, or on any incidents of the business of a motor common or contract carrier. (Ga. L. 1931, p. 199, § 18; Code 1933, § 68-623; Ga. L. 1937, p. 469, § 1; Ga. L. 1943, p. 351, § 1; Ga. L. 1973, p. 643, § 3; Ga. L. 1980, p. 475, § 2; Ga. L. 1986, p. 1283, § 4; Ga. L. 1988, p. 1607, § 1; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4.)

Cross references. — Permits and fees for motor trucks not registered in state, § 40-2-110 et seq. Schedule of license fees for operation of motor vehicles, § 48-10-2.

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials,

adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

In light of the similarity of the provisions, decisions under former Ga. L. 1929, p. 293, and former Code Section 46-7-60, are included in the annotations under this Code section.

This section not violative of constitutional rights. — Former Code 1933, § 68-623 (see O.C.G.A. § 46-7-15) did not violate Ga. Const. 1976, Art. I, Sec. I, Para. I and Art. I, Sec. II, Para. III (Ga. Const. 1983, Art. I, Sec. I, Para. I; Art. I, Sec. I, Para. II), which declared that protection to person and property was the paramount duty of government and shall be impartial and complete, and no person shall be deprived of life, liberty, or property, except by due process of law. *City of Albany v. Ader*, 176 Ga. 391, 168 S.E. 1 (1933); *Mayor of Savannah v. V.C. Ellington Co.*, 177 Ga. 149, 170 S.E. 38 (1933).

Former Code 1933, § 68-623 (see O.C.G.A. § 46-7-15) was not unconstitutional on grounds that it referred to more than one subject matter or contains matter different from what was expressed in its title. *City of Albany v. Ader*, 176 Ga. 391, 168 S.E. 1 (1933); *Mayor of Savannah v. V.C. Ellington Co.*, 177 Ga. 149, 170 S.E. 38 (1933); *V.C. Ellington Co. v. City of Macon*, 177 Ga. 541, 170 S.E. 813 (1933).

Private and common carriers for hire covered by section. — Former Code 1933, § 68-623 (see § 46-7-15) applied to both private carriers for hire and common carriers for hire, and a municipal road-use tax on these motor carriers was void. *Mayor of Savannah v. V.C. Ellington Co.*, 177 Ga. 149, 170 S.E. 38 (1933).

Reasonable classification exempts producer from prescribed fee. — The language "So long as the title remains in the producer" limits the operation of the statutory exemption to such an extent that the only property in the class mentioned which was exempted was property where the "title remains in the producer." This was a reasonable classification in favor of the producer, which will enable movement of the products over the highways so long as title remains in the producer without exaction of the prescribed fee. *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n*, 179 Ga. 431, 176 S.E. 487 (1934), *aff'd*, 295 U.S. 285, 55 S. Ct. 709, 79 L. Ed. 1439 (1935) (decided under former Code Section 46-7-60).

Annual license fee not unreasonable or oppressive. — As the annual license fee is for the privilege for a use as extensive as the carrier wills that it shall be, there is nothing unreasonable or oppressive in the burden so imposed. *Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n*, 295 U.S. 285, 55 S. Ct. 709, 79 L. Ed. 1439 (1935) (decided under former Code Section 46-7-60).

Exemption from municipal taxation covers incidents of carrier business. — Former Code 1933, § 68-623 (see O.C.G.A. § 46-7-15) sets up an exemption of a motor common carrier from municipal taxation, not only on its equipment and the right to operate the same, but also on "any incidents of said motor carrier business." *Acme Freight Lines v. City of Vidalia*, 193 Ga. 334, 18 S.E.2d 540 (1942).

"Incidents" of the business of a motor common carrier does not mean those things without which the business cannot be carried on. Such would be more properly classified as the business itself, rather than an incident thereof. *Acme Freight Lines v. City of Vidalia*, 193 Ga. 334, 18 S.E.2d 540 (1942).

An incident of the business of a motor common carrier of freight would be something naturally associated as pertinent to such transportation and necessarily dependent upon it, but without which the business of transportation might nevertheless be carried on, i.e., the incidental operation would be necessarily dependent upon the transportation, but the business of transportation would not be necessarily dependent upon the incidental operation. *Acme Freight Lines v. City of Vidalia*, 193 Ga. 334, 18 S.E.2d 540 (1942).

Operation of service is incident of carrier's business within this section. — The operation by a motor common carrier, at a municipality lying on its route, of a truck to pick up and deliver freight which is to be or has been shipped from or to patrons at such municipality, was an incident of the carrier's business of transporting freight, within former Code 1933, § 68-623 (see O.C.G.A. § 46-7-15), and by virtue of that section it was exempt from local taxation. *Acme Freight Lines v. City of Vidalia*, 193 Ga. 334, 18 S.E.2d 540 (1942).

Operation of motor common carrier in and around municipality not exempt from this section. — The operation of a motor common carrier in and immediately around a municipality lying on its route of a pick-up and delivery service of freight that had been shipped or was to be shipped to or by patrons at the municipality, is a service, within the classification of an incident of the business of a motor common carrier, and the operation cannot be termed "local draying," such as is exempted from the operation of Ga. L. 1931, pp. 197 and 207, and to which the exemption from local taxation, under former Code 1933, § 68-602 (see O.C.G.A. § 46-7-15), would not apply. *Acme Freight Lines v. City of Vidalia*, 193 Ga. 334, 18 S.E.2d 540 (1942).

City tax ordinance held invalid. — Taxing ordinance of city was invalid because it was in conflict with former Code 1933, § 68-623 (see O.C.G.A. § 46-7-15), it being evident that the General Assembly's purpose was to reserve to the state the exclusive right to tax common carrier. *City of Albany v. Ader*, 176 Ga. 391, 168 S.E. 1 (1933).

City without power to pass tax ordinance contrary to this section. — In view of the provisions of subsection (d) of former Code 1933, § 68-623 (see O.C.G.A. § 46-7-15), the mayor and council of the City of Atlanta were without power to pass an ordinance imposing an occupational license tax of \$300.00 for the operation of a bus terminal. *Southeastern Greyhound Lines v. City of Atlanta*, 177 Ga. 181, 170 S.E. 43 (1933).

Entire municipal ordinance fails where repugnant to this section. — Where a municipal corporation attempts to lay a charge indifferently against motor common carriers and motor carriers for hire other than common carriers for the use of its streets by such carriers, and the portion of the ordinance relating to common carriers is invalid because repugnant to the state law, the entire ordinance will necessarily fail, since the objectionable portion as to common carriers is so connected with the general legislative scheme that, if it should be stricken out, effect could not be given to the intention of the mayor and council in adopting the ordinance. *V.C. Ellington Co. v. City of Macon*, 177 Ga. 541, 170 S.E. 813 (1933).

Control of state over streets and highways of entire commonwealth is paramount and supreme. — Municipal ordinances which conflict with legislative enactments must yield to the superior authority of the state. Silence on the part of the state, while the state may concede for the time being to municipalities the control and regulation of the streets and highways within the corporate limits of a municipality, is no bar to the exercise of the supreme authority whenever the state sees fit, by legislative enactment, to exercise authority and control. *Mayor of Savannah v. V.C. Ellington Co.*, 177 Ga. 149, 170 S.E. 38 (1933).

"Highway" construed. — Word "highways" as used in former Code 1933, § 68-623 (see O.C.G.A. § 46-7-15) included streets. *Southeastern Greyhound Lines v. City of Atlanta*, 177 Ga. 181, 170 S.E. 43 (1933).

Fees charged are in nature of tax for use of highways. — Fees charged motor carriers for certificate of public convenience and necessity and for the license of each vehicle are in the nature of a tax, justified in the reasonable amounts exacted, as recompense for the special use of the highways for the purpose of gain. *Southern Motorways, Inc. v. Perry*, 39 F.2d 145 (N.D. Ga. 1930) (decided under former Ga. L. 1929, p. 293).

No right of interstate carrier to use highway without paying. — An interstate carrier has no better right than any other to use the state's improved highway without its consent, or without paying for it. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931) (decided under former Ga. L. 1929, p. 293).

Regulation of use of roads by state. — The state may license or refuse to license, may condition or charge for, the use of its improved roads, when they are turned from their common uses and purposes to the carrier's business. *Johnson Transf. & Freight Lines v. Perry*, 47 F.2d 900 (N.D. Ga. 1931) (decided under Ga. L. 1929, p. 293).

Cited in *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72, 59 S. Ct. 435, 83 L. Ed. 495 (1939); *Benton Bros. Drayage & Storage Co. v. Mayor of Savannah*, 219 Ga. 172, 132 S.E.2d 196 (1963).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — Some of the decisions cited below were decided under former Code 1933, § 68-518.

Lessor exempt from purchasing tags for vehicles leased to postal service. — Lessors relieved of liability of purchasing registration tags for vehicles leased to postal service, when said leases are longer than 30 days duration and the postal service has exclusive

use of the vehicles during the lease periods; when the lessors regain the use of vehicles on the termination of the leases or before their termination, they will again be responsible for the purchase of registration tags for the vehicles. 1974 Op. Att'y Gen. No. U74-16 (rendered under former Code 1933, § 68-518).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 300, 305, 313.

ALR. — State regulation of carriers by motor vehicle as affected by interstate com-

merce clause, 47 ALR 230; 49 ALR 1203; 62 ALR 52; 85 ALR 1136; 109 ALR 1245; 135 ALR 1358.

46-7-15.1. Motor carrier of property permit.

(a) Before any motor carrier of property shall operate any motor vehicle on or over any public highway of this state, it shall first secure a motor carrier of property permit from the commissioner by making application therefor on forms supplied by the commissioner and paying the required filing fee. The application shall be in writing and under oath and shall include such information as the commissioner may require including, but not limited to:

- (1) Whether hazardous commodities will be transported;
- (2) The number and type of vehicles to be utilized;
- (3) The carrier's safety record and safety rating; and
- (4) Proof of compliance with applicable insurance or self-insurance requirements.

(b) The commissioner shall issue the motor carrier of property permit if the application is complete and the applicant demonstrates compliance with the laws of this state and the rules and regulations of the commissioner regarding insurance and safety, including the handling of hazardous materials. The commissioner may refuse to issue a permit where the applicant has failed to show compliance with the applicable laws of this state and the rules and regulations of the commissioner. In any such instance where a permit is denied, the applicant shall, upon request made within 30 days of the date of denial, be entitled to a hearing to contest such denial of a permit.

(c) The commissioner may, at any time after notice and a hearing, suspend, revoke, alter, or amend any permit issued under this title if it shall appear that the holder of the permit has violated or refused to observe any

of the lawful and reasonable orders, rules, or regulations prescribed by the commissioner, any provisions of this title, or any other law of this state regulating or providing for the taxation of motor vehicles. (Code 1981, § 46-7-15.1, enacted by Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 366, § 11.)

The 2004 amendment, effective July 1, 2004, deleted former subsection (d) which read: “(d) In order to provide for the publication and maintenance of just and reasonable joint-line rates, routes, classifications, and mileage guides, the commissioner may establish a collective rate-making procedure for all motor carriers of property who elect to participate.”

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, a colon was substituted for a semicolon at the end of the introductory language of subsection (a).

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assem-

bly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-16. Registration and insurance for carriers engaged solely in interstate commerce; emergency, temporary, or trip-lease vehicle registration permits; late registration and identification; reciprocal agreements; certificate not required.

(a) Before any motor carrier engaged solely in interstate commerce under authority issued by the Interstate Commerce Commission or any successor agency shall operate any motor vehicle on or over any public highway of this state, it shall obtain from the commissioner or the carrier's designated base state a registration receipt issued pursuant to rules adopted by the Interstate Commerce Commission or any successor agency as determined by federal law.

(b) Before any motor carrier engaged solely in interstate operations exempt from regulation by the Interstate Commerce Commission shall operate any motor vehicle on or over any public highway of this state, it shall first:

(1) Secure a registration permit from the commissioner by making application therefor on forms supplied by the commissioner and paying a \$25.00 filing fee. A carrier's registration shall be valid so long as there is no change in its operating authority with regard to its operations in this state, but the registration may be amended to reflect such changes by application to the commissioner on forms supplied by the commissioner and payment of a \$5.00 filing fee;

(2) Annually on or before the thirty-first day of December of each calendar year, but not earlier than the preceding first day of October or,

as to a vehicle put into use during the course of the year, before the vehicle is put into use, make application to the commissioner for the issuance of an annual identification and registration stamp or stamps, make application for the registration of all motor vehicles to be operated under such permit, in such manner and form as the commissioner may by rule or regulation prescribe, and shall pay to the commissioner a fee of \$5.00 for the registration of each vehicle and issuance of identification and registration stamp to operate same. Each annual identification and registration stamp shall be valid for a period of 16 months extending from the first day of October of any year through the thirty-first day of January of the next succeeding year. Notwithstanding any other provision of this Code section, the commissioner is authorized to impose a vehicle identification and registration fee equal to the identification and registration fee charged by any other state, up to a maximum of \$25.00, upon vehicles licensed in that state if such state charges equipment licensed in Georgia a vehicle identification and registration fee in excess of \$5.00; and

(3) Give the bond or indemnity insurance prescribed by this article, omitting the protection in respect to their own passengers and cargoes.

(c) Motor carriers operating pursuant to a registration permit as provided for in this Code section may, in lieu of all other registration and identification requirements contained in subsection (b) of this Code section, register vehicles operated in Georgia as an emergency, temporary, or trip-lease vehicle for a period not exceeding 15 days by payment to the commissioner of a fee of \$8.00 for each vehicle so registered; and upon such payment, the commissioner shall issue an emergency, temporary, or trip-lease vehicle registration permit.

(d) Where a carrier has not previously qualified with the commissioner to operate in interstate exempt or intrastate commerce in Georgia pursuant to this Code section and thus has not secured a registration permit pursuant to this Code section, the emergency, temporary, or trip-lease vehicle registration permit provided for in subsection (c) of this Code section will also include the authority to operate in Georgia during the 15 day or less period covered by the emergency, temporary, or trip-lease vehicle registration permit, provided that the carrier has otherwise qualified its operations with the commissioner as provided for in this Code section; provided, however, that whenever any motor vehicle is operated on or over any public highway of this state without the motor carrier operating such vehicle first having obtained the annual registration and identification stamp or license or the emergency, temporary, or trip-lease vehicle registration permit provided for in this Code section, the motor carrier operating such vehicle shall be required to pay a fee of \$25.00 for the late registration and identification of such vehicle.

(e) Reserved.

(f) It shall not be necessary for any motor carrier to obtain a certificate from the commissioner when such carrier is engaged solely in interstate commerce over the public highways of this state. (Ga. L. 1931, p. 199, § 30; Code 1933, § 68-633; Ga. L. 1968, p. 392, § 1; Ga. L. 1973, p. 643, § 4; Ga. L. 1980, p. 475, § 3; Ga. L. 1986, p. 1283, § 5; Ga. L. 1988, p. 1607, § 2; Ga. L. 1989, p. 14, § 46; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2002, p. 415, § 46; Ga. L. 2004, p. 366, § 12.)

The 2002 amendment, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, substituted "Reserved" for the former provisions of subsection (e), which read: "Nothing in this Code section shall limit the authority of the commissioner to negotiate reciprocal agreements relating to vehicle identification and registration fees in excess of those provided for under Title 49 USC, Section 302(b)(2), as provided in Code Section 46-7-91."

The 2004 amendment, effective July 1, 2004, deleted "of public convenience" following "certificate" near the middle of subsection (f).

Cross references. — Permits and fees for motor trucks not registered in state, § 40-2-110 et seq.

Code Commission notes. — Pursuant to Code section 28-9-5, in 1988, "is" was substituted for "in" preceding "put into use" in the first sentence of present paragraph (a)(2) (now paragraph (b)(2)).

Pursuant to Code Section 28-9-5, in 2000, "commissioner" was substituted for "commission" in the last sentence of paragraph (b)(1).

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

Direct actions against insurers of interstate carriers allowed. — A proper interpretation of the provision in former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) allowing for direct actions against insurance carriers, in conjunction with former Code 1933, § 68-633 (see O.C.G.A. § 46-7-16) that it applied to interstate carriers as well as intrastate carriers. *Kimberly v. Bankers & Shippers Ins. Co.*, 490 F. Supp. 93 (N.D. Ga. 1980).

Cause of action for tort occurring out of state. — Since, under O.C.G.A. § 46-7-16(f), a certificate and bond or insurance is not required at all when carrier is engaged solely in interstate commerce over the public highways of Georgia, the certificate of convenience which permits joinder of the insurer in a suit against a carrier "subject to action" in Georgia applies specifically to causes of

action for a tort which occurred on public highways of other states. *Johnson v. Woodard*, 208 Ga. App. 41, 429 S.E.2d 701 (1993).

Joinder of interstate carrier allowed. — Insurer of motor carrier was joined in an action against a carrier operating under a certificate of convenience issued by the state and was required to be, or could have been sued in Georgia. *Johnson v. Woodard*, 208 Ga. App. 41, 429 S.E.2d 701 (1993).

Cited in *Lowe v. City Council*, 45 F. Supp. 143 (S.D. Ga. 1942); *Gallahar v. George A. Rheman Co.*, 50 F. Supp. 655 (S.D. Ga. 1943); *Rogers v. Atlantic Greyhound Corp.*, 50 F. Supp. 662 (S.D. Ga. 1943); *Beck & Gregg Hdwe. Co. v. Cook*, 210 Ga. 608, 82 S.E.2d 4 (1954); *Harper Motor Lines v. Roling*, 218 Ga. 812, 130 S.E.2d 817 (1963); *Record Truck Line v. Harrison*, 109 Ga. App.

653, 137 S.E.2d 65 (1964); *Ellerbee v. Interstate Contract Carrier Corp.*, 183 Ga. App. 828, 360 S.E.2d 280 (1987).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the provisions, opinions under former Code Section 46-7-61 are included in the annotations for this section.

Commission filing fee not inconsistent with federal regulation. — The \$25.00 fee required to be charged by the Public Service Commission pursuant to § 46-7-61 and this section for the regulation of interstate motor carriers is not inconsistent with the Interstate Commerce Commission regulation which established a maximum fee of \$5.00 which state commissions could charge interstate motor carriers for annual licenses or identification stamps, provided it can be demonstrated that at least \$20.00 of such fee is used solely for defraying the cost of the regulation of carriers by highway operating within the borders of this state and the enforcement of laws pertaining thereto. 1972 Op. Att'y Gen. No. 72-71.

Intent of sections prescribing penalties for violations of laws concerning motor common and contract carriers. — This section and §§ 32-1-10, 32-6-23, 32-6-24, and 46-7-78 are intended to promote safety of traveling public and protect public's investment in its roads and highways. 1981 Op. Att'y Gen. No. U81-17 (rendered under former Code Section 46-7-61).

Classification of traffic offenses included violations of Ga. L. 1973, pp. 947 and 1105 and former Code 1933, § 95A-963 (see O.C.G.A. § 32-6-30), dealing with failure to stop for inspection of vehicle or load. 1981 Op. Att'y Gen. No. U81-17 (rendered under former Code Section 46-7-61).

Use of uniform traffic citation permitted where section violated. — Section 17-7-71(b) specifically permits use of uniform traffic

citation in all misdemeanor cases involving vehicle dimensions and laws concerning motor common carriers and motor contract carriers, which includes violations of this section to the extent that such violations are misdemeanors. 1981 Op. Att'y Gen. No. U81-17 (rendered under former Code Section 46-7-61).

Posted cash appearance bond may be forfeited. — Since violations of §§ 32-6-30 and 46-7-61 constitute misdemeanor traffic offenses, cases arising from these sections may be tried upon uniform traffic citation, and any cash appearance bonds posted may be forfeited as provided by § 17-6-8. 1981 Op. Att'y Gen. No. U81-17 (rendered under former Code Section 46-7-61).

Additional registration fee for vehicle leased to another carrier. — Where a vehicle bearing Georgia revenue license plates and a \$25.00 Georgia Public Service Commission tag is leased to another carrier for movement of a shipment in intrastate commerce or interstate commerce between points in Georgia, this section requires the payment of an additional fee for registration of that vehicle in the name of the lessee. 1968 Op. Att'y Gen. No. 68-505 (rendered under former Code Section 46-7-61).

Where a vehicle bearing Georgia revenue license plates and a \$25.00 Georgia Public Service Commission tag is leased to another carrier for movement of a shipment in interstate commerce to, from, or through Georgia, this section requires the payment of an additional fee for registration of that vehicle in the name of the lessee. 1968 Op. Att'y Gen. No. 68-505 (rendered under former Code Section 46-7-61).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 36 et seq.

C.J.S. — 60 C.J.S., Motor Vehicles, §§ 174 et seq., 179 et seq., 192 et seq., 226.

ALR. — Applicability of state Anti-trust Act to interstate transaction, 24 ALR 787.

State regulation of carriers by motor vehicle as affected by interstate commerce clause, 47 ALR 230; 49 ALR 1203; 62 ALR 52; 85 ALR 1136; 109 ALR 1245; 135 ALR 1358.

Rules of federal courts or those of state court as applicable in action for tort against

carrier arising out of interstate transportation of persons, 76 ALR 428.

Territorial coverage of motor carrier's public liability policy required by statute or ordinance as coextensive with area of authorized operation, 154 ALR 520.

Owning, leasing, or otherwise engaging in business of furnishing services for taxicabs as basis of tort liability for acts of taxi driver under respondeat superior doctrine, 8 ALR3d 818.

46-7-17. Designation and maintenance of agents for service on nonresident carriers; service of process; venue.

(a) Each nonresident motor common or contract carrier shall, before any certificate or permit is issued to it under this article or at the time of registering as required by Code Section 46-7-16, designate and maintain in this state an agent or agents upon whom may be served all summonses or other lawful processes in any action or proceeding against such motor carrier growing out of its carrier operations; and service of process upon or acceptance or acknowledgment of such service by any such agent shall have the same legal force and validity as if duly served upon such nonresident carrier personally. Such designation shall be in writing, shall give the name and address of such agent or agents, and shall be filed in the office of the commissioner. Upon failure of any nonresident motor carrier to file such designation with the commissioner or to maintain such an agent in this state at the address given, such nonresident carrier shall be conclusively deemed to have designated the Secretary of State and his or her successors in office as such agent; and service of process upon or acceptance or acknowledgment of such service by the Secretary of State shall have the same legal force and validity as if duly served upon such nonresident carrier personally, provided that notice of such service and a copy of the process are immediately sent by registered or certified mail or statutory overnight delivery by the Secretary of State or his or her successor in office to such nonresident carrier, if its address be known. Service of such process upon the Secretary of State shall be made by delivering to his or her office two copies of such process with a fee of \$10.00.

(b) Except in those cases where the Constitution of Georgia requires otherwise, any action against any resident or nonresident motor common or contract carrier for damages by reason of any breach of duty, whether contractual or otherwise, or for any violation of this article or of any order, decision, rule, regulation, direction, demand, or other requirement established by the commissioner, may be brought in the county where the cause of action or some part thereof arose; and if the motor common or contract carrier or its agent shall not be found for service in the county where the action is instituted, a second original may issue and service be made in any other county where the service can be made upon the motor common or contract carrier or its agent. The venue prescribed by this Code section shall be cumulative of any other venue provided by law. (Ga. L. 1931, p. 199, § 13; Code 1933, § 68-618; Ga. L. 1963, p. 376, § 1; Ga. L. 1965, p. 418, § 1; Ga. L. 1983, p. 1474, § 5; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2000, p. 1589, § 3.)

Cross references. — Provisions of Constitution of Georgia relating to venue in civil cases generally, Ga. Const. 1983, Art. VI, Sec. II, Para. VI.

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the first 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that

the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the 2000 amendment is applicable with respect to notices delivered on or after July 1, 2000.

Law reviews. — For comment, "Personal Jurisdiction Based on Agency by Estoppel," see 4 Ga. St. B.J. 252 (1967).

JUDICIAL DECISIONS

In light of the similarity of the provisions, decisions under former Code Section 46-7-62 are included in the annotations for this section.

Strict construction of this section. — The provisions of former Code 1933, § 68-618 (see O.C.G.A. § 46-7-17) as to service on nonresident motor carriers are in derogation of common law and are to be strictly construed. *Record Truck Line v. Harrison*, 109 Ga. App. 653, 137 S.E.2d 65, aff'd, 220 Ga. 289, 138 S.E.2d 578 (1964).

Former Code 1933, § 68-618 (see O.C.G.A. § 46-7-17), being in derogation of the common law, will not be extended beyond the mode fixed by the legislature and shall be strictly and literally construed. *Norris Candy Co. v. Dixie Hwy. Express, Inc.*, 102 Ga. App. 665, 117 S.E.2d 250 (1960).

Former Code 1933, § 68-618 (see O.C.G.A. § 46-7-17), being in derogation of common-law and granting extraterritorial jurisdiction, must be strictly construed. *Taylor v. Jones*, 123 Ga. App. 476, 181 S.E.2d 506 (1971) (decided under former Code Section 46-7-62).

Section is not mandatory. — Former Code 1933, § 68-618 (see O.C.G.A. § 46-7-17) was not to be construed as mandatory as respects the venue of a tort action against a motor common carrier being in the county in which the cause of action originated. *De Loach v. Southeastern Greyhound Lines*, 49 Ga. App. 662, 176 S.E. 518 (1934).

Applicability of subsection (a). — The provisions of subsection (a) of former Code 1933, § 68-618 (see O.C.G.A. § 46-7-17) were are applicable only to those situations

in which the cause of action arose out of the carrier's operations in this state. *Record Truck Line v. Harrison*, 110 Ga. App. 520, 139 S.E.2d 153 (1964); *Mathews v. Rail Express, Inc.*, 836 F. Supp. 873 (N.D. Ga. 1993).

Venue of personal injury action. — Even though a nonresident interstate motor common carrier was registered in Georgia and had a registered agent for service of process, venue of a personal injury action against the carrier and nonresident driver was proper only in the county in which the accident occurred, not where the carrier's registered office was maintained. *Southern Drayage, Inc. v. Williams*, 216 Ga. App. 721, 455 S.E.2d 418 (1995).

Payment of money determines applicability of subsection (a). — In determining whether an entity is a "motor contract or common carrier" such that the substituted service provisions of subsection (a) of O.C.G.A. § 46-7-17 and § 46-7-62(a) (now repealed) apply, the inquiry must focus on the payment of money for the transportation of the goods or people. *Ellerbee v. Interstate Contract Carrier Corp.*, 183 Ga. App. 828, 360 S.E.2d 280 (1987).

Language refers to carrier operations upon highways of this state. — When the words "motor common carrier" were used in subsection (a) of former Code 1933, § 68-618 (see O.C.G.A. § 46-7-17), they referred to motor common carriers using the public highways of this state; and in providing that such nonresident motor common carrier shall designate an agent for service in this state upon whom service may be perfected "in any action or proceeding against

such motor common carrier growing out of its carrier operations," it necessarily referred to carrier operations upon the highways of this state. *Record Truck Line v. Harrison*, 220 Ga. 289, 138 S.E.2d 578 (1964).

Out-of-state accident. — Georgia court had no personal jurisdiction over a trucking company licensed in Georgia as a nonresident motor common carrier, where it was undisputed that the traffic accident involving the trucking company occurred outside the State of Georgia. *Tuck v. Cummins Trucking Co.*, 171 Ga. App. 485, 320 S.E.2d 265 (1984); *Mathews v. Rail Express, Inc.*, 836 F. Supp. 873 (N.D. Ga. 1993) (decided under former Code Section 46-7-62).

Burden of proving vehicle exempt from definition of "motor contract carrier". — On the question of whether a carrier was a "motor contract carrier" subject to suit in the county of the accident pursuant to subsection (b) of former § 46-7-62 the burden of proof was on the truck owner to show that its truck came within the exemption from the definition of "motor contract carrier" found in former § 46-1-1(8)(c) and there was no burden on plaintiffs to prove that the truck was not within the exemption. *Georgia Cas. & Sur. Co. v. Jernigan*, 166 Ga. App. 872, 305 S.E.2d 611 (1983) (decided under former Code Section 46-7-62).

Venue provision is permissive and cumulative. — Former Code 1933, § 68-618 (see O.C.G.A. § 46-7-17) did not make mandatory the bringing of such action against a motor common carrier in the county where the cause of action originated, but was purely permissive and cumulative. *Harrison v. Neel Gap Bus Line*, 51 Ga. App. 120, 179 S.E. 871 (1935).

Venue provision inapplicable to vehicles of state or political subdivision. — In action against county hospital authority and ambulance driver by automobile accident victim, the hospital authority was exempt from the venue provision of O.C.G.A. § 46-7-17 under the exemption provided for vehicles operated by any state or subdivision thereof in former § 46-1-1(7)(C)(viii). *Calhoun County Hosp. Auth. v. Walker*, 205 Ga. App. 259, 421 S.E.2d 777 (1992), cert. denied, 205 Ga. App. 899, 421 S.E.2d 777 (1992).

Not all venue options applicable to non-resident carrier. — The last sentence of subsection (b) of O.C.G.A. § 46-7-17 does

not mean that any and all venue provisions relative to an action against an insurer are applicable, at the election of the plaintiff, in a tort action against a motor carrier. What the sentence does mean is that its venue provisions are not exclusive with regard to a suit against a motor carrier and that venue can be predicated upon any statute which is otherwise applicable. *Thomas v. Bobby Stevens Hauling Contractors*, 165 Ga. App. 710, 302 S.E.2d 585 (1983).

Venue in action arising out of transaction in this state against nonresident carrier. — It is provided that an action against a nonresident motor common carrier may be brought in the county where the cause of action or some part thereof arose, this does not have the effect of restricting or limiting the venue in that respect; this provision contemplates an action arising out of a transaction in this state, but even then it does not require that the action be brought in the county where it arose. *Parker v. Ryder Truck Lines*, 150 Ga. App. 163, 257 S.E.2d 18 (1979).

Venue proper in county of registered office. — In an action against a trucking company, venue was proper in the county in which the company had its office properly registered with the secretary of state, not in the county of residence of the company's designated registered agent for service of process. *Rock v. Ready Trucking, Inc.*, 218 Ga. App. 774, 463 S.E.2d 355 (1995).

Residence of foreign carrier where cause of action originated. — A foreign motor common carrier, engaged in the business of trucking, hauling, and transporting freight over the various public highways within the state, and having designated a resident agent upon whom service of process can be made, under the clear mandate of former Code 1933, § 68-618 (see O.C.G.A. § 46-7-17), was, so far as the right to sue was concerned, a resident of this state, and a resident of the county in which the cause of action originated, so far as the right to bring an action against it for a cause of action originating in that county was concerned. *Southeastern Truck Lines v. Rann*, 214 Ga. 813, 108 S.E.2d 561 (1959).

Alternative venue for actions against carriers. — Under former Code 1933, § 68-618 (see O.C.G.A. § 46-7-17), a motor carrier "may be" sued in the county where the cause of action originated or may be sued in

the county where it maintained its principal office and place of business, and this was so, regardless of whether the motor carrier had an agent in the jurisdiction wherein the cause of action originated. *Modern Coach Corp. v. Faver*, 87 Ga. App. 221, 73 S.E.2d 497 (1952).

Permissible venue in county where cause of action originated despite residence of defendants. — A motor common carrier may be a nonresident corporation, yet since it is engaged in doing business in this state, and has agents in the state for that purpose, it is a resident of this state and a resident of the county in which the cause of action originated, so far as the right to bring an action against it for a cause of action originating in that county is concerned, and, being a resident of that county for the purpose of an action, a joint tort-feasor, notwithstanding that the joint tortfeasor may reside in another county of this state, may be sued jointly with the motor common carrier in the county in which the cause of action originated. *A.G. Boone Co. v. Owens*, 51 Ga. App. 739, 181 S.E. 519 (1935).

A joint cause of action against a motor common carrier, which is a domestic corporation, against its servant and employee, and against the insurance carrier of the motor common carrier, a nonresident corporation with an agent for service in this state, for damages alleged to have been sustained by the negligent operation of the motor vehicle of the motor common carrier, may be brought in the county wherein the cause of action originated, although none of the defendants are residents of such county or have agents therein. *Atlanta-Asheville Motor Express v. Dooley*, 78 Ga. App. 265, 50 S.E.2d 822 (1948).

Lack of agent in county where action originated does not preclude venue therein.

— An action against a motor common carrier, except where the Constitution of this state otherwise provides, may be brought and maintained in any county in this state in which the cause of action originated, for damages for an injury to person or property by the operation of the vehicles of such motor common carrier, although it may not have an agent in that county upon whom service of the suit may be perfected. *A.G. Boone Co. v. Owens*, 51 Ga. App. 739, 181 S.E. 519 (1935).

Same venue principles applicable to carriers as to railroad companies. — Under former Code 1933, § 94-1101 (see O.C.G.A. § 46-1-2), a joint and several action can be brought against a railroad company and another tort-feasor, and as against the railroad company and its employee, a conductor or engineer, and the suit can be brought in the county where the cause of action originated and service perfected by second original, and this was true even though neither defendant resided or had an agent in that county; the same principle was applicable to a suit against a motor common carrier and the driver of its motor vehicle for a tort. *Atlanta-Asheville Motor Express v. Dooley*, 78 Ga. App. 265, 50 S.E.2d 822 (1948).

Venue as to nonresidents. — Venue of action against nonresidents may be maintained under § 40-12-3 as well as former Code 1933, § 68-618 (see O.C.G.A. § 46-7-17). *Parker v. Ryder Truck Lines*, 150 Ga. App. 163, 257 S.E.2d 18 (1979).

Conferring of qualified residence upon nonresident motor carrier. — Former Code 1933, § 68-514 controlled qualified residence upon nonresident motor contract carrier for purposes of action such that a resident joint tort-feasor may be joined in an action against it in the county where the injury occurred although the joint tort-feasor is a nonresident of such county, and although the defendant corporation has no office or place of doing business therein. *Pate v. Brock*, 95 Ga. App. 594, 98 S.E.2d 404 (1957) (decided under former Code Section 46-7-62).

No misjoinder where proper action brought against parties. — It being alleged that the driver of the motor vehicle was engaged in carrying out the duties of the driver's employment as a driver for a common carrier at the time of the accident, and it appearing that the casualty company was the insurance carrier of the motor carrier, the action was properly brought against the three named defendants, and there was no misjoinder. *Atlanta-Asheville Motor Express v. Dooley*, 78 Ga. App. 265, 50 S.E.2d 822 (1948).

Cited in *Lee v. Acme Freight Lines*, 54 F. Supp. 397 (S.D. Ga. 1944); *United Motor Freight Term. Co. v. Driver*, 74 Ga. App. 244, 39 S.E.2d 496 (1946); *American Fid. & Cas.*

Co. v. Farmer, 77 Ga. App. 166, 48 S.E.2d 122 (1948); Dependable Ins. Co. v. Gibbs, 218 Ga. 305, 127 S.E.2d 454 (1962); Delcher Bros. Storage Co. v. Ward, 134 Ga. App. 686, 215 S.E.2d 516 (1975); Dove v. National Freight, Inc., 138 Ga. App. 114, 225 S.E.2d

477 (1976); Irving Com. Corp. v. Sound Floor Coverings, Inc., 595 F. Supp. 536 (N.D. Ga. 1984); Gault v. National Union Fire Ins. Co., 208 Ga. App. 134, 430 S.E.2d 63 (1993); Cooper v. Edwards, 235 Ga. App. 48, 508 S.E.2d 708 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 287. 14 Am. Jur. 2d, Carriers, §§ 595, 1130.

C.J.S. — 61 C.J.S., Motor Vehicles, §§ 992 et seq., 1025, 1026.

ALR. — State regulation of carriers by motor vehicle as affected by interstate commerce clause, 47 ALR 230; 49 ALR 1203; 62

ALR 52; 85 ALR 1136; 109 ALR 1245; 135 ALR 1358.

Constitutionality of statutes which permit action against trucking or bus company for injury to person or property to be brought in any county through or into which the route passes, and providing for the service of process in such cases, 81 ALR 777.

46-7-18. Authority of commissioner to prescribe reasonable rates, fares, and charges for carriers; form, filing, and publication of tariffs; collective rate-making procedure.

The commissioner shall prescribe just and reasonable rates, fares, and charges for transportation by motor common and contract carriers of passengers and household goods and for all services rendered by motor common and contract carriers in connection therewith. The tariffs therefor shall be in such form and shall be filed and published in such manner and on such notice as the commissioner may prescribe. Such tariffs shall also be subject to change on such notice and in such manner as the commissioner may prescribe. In order to carry out the purposes of this Code section, including the publication and maintenance of just, reasonable, and non-discriminatory rates and charges, the commissioner shall establish a collective rate-making procedure for all carriers of passengers and household goods. Failure on the part of any motor common or contract carrier to comply with this Code section or the rules and regulations promulgated under this Code section may result in suspension or cancellation of said carrier's operating authority by the commissioner. (Ga. L. 1931, p. 199, § 8; Code 1933, § 68-613; Ga. L. 1980, p. 1119, § 2; Ga. L. 1983, p. 529, § 1; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4.)

Cross references. — Authority of General Assembly regarding regulation of public utility rates, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Prohibition against rebates, Ga. Const. 1983, Art. III, Sec. VI, Para. V.

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000,

for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

Collective ratemaking activities by “rate bureaus” immune from antitrust liability. — Collective ratemaking activities carried on by “rate bureaus” composed of motor common carriers operating in several states, although not compelled by the states involved, “clearly articulated state policy” and thus were immune from antitrust liability. *Southern Motor Carriers Rate Conference, Inc. v.*

United States, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985).

Cited in *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. 1982); *Executive Town & Country Servs., Inc. v. City of Atlanta*, 789 F.2d 1523 (11th Cir. 1986); *Executive Town & Country Servs., Inc. v. Young*, 258 Ga. 860, 376 S.E.2d 190 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 157, 158.

C.J.S. — 60 C.J.S., Motor Vehicles, §§ 187 et seq., 192 et seq.

46-7-19. Discrimination in rates, fares, and charges; commissioner’s orders as to permissible reductions in rates and waivers of charges.

No motor common or contract carrier of passengers or household goods shall charge, demand, collect, or receive a greater or lesser or different compensation for the transportation of passengers and property or for any service rendered in connection therewith than the rates, fares, and charges prescribed or approved by order of the commissioner; nor shall any such motor carrier unjustly discriminate against any person in its rates, fares, or charges for service. The commissioner may prescribe, by general order, to what persons motor common and contract carriers of passengers or household goods may issue passes or free transportation; may prescribe reduced rates for special occasions; and may fix and prescribe rates and schedules. (Ga. L. 1931, p. 199, § 9; Code 1933, § 68-614; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4.)

Cross references. — Authority of General Assembly regarding regulation of public utility rates, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Prohibition against rebates, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Unjust discrimination in freight-transportation rates by common carriers generally, § 46-9-52.

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes admin-

istrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

Cited in *Myers v. Atlantic Greyhound Lines*, 52 Ga. App. 698, 184 S.E. 414 (1936);

United States v. Southern Motor Carriers Rate Conference, 439 F. Supp. 29 (N.D. Ga.

1977); *Executive Town & Country Servs., Inc. v. City of Atlanta*, 789 F.2d 1523 (11th Cir. 1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 245 et seq., 251, 266, 264 et seq.

C.J.S. — 13 C.J.S., Carriers, §§ 155, 195, 197, 199, 232, 233, 281, 367, 370, 371, 372, 596. 60 C.J.S., Motor Vehicles, § 154.

ALR. — State regulation of carriers by motor vehicle as affected by interstate commerce clause, 47 ALR 230; 49 ALR 1203; 62 ALR 52; 85 ALR 1136; 109 ALR 1245; 135 ALR 1358.

Right to maintain action against carrier on

ground that rates which were filed and published by carrier pursuant to law were excessive, 97 ALR 406.

Right of common or private carrier on highways to challenge rates of common carriers by rail or of other carriers on highways, 104 ALR 1169.

Joinder or representation of several claimants in action against carrier or utility to recover overcharge, 1 ALR2d 160.

46-7-20. Rules as to carriage of baggage; rates for carriage of baggage; limitation of liability.

Motor common or contract carriers of passengers shall not be compelled to carry baggage of passengers, except hand baggage, the character, amount, and size of which the motor carrier may limit by its rules and regulations, subject to the approval of the commissioner; and the commissioner may by rule or regulation limit the amount of the liability of the motor carrier therefor. If a motor carrier shall elect to carry the personal baggage of passengers (other than hand baggage), the commissioner shall prescribe just and reasonable rates therefor and such other rules and regulations with respect thereto as may be reasonable and just, and may by rule or regulation limit the amount of the liability of the motor carrier therefor. (Ga. L. 1931, p. 199, § 12; Code 1933, § 68-617; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4.)

Cross references. — Carrying of baggage by carriers and common carriers generally, § 46-9-136.

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials,

adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

Ignorance of commission rules no excuse. — Rules of the commission made pursuant to former Code 1933, § 68-617 (see O.C.G.A. § 46-7-20) were presumed to be

known or ascertainable by the public, and ignorance thereof excused no one. *Myers v. Atlantic Greyhound Lines*, 52 Ga. App. 698, 184 S.E. 414 (1936).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Carriers, §§ 1181, 1232, 1248 et seq. **C.J.S.** — 60 C.J.S., Motor Vehicles, § 227.

46-7-21. Carriage of mail, parcels, and packages.

Reserved. Repealed by Ga. L. 1996, p. 950, § 3, effective April 15, 1996.

Editor's notes. — This Code section was based on Ga. L. 1931, p. 199, § 10; Code 1933, § 68-615.

46-7-22. Maintenance by carriers of records as to vehicle and trailer use; filing of records with commission; preservation of summaries of records.

Reserved. Repealed by Ga. L. 1986, p. 1283, § 6, effective April 9, 1986.

Editor's notes. — This Code section, which was repealed in 1986, was reserved by Ga. L. 1996, p. 950, § 3, effective April 15, 1996. Ga. L. 2000, p. 951, § 9-4, reenacted the reservation of this Code section without change.

46-7-23. Power of commissioner to prescribe and examine books and records of carriers.

The commissioner shall prescribe the books and the forms of accounts to be kept by the holders of certificates under this article, which books and accounts shall be preserved for such reasonable time as may be prescribed by the commissioner. The books and records of every certificate holder shall be at all times open to the inspection of the commissioner or any agent of the department for such purpose. The commissioner shall have the power to examine the books and records of all motor carriers to whom he or she has granted certificates or permits to operate under this article and to examine under oath the officers and agents of any motor carrier with respect thereto. (Ga. L. 1931, p. 199, § 19; Code 1933, § 68-625; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4.)

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 31, 43, 91, 112, 113.

C.J.S. — 60 C.J.S., Motor Vehicles, § 114 et seq.

ALR. — State regulation of carriers by

motor vehicle as affected by interstate commerce clause, 47 ALR 230; 49 ALR 1203; 62 ALR 52; 85 ALR 1136; 109 ALR 1245; 135 ALR 1358.

46-7-24. Observance of size, weight, and speed laws; filing of schedules with commissioner.

Motor carriers shall observe the laws of this state in respect to size, weight, and speed of their vehicles. Intrastate motor carriers of passengers shall, and interstate motor carriers of passengers may, file with the commissioner the schedules upon which they propose to operate their vehicles, which schedules shall be such that the net running time of vehicles between terminal points shall not exceed the lawful speed limit; and any motor carrier of passengers filing such a schedule shall be allowed to operate his or her vehicles on the highway at a rate of speed not exceeding the lawful speed limit in order to maintain a schedule so filed. (Ga. L. 1931, p. 199, § 32; Code 1933, § 68-634; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4.)

Cross references. — Size and weight restrictions relating to motor vehicles, § 32-6-20 et seq.

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials,

adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

Cited in *Folds v. Auto Mut. Indem. Co.*, 55 Ga. App. 198, 189 S.E. 711 (1937); *Atlantic*

Greyhound Corp. v. Loudermilk, 110 F.2d 596 (5th Cir. 1940).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 263, 265, 267, 284.

C.J.S. — 60 C.J.S., Motor Vehicles, §§ 24 et seq., 42 et seq., 105 et seq., 133 et seq., 162, 166.

ALR. — State regulation of carriers by motor vehicle as affected by interstate com-

merce clause, 47 ALR 230; 49 ALR 1203; 62 ALR 52; 85 ALR 1136; 109 ALR 1245; 135 ALR 1358.

Construction and application of statute or ordinance designed to prevent use of vehicles or equipment thereof injurious to the highway, 134 ALR 550.

46-7-25. Railroad companies as motor common carriers.

Reserved. Repealed by Ga. L. 1996, p. 950, § 3, effective April 15, 1996.

Editor's notes. — This Code section was based on Ga. L. 1931, p. 199, § 15; Code 1933, § 68-620.

46-7-26. Authority of commissioner to promulgate rules and regulations for safety.

The commissioner shall have the authority to promulgate rules and regulations for the safe operation of motor vehicles and drivers and the safe transportation of hazardous materials. Any such rules and regulations promulgated or deemed necessary by the commissioner shall include the following:

(1) Every motor vehicle and all parts thereof shall be maintained in a safe condition at all times; and the lights, brakes, and equipment shall meet such safety requirements as the commissioner shall from time to time promulgate. Specifically but without limitation, the commissioner shall promulgate rules or regulations for the safe operation of trailers or semitrailers effective on and after July 1, 2000, consistent with the applicable provisions of Code Section 40-8-50;

(2) Every driver employed to operate a motor vehicle for a motor common or contract carrier shall be at least 18 years of age, of temperate habits and good moral character, possess a valid driver's license, not use or possess prohibited drugs or alcohol while on duty, and shall be fully competent to operate the motor vehicle under his or her charge;

(3) Accidents arising from or in connection with the operation of motor common or contract carriers shall be reported to the commissioner in such detail and in such manner as the commissioner may require; and

(4) The commissioner shall require every motor common and contract carrier to have attached to each unit or vehicle such distinctive markings or tags as shall be adopted by the commissioner. (Ga. L. 1931, p. 199, § 24; Code 1933, § 68-627; Ga. L. 1972, p. 1015, § 1604; Ga. L. 1981, p. 409, §§ 1, 2; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 809, § 2; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2002, p. 415, § 46.)

The 2002 amendment, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, substituted "commissioner" for "commission" in paragraph (1).

Cross references. — Similar provisions regarding authority of commission to promulgate rules regarding equipment of motor vehicles within its jurisdiction, § 40-8-2.

Editor's notes. — Ga. L. 2000, p. 809, § 4, not codified by the General Assembly, provided that this Act shall become effective April 27, 2000, for purposes of promulgation of rules or regulations by the Public Service Commission. For all other purposes, this Act shall become effective July 1, 2000.

Ga. L. 2000, p. 951, § 13-1, not codified by

the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full

implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

Law reviews. — For note on 2000 amendment of O.C.G.A. § 46-7-26, see 17 Ga. St. U.L. Rev. 259 (2000).

JUDICIAL DECISIONS

Rule of the commission is not “law of the state” within the meaning of that term as used in the provisions of the Constitution giving exclusive jurisdiction on appeal to Supreme Court to pass on constitutionality of state law. *Maner v. Dykes*, 183 Ga. 118, 187 S.E. 699 (1936); *Reliable Transf. Co. v. May*, 70 Ga. App. 613, 29 S.E.2d 187 (1944).

Delegation of regulatory power by Legislature proper. — The legislature could

clearly designate the commission to act for it in seeing that public service motor vehicles conformed to the regulatory laws applicable to them, leaving to that body the working out of the minor details regarding such regulations. *Maner v. Dykes*, 55 Ga. App. 436, 190 S.E. 189 (1937).

Cited in *Folds v. Auto Mut. Indem. Co.*, 55 Ga. App. 198, 189 S.E. 711 (1937); *Carter v. Bishop*, 209 Ga. 919, 76 S.E.2d 784 (1953).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 27 et seq.

C.J.S. — 60 C.J.S., Motor Vehicles, § 114 et seq.

ALR. — Liability for injuries due to collision between streetcar and automobile at street intersection, 28 ALR 217; 46 ALR 1000.

State regulation of carriers by motor vehicle as affected by interstate commerce

clause, 47 ALR 230; 49 ALR 1203; 62 ALR 52; 85 ALR 1136; 109 ALR 1245; 135 ALR 1358.

Liability for injury to or death of passenger from accident due to physical condition of carrier's employee, 53 ALR3d 669.

Liability or recovery in automobile negligence action as affected by absence on insufficiency of lights on parked or standing motor vehicle, 61 ALR3d 13.

46-7-27. Authority of commissioner to adopt rules and orders necessary for enforcement of article.

The commissioner is authorized to adopt such rules and orders as he or she may deem necessary in the enforcement of this article. Such rules and orders so approved by the commissioner shall have the same dignity and standing as if such rules and orders were specifically provided in this article. (Ga. L. 1931, p. 199, § 26; Code 1933, § 68-629; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 631, § 46.)

The 2004 amendment, effective May 13, 2004, part of an Act to revise, modernize, and correct the Code, substituted “as he or she may deem necessary” for “as it may deem necessary” in the first sentence.

Editor's notes. — Ga. L. 1996, p. 950, § 3,

effective April 15, 1996, reenacted this Code section without change.

Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but autho-

riz es administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full

implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

Editor's note. — In light of the similarity of the provisions, decisions under former Code 1933, § 68-523 are included in the annotations for this section.

Rule of the commission is not "law of the state" within the meaning of that term as used in the provisions of the Constitution giving exclusive jurisdiction on appeal to Supreme Court to pass on constitutionality of state law. *Reliable Transf. Co. v. May*, 70 Ga. App. 613, 29 S.E.2d 187 (1944).

Commission acts in quasi-legislative manner. — As the commission is authorized to adopt such rules and orders as it may deem necessary in the enforcement of the provisions of the statutory law regarding motor common carriers, it therefore, acts in a quasi-legislative manner. *Georgia Pub. Serv. Comm'n v. Smith Transf. Co.*, 207 Ga. 658, 63 S.E.2d 653 (1951).

Commission rules have same force and effect as statute. — A rule passed by the commission in pursuance of the statutory law regarding motor common carriers has the force and effect of a law or statute of this state. *Maner v. Dykes*, 52 Ga. App. 715, 184 S.E. 438 (1936), later appeal, 55 Ga. App. 436, 190 S.E. 189 (1937).

The commission has authority and power to adopt such rules and regulations within the scope of the legislative enactment, and as an effective means of enforcing the statutory law respecting motor common carriers, and such rules and regulations have the same force and effect as that of a statute. *Georgia Pub. Serv. Comm'n v. Jones Transp., Inc.*, 213 Ga. 514, 100 S.E.2d 183 (1957).

Delegation of regulatory power by Legislature proper. — The legislature could

clearly designate the Public Service Commission to act for it in seeing that public service motor vehicles conformed to the regulatory laws applicable to them, leaving to that body the working out of the minor details regarding such regulations. *Maner v. Dykes*, 55 Ga. App. 436, 190 S.E. 189 (1937).

Commission not bound by strict rules of evidence in conducting hearings. — The commission was authorized by former Code 1933, § 68-523 to adopt rules of evidence and procedure in carrying out its duties in the administration of this article, and was not bound by strict rules of evidence in conducting its hearings. *Tamiami Trail Tours, Inc. v. Georgia Pub. Serv. Comm'n*, 213 Ga. 418, 99 S.E.2d 225 (1957) (decided under former Code 1933, § 68-523).

Effect of introduction of ex parte affidavits at hearing upon commission order. — Upon a hearing by the commission on an application for a certificate of public convenience and necessity, the mere introduction before that body of ex parte affidavits does not invalidate the order of the commission. *Tamiami Trail Tours, Inc. v. Georgia Pub. Serv. Comm'n*, 213 Ga. 418, 99 S.E.2d 225 (1957) (decided under former Code 1933, § 68-523).

Cited in *Bass v. Georgia Public-Service Comm'n*, 192 Ga. 106, 14 S.E.2d 740 (1941); *Reliance Ins. Co. v. Bridges*, 168 Ga. App. 874, 311 S.E.2d 193 (1983); *Kinard v. National Indem. Co.*, 225 Ga. App. 176, 483 S.E.2d 664 (1997), *aff'd sub nom.*, *Ross v. Stephens*, 269 Ga. 266, 496 S.E.2d 705 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 21 et seq., 27 et seq., 130, 140 et seq.

ALR. — State regulation of carriers by motor vehicle as affected by interstate com-

merce clause, 47 ALR 230; 49 ALR 1203; 62 ALR 52; 85 ALR 1136; 109 ALR 1245; 135 ALR 1358.

46-7-28. Employment and compensation of enforcement personnel; reimbursement of Commissioners and employees for travel expenses; delegation of enforcement power to employees.

Reserved. Repealed by Ga. L. 2000, p. 951, § 9-4, effective July 1, 2001.

Editor's notes. — This Code section was based on Ga. L. 1931, p. 199, § 21; Code 1933, § 68-626; Ga. L. 1960, p. 1126, § 2; Ga. L. 1990, p. 2022, § 1; Ga. L. 1996, p. 950, § 3.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 32, 33.

C.J.S. — 60 C.J.S., Motor Vehicles, § 114 et seq.

46-7-29. Power of commission to delegate to its employees authority to hear cases; appeal of decisions to full commission.

Reserved. Repealed by Ga. L. 2000, p. 951, § 9-4, effective July 1, 2001.

Editor's notes. — This Code section was based on Code 1933, § 68-613.1, enacted by Ga. L. 1980, p. 618, § 1; Ga. L. 1985, p. 1126, § 1; Ga. L. 1996, p. 950, § 3.

46-7-30. Enforcement of article.

The commissioner is authorized to enforce this article by instituting actions for injunction, mandamus, or other appropriate relief. (Ga. L. 1931, p. 199, § 13; Code 1933, § 68-618; Ga. L. 1963, p. 376, § 1; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4.)

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in

full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-31. Injunctions.

Any motor carrier which operates on the public highways of this state without the required certificate or permit, or after such certificate or permit has been canceled, or without having registered its vehicle or vehicles as provided for in this article, or which operates otherwise than is permitted by the terms of such certificate or permit or the laws of this state may be enjoined from operating on the public highways of this state upon the

bringing of a civil action by the commissioner, by a competing motor carrier or rail carrier, or by any individual. (Ga. L. 1931, p. 199, § 29; Code 1933, § 68-632; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 366, § 13.)

The 2004 amendment, effective July 1, 2004, deleted “of public convenience and necessity” following “certificate” near the beginning of this Code section.

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials,

adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

The 1931 law was regulatory in nature, and all persons proposing to conduct the business of a motor carrier as defined thereby must submit themselves to the jurisdiction and control of the commission. *McKinney v. Patton*, 176 Ga. 719, 169 S.E. 16 (1933).

Meaning of language “or any individual”. — The words “or any individual” mean any other person having an interest in the subject matter, such as any individual who competes with the common carrier, and would not authorize the grant of an injunction at the instance of individuals whose only interest is as citizens and taxpayers. *Gulledge v.*

Augusta Coach Co., 210 Ga. 377, 80 S.E.2d 274 (1954).

“Required certificate” necessary. — The mere fact that a carrier was a certificate holder would afford the carrier no protection. The question is did the carrier have the required certificate that is one under the terms of which the carrier’s particular operation was authorized. *Bass v. Georgia Public-Service Comm’n*, 192 Ga. 106, 14 S.E.2d 740 (1941).

Cited in *McKinney v. Patton*, 176 Ga. 719, 169 S.E. 16 (1933); *Georgia Pub. Serv. Comm’n v. Jones Transp., Inc.*, 213 Ga. 514, 100 S.E.2d 183 (1957).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 33, 125, 146.

C.J.S. — 60 C.J.S., Motor Vehicles, §§ 207, 209, 210.

46-7-32. No vested right or perpetual franchise in use of public highways.

Nothing in this article or any other law shall be construed to vest in the owner, holder, or assignee of any certificate or permit issued under this article any vested right to use the public highways of this state and shall not be construed to give to any motor carrier any perpetual franchise over such public highways. (Ga. L. 1931, p. 199, § 28; Code 1933, § 68-631; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 366, § 14.)

The 2004 amendment, effective July 1, 2004, deleted “of public convenience and necessity” following “certificate” near the middle of this Code section.

Editor's notes. — Ga. L. 2000, p. 951, § 9-4, reenacted this Code section without change.

Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which reenacted this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regula-

tions, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the reenactment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

No certificate holder acquires vested right or perpetual franchise. — No holder of a certificate of public convenience and necessity issued by the commission shall acquire any vested right to use the public roads or any perpetual franchises. *Bass v. Georgia Public-Service Comm'n*, 192 Ga. 106, 14 S.E.2d 740 (1941).

No right to review of commission order by writ of certiorari. — Where a certificate of public convenience and necessity has been granted by the commission to a motor common carrier, and thereafter, by order of the commission, and after a hearing such certificate is revoked and canceled because the

evidence adduced at such hearing showed that such motor common carrier had abandoned the passenger service along the route in question, the motor common carrier, whose certificate of public convenience has thus been revoked and canceled by the commission does not have the right to review such judgment or order of the commission by the writ of certiorari in the superior court having jurisdiction. *Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n*, 181 Ga. 75, 181 S.E. 834 (1935).

Cited in *Coleman v. Drake*, 183 Ga. 682, 188 S.E. 897 (1936).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d., Carriers, §§ 125 et seq., 148, 149, 151.

46-7-33. Proceedings before commissioner generally; appeal from orders.

In all respects in which the commissioner has power and authority under this article, proceedings may be instituted, complaints made and filed with him or her, process issued, hearings held, and opinions, orders, and decisions made and filed. Any final order of the commissioner may be reviewed by any court of competent jurisdiction under the conditions and subject to the limitations prescribed by law which relate to the commissioner. (Ga. L. 1931, p. 199, § 16; Code 1933, § 68-621; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 631, § 46.)

The 2004 amendment, effective May 13, 2004, part of an Act to revise, modernize, and correct the Code, substituted "filed with him or her," for "filed with it," in the middle of the first sentence.

Editor's notes. — Ga. L. 1906, p. 950, § 3,

effective April 15, 1996, reenacted this Code section without change.

Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but autho-

rizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full

implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

No provision for unconditional review. — There was no provision in former Code 1933, § 68-621 (see O.C.G.A. § 46-7-33) for unconditional review, but it was to be under the conditions and subject to the limitations as now prescribed by law as related to the commission. *Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n*, 181 Ga. 75, 181 S.E. 834, answer conformed to, 52 Ga. App. 35, 182 S.E. 204 (1935).

No right to review order of commission by writ of certiorari. — Where a certificate of public convenience and necessity has been granted by the commission to a motor common carrier and, thereafter such certificate is revoked and canceled by order of the commission, after hearing pursuant to a rule nisi, because of the carrier's failure to operate passenger bus service under said certificate, the motor common carrier has not the right to review such order or judgment of the commission by writ of certiorari from the

superior court, as the act of the commission in the revocation of such certificate was not a judicial function, but was the exercise of administrative power, to which action the writ of certiorari does not lie. *Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n*, 52 Ga. App. 35, 182 S.E. 204 (1935).

No interference with order of commission unless showing of unreasonableness. — Neither the trial court, nor the Supreme Court on review, will substitute its own discretion and judgment for that of the commission where it has exercised its discretion in a matter over which it has jurisdiction, and neither court will interfere with a valid order of the commission unless it be clearly shown that the order is unreasonable, arbitrary, or capricious. *Woodside Transf. & Storage Co. v. Georgia Pub. Serv. Comm'n*, 212 Ga. 625, 94 S.E.2d 706 (1956).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 140 et seq., 146.

C.J.S. — 13 C.J.S., Carriers, § 373. 60 C.J.S., Motor Vehicles, §§ 114 et seq., 174, 192 et seq.

ALR. — Right to maintain action against carrier on ground that rates which were filed and published by carrier pursuant to law were excessive, 97 ALR 406.

46-7-34. Effect of certificates granted under prior laws.

(a) All certificates of public convenience and necessity to operate as a motor common or contract carrier of passengers or household goods issued prior to January 1, 1995, shall continue in full force and effect until revoked by the commissioner or surrendered by the holders thereof.

(b) All certificates of public convenience and necessity authorizing transportation of property and all registration permits for intrastate exempt commodity transportation that were in effect on December 31, 1994, shall be deemed null and void as of midnight December 31, 1994, and revoked by operation of law effective January 1, 1995. All persons holding certifi-

cates of public convenience and necessity authorizing transportation of property and all persons holding registration permits for intrastate exempt commodity transportation issued prior to January 1, 1995, who received a motor carrier of property permit from the Public Service Commission pursuant to its emergency rules shall be deemed to hold a motor carrier of property permit issued under Code Section 46-7-15.1.

(c) Any person holding a certificate of public convenience and necessity authorizing transportation of property issued prior to January 1, 1995, and any person holding a registration permit for intrastate exempt commodity transportation issued prior to January 1, 1995, who did not apply for a motor carrier of property permit pursuant to the Public Service Commission's rules on or before July 15, 1995, shall be deemed to have surrendered all rights to operate as a motor carrier for hire in Georgia and may not operate any motor carrier on or over any public highway of this state without first securing a motor carrier of property permit from the commissioner, upon application and payment of the required application fee. (Ga. L. 1931, p. 199, § 4; Code 1933, § 68-606; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4.)

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in

full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 148, 149, 151.

46-7-35. Applicability of article generally.

Reserved. Repealed by Ga. L. 1986, p. 1283, § 7, effective April 9, 1986.

Editor's notes. — This Code section, which was repealed in 1986, was reserved by Ga. L. 1996, p. 950, § 3, effective April 15, 1996.

Ga. L. 2000, p. 951, § 9-4, effective July 1, 2001, reenacted the reservation of this Code section without change.

46-7-36. Applicability of article to carriers engaged in both interstate and intrastate commerce.

In circumstances where a motor common or contract carrier is engaged in both interstate and intrastate commerce, it shall nevertheless be subject to all the provisions of this article so far as it separately relates to commerce

carried on exclusively in this state. It is not intended that the commissioner shall have the power of regulating the interstate commerce of such motor carrier, except to the extent expressly authorized by this article as to such commerce. Code Sections 46-7-14 and 46-7-18 through 46-7-20 and 46-7-23 do not apply to purely interstate commerce nor to carriers exclusively engaged in interstate commerce. When a motor common or contract carrier is engaged in both intrastate and interstate commerce, it shall be subject to all the provisions of this article so far as they separately relate to commerce carried on in this state. (Ga. L. 1931, p. 199, § 30; Code 1933, § 68-633; Ga. L. 1973, p. 643, § 4; Ga. L. 1987, p. 3, § 46; Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4.)

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in

full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

JUDICIAL DECISIONS

Direct action against insurers of interstate carriers allowed. — A proper interpretation of the provision in former Code 1933, § 68-612 (see O.C.G.A. § 46-7-12) allowing for direct actions against insurance carriers, in conjunction with former Code 1933, § 68-633 (see O.C.G.A. § 46-7-36), was that it applied to interstate carriers as well as intrastate carriers. *Kimberly v. Bankers & Shippers Ins. Co.*, 490 F. Supp. 93 (N.D. Ga. 1980).

Cause of action for tort occurring out-of-state. — Since, under former

§ 46-7-16(e), a certificate and bond or insurance is not required at all when carrier is engaged solely in interstate commerce over the public highways of Georgia, the certificate of convenience which permits joinder of the insurer in a suit against a carrier "subject to action" in Georgia applies specifically to causes of action for a tort which occurred on public highways of other states. *Johnson v. Woodard*, 208 Ga. App. 41, 429 S.E.2d 701 (1993).

Cited in *Record Truck Line v. Harrison*, 220 Ga. 289, 138 S.E.2d 578 (1964).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 36 et seq.

C.J.S. — 60 C.J.S., Motor Vehicles, §§ 174 et seq., 179 et seq., 192 et seq., 226.

ALR. — State regulation of carriers by

motor vehicle as affected by interstate commerce clause, 47 ALR 230; 49 ALR 1203; 62 ALR 52; 85 ALR 1136; 109 ALR 1245; 135 ALR 1358.

46-7-37. Private carriers excepted from application of article; safety rules authorized; certificates or permits not required.

(a) Except as otherwise provided in subsection (b) of this Code section, this article shall not apply to private carriers engaged exclusively in the

transportation of goods belonging to the individual, firm, partnership, corporation, or association owning, controlling, operating, or managing the motor vehicle in private transportation over any public highway in this state.

(b) The commissioner shall have the authority to promulgate rules designed to promote safety of private carriers. Every motor vehicle of a private carrier and all parts thereof shall be maintained in a safe condition at all times; and the carrier's equipment shall meet such safety requirements as the commissioner shall from time to time promulgate.

(c) Private carriers are not required to hold certificates or permits issued by the commissioner. (Code 1981, § 46-7-37, enacted by Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 366, § 15.)

The 2004 amendment, effective July 1, 2004, substituted "or permits" for "of public convenience and necessity or registration permits" near the middle of subsection (c).

Editor's notes. — Ga. L. 1996, p. 950, § 3, effective April 15, 1996, renumbered former Code Section 46-7-37 as present Code Section 46-7-38.

Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing

April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 1, 18 et seq.

C.J.S. — 13 C.J.S., Carriers, §§ 333, 336,

355. 61A C.J.S., Motor Vehicles, § 1311 et seq.

46-7-38. Acceptance of rebates, drawbacks, or unauthorized free transportation passes; possession of goods without authority evidence of intentional violation; burden of proof as to exceptions under article.

(a) Any officer, agent, or employee of any corporation, and any other person, who knowingly accepts or receives any rebate or drawback from the rates, fares, or charges established or approved by the commissioner for motor common or contract carriers of passengers or household goods, or who procures, aids, or abets therein, or who uses or accepts from such motor carrier any free pass or free transportation not authorized or permitted by law or by the orders, rules, or regulations of the commissioner, or who procures, aids, or abets therein, shall be guilty of a misdemeanor.

(b) The possession of goods, wares, or merchandise loaded on a motor vehicle consigned to any person, firm, or corporation, being transported or having been transported over the public highways in this state, without the

authority of a permit or certificate for so transporting having been issued by the commissioner under this article, shall be prima-facie evidence that such transportation of such goods, wares, or merchandise was an intentional violation of the law regulating the transportation of persons and property over the public highways in this state.

(c) Any person claiming the benefit of any exception made in this article shall have the burden of proving that he or she falls within the exception. (Ga. L. 1931, p. 199, § 20; Code 1933, § 68-9911; Code 1981, § 46-7-38, as redesignated by Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4.)

Editor's notes. — Ga. L. 1996, p. 950, § 3, renumbered former Code Section 46-7-38 as present Code Section 46-7-39.

Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regula-

tions, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

OPINIONS OF THE ATTORNEY GENERAL

Intent of sections prescribing penalties for violations of laws concerning motor common and contract carriers. — O.C.G.A. § 46-7-38 and O.C.G.A. §§ 32-1-10, 32-6-23

and 32-6-24 are intended to promote safety of traveling public and protect public's investment in its roads and highways. 1981 Op. Att'y Gen. No. U81-17.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 285, 21 Am. Jur. 2d, Criminal Law, §§ 1, 18 et seq.

C.J.S. — 13 C.J.S., Carriers, §§ 333, 335, 336, 346, 355. 61A C.J.S., Motor Vehicles, § 1311 et seq.

46-7-39. Penalty.

Every officer, agent, or employee of any corporation and every person who violates or fails to comply with this article relating to the regulation of motor carriers, or any order, rule, or regulation of the commissioner, or who procures, aids, or abets therein, shall be guilty of a misdemeanor. (Code 1981, § 46-7-39, enacted by Ga. L. 1996, p. 950, § 3; Ga. L. 2000, p. 951, § 9-4.)

Editor's notes. — Former Code Section 46-7-39, relating to action for damages, repealed by Ga. L. 1992, p. 1179, § 1, was based on Ga. L. 1929, p. 315, § 1; Code 1933, §§ 18-607, 68-710; and Ga. L. 1984, p. 22, § 46. The provisions of that Code section were previously enacted in substantially sim-

ilar form by the Acts and codes listed above. However, those provisions were not originally enacted as part of O.C.G.A. by the Code enactment Act (Ga. L. 1981, Ex. Sess., p. 8).

Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000

Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by

executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

ARTICLE 2

MOTOR CONTRACT CARRIERS

Editor's notes. — This article consisted of Code Sections 46-7-50 through 46-7-68, 46-7-68.1, 46-7-69, 46-7-69.1, and 46-7-70 through 46-7-79, and was based on Ga. L. 1931, Ex. Sess., p. 199, §§ 1, 3, 4 through 10, 13 through 21, 23, 24, 26 through 28, 30, 31; Ga. L. 1931, p. 199, § 33; Code 1933, §§ 68-501, 68-503 through 68-510, 68-510.1, 68-511, 68-512, 68-514 through 68-521, 68-523 through 68-527, 68-9909, 68-9910; Ga. L. 1937, p. 727, § 2; Ga. L. 1960, p. 1126, § 1; Ga. L. 1963, p. 374, § 1; Ga. L. 1963, p. 378, §§ 1, 2; Ga. L. 1965, p. 257, § 1; Ga. L. 1968, p. 396, § 1; Ga. L. 1972, p. 1015, § 1064; Ga.

L. 1973, p. 643, §§ 1, 2; Ga. L. 1980, p. 479, §§ 2, 3; Ga. L. 1980, p. 616, §§ 1, 2; Ga. L. 1980, p. 1119, § 1; Ga. L. 1981, p. 409, §§ 1, 2; Ga. L. 1982, p. 3, § 46; Ga. L. 1983, p. 529, § 2; Ga. L. 1983, p. 1474, § 6; Ga. L. 1984, p. 22, § 46; Ga. L. 1984, p. 1394, §§ 2 through 4; Ga. L. 1985, p. 149, § 46; Ga. L. 1985, p. 1126, § 2; Ga. L. 1986, p. 1283, §§ 8 through 13; Ga. L. 1988, p. 1607, §§ 3, 4; Ga. L. 1989, p. 14, § 46; Ga. L. 1990, p. 2022, § 2.

Ga. L. 2000, p. 951, § 9-4, effective July 1, 2001, reenacted the reservation of these Code sections without change.

46-7-50 through 46-7-79.

Reserved. Repealed by Ga. L. 1996, p. 950, § 4, effective April 15, 1996.

Editor's notes. — Ga. L. 2000, p. 951, § 9-4, effective July 1, 2001, reenacted the

reservation of these Code sections without change.

ARTICLE 3

LIMOUSINE CARRIERS

Effective date. — This article became effective May 1, 1994.

Editor's notes. — Ga. L. 1994, p. 1238 contains two § 2's. The first § 2 redesignated former Article 3, relating to reciprocal

agreements, as present Article 4, and enacted present Article 3.

46-7-85.1. Definitions.

As used in this article, the term:

(1) "Certificate" means a certificate issued by the commissioner.

(2) "Chauffeur" means any person with a Georgia state driver's license who meets the qualifications as prescribed in Code Section 46-7-85.10 and who is authorized by the commissioner to drive a limousine under this article.

(3) “Commissioner” means the commissioner of motor vehicle safety.

(3.1) “Department” means the Department of Motor Vehicle Safety.

(4) “Limousine” means any motor vehicle that meets the manufacturer’s specifications for a luxury limousine with a designed seating capacity for no more than ten passengers and with a minimum of five seats located behind the operator of the vehicle, and which does not have a door at the rear of the vehicle designed to allow passenger entry or exit; further, no vehicle shall be permitted to be operated both as a taxicab and a limousine.

(5) “Limousine carrier” means any person operating a service regularly rendered to the public by furnishing transportation as a motor common carrier for hire, not over fixed routes, by means of limousines, or extended limousines, on the basis of telephone contract or written contract.

(6) “Person” means any individual, firm, partnership, corporation, company, association, or joint-stock association, and includes any trustee, receiver, assignee, or personal representative thereof.

(7) “Public highway” means every public street, road, or highway in this state. (Code 1981, § 46-7-85.1, enacted by Ga. L. 1994, p. 1238, § 2; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 366, § 16.)

The 2004 amendment, effective July 1, 2004, deleted “of public convenience and necessity” following “certificate” near the middle of paragraph (1).

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials,

adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-85.2. Compliance with article.

No limousine carrier shall operate any limousine for the transportation of passengers for compensation on any public highway in this state except in accordance with the provisions of this article. (Code 1981, § 46-7-85.2, enacted by Ga. L. 1994, p. 1238, § 2; Ga. L. 2000, p. 951, § 9-4.)

Editor’s notes. — Ga. L. 2000, p. 951, § 9-4, reenacted this Code section without change.

Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which reenacted this Code section becomes fully effective July 1, 2001, but autho-

rizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full

implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor,

the reenactment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-85.3. Requirement for certificate.

No person may engage in the business of a limousine carrier over any public highway in this state without first having obtained from the commissioner a certificate to do so. (Code 1981, § 46-7-85.3, enacted by Ga. L. 1994, p. 1238, § 2; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 366, § 17.)

The 2004 amendment, effective July 1, 2004, deleted “of public convenience and necessity” following “certificate” near the end of this Code section.

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials,

adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-85.4. Application for issuance of certificate.

(a) The commissioner shall prescribe the form of the application for the certificate and shall prescribe such reasonable requirements as to notice, publication, proof of service, maintenance of adequate liability insurance coverage, and information as may, in his or her judgment, be necessary and may establish fees as part of such certificate process.

(b) A certificate shall be issued to any qualified applicant, provided that such applicant is a limousine carrier business domiciled in this state, authorizing the operations covered by the application if it is found that the applicant is fit, willing, and able to perform properly the service and conform to the provisions of this article and the rules and regulations of the commissioner and has not been convicted of any felony as such violation or violations are related to the operation of a motor vehicle. (Code 1981, § 46-7-85.4, enacted by Ga. L. 1994, p. 1238, § 2; Ga. L. 2000, p. 951, § 9-4.)

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in

full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-85.5. Safety and mechanical inspections.

(a) It shall be the duty of the commissioner to regulate limousine carriers with respect to the safety of equipment.

(b) The department shall require safety and mechanical inspections at least on an annual basis for each vehicle owned and operated by a limousine carrier. The commissioner shall provide, by rule or regulation, for the scope of such inspections, the qualifications of persons who may conduct such inspections, and the manner by which the results of such inspections shall be reported to the department. (Code 1981, § 46-7-85.5, enacted by Ga. L. 1994, p. 1238, § 2; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2003, p. 426, § 1; Ga. L. 2004, p. 361, § 46.)

The 2003 amendment, effective October 1, 2003, in subsection (b), substituted “require” for “perform” in the first sentence and added the second sentence.

The 2004 amendment, effective May 13, 2004, part of an Act to revise, modernize, and correct the Code, substituted “rule or” for “rule and” near the beginning of the second sentence of subsection (b).

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully

effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-85.6. Transferability of certificates; authorization needed to encumber.

No certificate issued under this article may be leased, assigned, or otherwise transferred or encumbered unless authorized by the commissioner. (Code 1981, § 46-7-85.6, enacted by Ga. L. 1994, p. 1238, § 2; Ga. L. 2000, p. 951, § 9-4.)

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in

full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-85.7. Grounds for cancellation, revocation, or suspension of certificate.

The commissioner may cancel, revoke, or suspend any certificate issued under this article on any of the following grounds:

- (1) The violation of any of the provisions of this article;
- (2) The violation of an order, decision, rule, regulation, or requirement established by the commissioner pursuant to this article;
- (3) Failure of a limousine carrier to pay a fee imposed on the carrier within the time required by law or by the commissioner;
- (4) Failure of a limousine carrier to maintain required insurance in full force and effect; and
- (5) Failure of a limousine carrier to operate and perform reasonable services. (Code 1981, § 46-7-85.7, enacted by Ga. L. 1994, p. 1238, § 2; Ga. L. 2000, p. 951, § 9-4.)

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in

full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-85.8. Operations unlawful after cancellation, revocation, or suspension of certificate.

After the cancellation or revocation of a certificate or during the period of its suspension, it is unlawful for a limousine carrier to conduct any operations as such a carrier. (Code 1981, § 46-7-85.8, enacted by Ga. L. 1994, p. 1238, § 2; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 366, § 18.)

The 2004 amendment, effective July 1, 2004, substituted "certificate" for "permit" near the beginning of this Code section.

Editor's notes. — Ga. L. 2000, p. 951, § 9-4, reenacted this Code section without change.

Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which reenacted this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing

certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the reenactment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-85.9. Chauffeur's permit; form; possession requirement; fee; term.

Pursuant to rules and regulations prescribed by the commissioner, each chauffeur employed by a limousine carrier shall register with the commissioner and secure a permit as a limousine chauffeur. A chauffeur's permit issued under this subsection shall be upon a form prescribed by the

commissioner and shall bear thereon a distinguishing number assigned to the permittee, the full name and a photograph of the permittee, and such other information or identification as is required by the commissioner. Every chauffeur employed by a limousine carrier shall have his or her chauffeur's permit in his or her immediate possession at all times while operating a limousine. All applications for a chauffeur's permit shall be accompanied by such fee as the commissioner shall prescribe. The chauffeur's permit shall be valid for four calendar years. The commissioner may issue a chauffeur's permit by mail. (Code 1981, § 46-7-85.9, enacted by Ga. L. 1994, p. 1238, § 2; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2004, p. 366, § 19.)

The 2004 amendment, effective July 1, 2004, substituted "four calendar years" for "two calendar years" at the end of the next to the last sentence.

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials,

adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-85.10. Chauffeur's permit; requirements.

In order to secure a chauffeur's permit, an applicant must provide the following information on a form provided by the commissioner. The applicant must:

- (1) Be at least 18 years of age;
- (2) Possess a valid Georgia driver's license which is not limited as defined in Code Section 40-5-64; and
- (3)(A) Not have been convicted, been on probation or parole, or served time on a sentence for a period of five years previous to the date of application for the violation of any of the following criminal offenses of this state or any other state or of the United States: criminal homicide, rape, aggravated battery, mayhem, burglary, aggravated assault, kidnapping, robbery, driving a motor vehicle while under the influence of intoxicating beverages or drugs, child molestation, any sex related offense, leaving the scene of an accident, criminal solicitation to commit any of the above, any felony in the commission of which a motor vehicle was used, perjury or false swearing in making any statement under oath in connection with the application for a chauffeur's permit, any law involving violence or theft, or possession, sale, or distribution of narcotic drugs, barbituric acid derivatives, or central nervous system stimulants; provided, however, that all applicants shall be entitled to the full benefits of Article 3 of Chapter 8 of Title 42, relating to first offender probation.

(B) If at the time of application the applicant is charged with any of the offenses described in subparagraph (A) of this paragraph, consideration of the application shall be suspended until entry of a plea or verdict or dismissal.

(C) If after the issuance of a permit a person is charged with any of the offenses described in subparagraph (A) of this paragraph, the permit shall be suspended pending disposition of such charge. If the person is convicted of such charge, the permit shall be revoked.

(D) For purposes of this paragraph, a plea of nolo contendere to any of the offenses set out in this paragraph shall constitute a conviction. (Code 1981, § 46-7-85.10, enacted by Ga. L. 1994, p. 1238, § 2; Ga. L. 2000, p. 951, § 9-4; Ga. L. 2002, p. 1378, § 10.)

The 2002 amendment, effective July 1, 2002, substituted “is not limited” for “must have been held for a minimum period of one year prior to application, and said license must not be limited” in paragraph (2); added subparagraph (3)(C); and designated the former last sentence of subparagraph (3)(B) as present subparagraph (3)(D).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2002, “described” was substituted for “prescribed” in subparagraphs (3)(B) and (3)(C).

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which

amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-85.11. Preemption of regulation by general law; local fees authorized.

The State of Georgia fully occupies and preempts the entire field of regulation over limousine carriers as regulated by this article; provided, however, that the governing authority of any county or municipal airport shall be authorized to permit any limousine carrier doing business at any such airport and may establish fees as part of such permitting process; provided, further, that counties and municipalities may enact ordinances and regulations which require limousine carriers which are domiciled within their boundaries to pay business license fees. (Code 1981, § 46-7-85.11, enacted by Ga. L. 1994, p. 1238, § 2; Ga. L. 2000, p. 951, § 9-4.)

Editor’s notes. — Ga. L. 2000, p. 951, § 9-1, reenacted this Code section without change.

Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which reenacted this Code section becomes fully effective July 1, 2001, but autho-

rizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full

implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor,

the reenactment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-85.12. Tariff of rates and charges.

A limousine carrier operating under a certificate issued by the commissioner shall be required to file with the commissioner a tariff of rates and charges. (Code 1981, § 46-7-85.12, enacted by Ga. L. 1994, p. 1238, § 2; Ga. L. 2000, p. 951, § 9-4.)

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in

full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-85.13. Hearings on orders, regulations, or requirements.

Before the commissioner shall enter any order, regulation, or requirement directed against any limousine carrier, such carrier shall first be given reasonable notice and an opportunity to be heard on the matter. (Code 1981, § 46-7-85.13, enacted by Ga. L. 1994, p. 1238, § 2; Ga. L. 2000, p. 951, § 9-4.)

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in

full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-85.14. Temporary permits.

A limousine carrier may obtain a temporary permit for a period of 21 consecutive days beginning and ending on the dates specified on the face of the permit. Temporary permits shall be obtained by limousine carriers which make only infrequent trips within and through this state. The fee for each temporary certificate shall be \$100.00 per week and \$20.00 for each vehicle. No temporary permit shall be issued without the commissioner having first received satisfactory proof that the carrier meets the insurance requirements of the rules and regulations of the commissioner. A temporary permit shall be carried in the motor vehicle for which it was issued at

all times such vehicle is in this state. The commissioner may issue a temporary permit by facsimile message or letter. Any chauffeur operating a limousine under a temporary permit issued pursuant to this Code section shall be required to obtain a chauffeur's permit. (Code 1981, § 46-7-85.14, enacted by Ga. L. 1994, p. 1238, § 2; Ga. L. 2000, p. 951, § 9-4.)

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in

full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-85.15. License plates.

Each limousine carrier which registers any vehicle under this article shall, for each such certificated vehicle, affix to the center of the front bumper of each such certificated vehicle a standard size license plate bearing the following information: (1) limousine company name, (2) city and state of principal domicile, (3) company telephone number, and (4) the vehicle classification, IE-1. The cost for such license plate shall be the sole responsibility of the limousine carrier and must be placed on each certificated vehicle prior to said vehicle being placed in service and no later than May 1, 1994, for all such vehicles currently owned and to be registered and operated by a limousine carrier. (Code 1981, § 46-7-85.15, enacted by Ga. L. 1994, p. 1238, § 2; Ga. L. 2000, p. 951, § 9-4.)

Editor's notes. — Ga. L. 2000, p. 951, § 9-4, reenacted this Code section without change.

Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which reenacted this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regula-

tions, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the reenactment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-85.16. Eligibility for certificates of carriers operating on May 1, 1994.

Reserved. Repealed by Ga. L. 2000, p. 951, § 9-4, effective July 1, 2001.

Editor's notes. — This Code section was based on Code 1981, § 46-7-85.16, enacted by Ga. L. 1994, p. 1238, § 2.

46-7-85.17. Rules and regulations.

The commissioner shall promulgate such rules and regulations as are necessary to effectuate and administer the provisions of this article. (Code 1981, § 46-7-85.17, enacted by Ga. L. 1994, p. 1238, § 2; Ga. L. 2000, p. 951, § 9-4.)

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in

full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

ARTICLE 4**PENALTIES**

Editor's notes. — This article formerly consisted of Code Sections 46-7-90 through 46-7-94 and was based on Ga. L. 1937-38, Ex. Sess., p. 617, §§ 1, 3-6; Ga. L. 1941, p. 361, §§ 2, 5, 6; Ga. L. 1947, p. 1157, § 1; Ga. L. 1959, p. 25, § 1; Ga. L. 1973, p. 559, § 1; Ga. L. 1979, p. 1015, § 1; Ga. L. 1976, p. 198, § 1; Ga. L. 1994, p. 1238, § 2.

Ga. L. 1994, p. 1238 contains two § 2's. The first § 2, effective May 1, 1994, redesignated former Article 3, concerning reciprocal agreements, as Article 4 and redesignated former Article 4, concerning motor vehicle safety inspections, as Article 5.

Ga. L. 2000, p. 951, § 9-4, provided for the repeal of former Code Sections 46-7-90 and 46-7-91 as part of former Article 4, concern-

ing reciprocal agreements. Section 13-1 of that Act, not codified by the General Assembly, provides that the Act becomes fully effective July 1, 2001, but authorizes certain administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the repeal of this section as part of former Article 4 by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-7-90. Violation of laws administered by commissioner; judicial review.

(a) Any motor or common contract carrier subject to the jurisdiction of the commissioner, which carrier willfully violates any law administered by the commissioner or any duly promulgated regulation issued thereunder or which fails, neglects, or refuses to comply with any order after notice thereof, shall be liable to a penalty not to exceed \$15,000.00 for such violation and an additional penalty not to exceed \$10,000.00 for each day during which such violation continues.

(b)(1) The commissioner, after a hearing conducted after not less than 30 days' notice, shall determine whether any carrier has willfully violated any law administered by the commissioner or any duly promulgated

regulation issued thereunder, or has failed, neglected, or refused to comply with any order of the commissioner. Upon an appropriate finding of a violation, the commissioner may impose by order such civil penalties as are provided by subsection (a) of this Code section or by subsection (a) of Code Section 46-7-91. In each such proceeding, the commissioner shall maintain a record as provided in paragraph (8) of subsection (a) of Code Section 50-13-13 including all pleadings, a transcript of proceedings, a statement of each matter of which the commissioner takes official notice, and all staff memoranda or data submitted to the commissioner in connection with its consideration of the case. All penalties and interest thereon (at the rate of 10 percent per annum) recovered by the commissioner shall be paid into the general fund of the state treasury.

(2) Any party aggrieved by a decision of the commissioner may seek judicial review as provided in subsection (c) of this Code section.

(c)(1) Any party who has exhausted all administrative remedies available before the commissioner and who is aggrieved by a final decision of the commissioner in a proceeding described in subsection (b) of this Code section may seek judicial review of the final order of the commissioner in the Superior Court of Fulton County.

(2) Proceedings for review shall be instituted by filing a petition within 30 days after the service of the final decision of the commissioner or, if a rehearing is requested, within 30 days after the decision thereon. A motion for rehearing or reconsideration after a final decision by the commissioner shall not be a prerequisite to the filing of a petition for review. Copies of the petition shall be served upon the commissioner and all parties of record before the commissioner.

(3) The petition shall state the nature of the petitioner's interest, the facts showing that the petitioner is aggrieved by the decision, and the ground, as specified in paragraph (6) of this subsection, upon which the petitioner contends that the decision should be reversed. The petition may be amended by leave of court.

(4) Within 30 days after service of the petition, or within such further time as is stipulated by the parties or as is allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceedings under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate that the record be limited may be taxed for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(5) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and there were good reasons for failure to present it in the proceedings before the agency, the

court may order that the additional evidence be taken before the commissioner upon such procedure as is determined by the court. The commissioner may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(6) The review shall be conducted by the court without a jury and shall be confined to the record. The court shall not substitute its judgment for that of the commissioner as to the weight of the evidence on questions of fact. The court may affirm the decision of the commissioner or remand the case for further proceedings. The court may reverse the decision of the commissioner if substantial rights of the petitioner have been prejudiced because the commissioner's findings, inferences, conclusions, or decisions are:

- (A) In violation of constitutional or statutory provisions;
- (B) In excess of the statutory authority of the commissioner;
- (C) Made upon unlawful procedure;
- (D) Clearly not supported by any reliable, probative, and substantial evidence on the record as a whole; or
- (E) Arbitrary or capricious.

(7) A party aggrieved by an order of the court in a proceeding authorized under subsection (b) of this Code section may appeal to the Supreme Court of Georgia or to the Court of Appeals of Georgia in accordance with Article 2 of Chapter 6 of Title 5, the "Appellate Practice Act." (Code 1981, § 46-7-90, enacted by Ga. L. 2004, p. 366, § 20.)

Effective date. — This Code section became effective July 1, 2004.

46-7-91. Penalty for holding oneself out as household goods carrier for hire without valid certificate of authority; penalty for advertising services falsely.

(a) Whenever the commissioner, after a hearing conducted in accordance with the provisions of subsection (b) of Code Section 46-7-90, finds that any person, firm, or corporation is operating as a household goods carrier for hire without a valid certificate issued by the commissioner or is holding itself out as such a carrier without such a certificate in violation of subsection (b) of this Code section, the commissioner may impose a fine of not more than \$5,000.00 for each violation. The commissioner may assess the person, firm, or corporation an amount sufficient to cover the reasonable expense of investigation incurred by the commissioner. The commissioner may also assess interest at the rate specified in paragraph (1) of subsection (b) of Code Section 46-7-90 on any fine or assessment

imposed, to commence on the day the fine or assessment becomes delinquent. All fines, assessments, and interest collected by the commissioner shall be paid into the general fund of the state treasury. Any party aggrieved by a decision of the commissioner under this subsection may seek judicial review as provided in subsection (c) of Code Section 46-7-90.

(b) Any person, firm, or corporation who knowingly and willfully issues, publishes, or affixes or causes or permits the issuance, publishing, or affixing of any oral or written advertisement, broadcast, or other holding out to the public, or any portion thereof, that the person, firm, or corporation is in operation as a household goods carrier for hire without having a valid certificate issued by the commissioner is guilty of a misdemeanor. Any fine or assessment imposed by the commissioner pursuant to the provisions of subsection (a) of this Code section shall not bar criminal prosecution pursuant to the provisions of this subsection. (Code 1981, § 46-7-91, enacted by Ga. L. 2004, p. 366, § 21.)

Effective date. — This Code section became effective July 1, 2004.

ARTICLE 5

MOTOR VEHICLE SAFETY INSPECTIONS

Editor's notes. — This article consisted of Code Sections 46-7-100 and 46-7-101 and was based on Code 1981, §§ 46-7-100 and 46-7-101, enacted by Ga. L. 1983, p. 735, § 2; Ga. L. 1990, p. 2022, § 3.

46-7-100 and 46-7-101.

Reserved. Repealed by Ga. L. 2000, p. 951, § 9-4, effective July 1, 2001.

Editor's notes. — Ga. L. 1994, p. 1238 May 1, 1994, redesignated former Article 4 contains two § 2's. The first § 2, effective as present Article 5.

CHAPTER 8

RAILROAD COMPANIES

Article 1

Sec.

General Provisions

Sec.

- 46-8-1. Recording of leases by railroad company in each county through which its road runs, generally.
- 46-8-2. Effect of failure or refusal to record on rights of action against company.
- 46-8-3. Maintenance of books and records by railroad company secretary; inspection; furnishing of transcripts of board proceedings by secretary; transfer of custody of records upon resignation or vacation of office by secretary.
- 46-8-4. Applicability of Article 14 of Chapter 2 of Title 14 to chapter.

Article 2

Powers and Duties of Commission as to Railroad Companies

Generally

- 46-8-20.. Exclusive power of commission to determine just and reasonable rates and charges; establishing rates and tariffs generally; locating of depots and construction of freight and passenger buildings.
- 46-8-21. Powers of commission regarding railroads generally.
- 46-8-22. Investigation by commission of books and papers of railroad companies; inspection of railroad offices and stations; examination of railroad's agents and employees; rules and regulations concerning investigations and inspections.
- 46-8-23. Prescription and enforcement by commission of rules, regulations, and orders as to receipt, transportation, and delivery of freight by railroads.
- 46-8-24. Inspection by commission of contracts and agreements between railroad companies; disap-

proval of agreements; inclusion in agreements of rates exceeding rates fixed by commission.

- 46-8-25. Inspection of railroads by commission; requiring repair of railroads; allotment of reasonable time for repairs; effect of Code section on liability of railroads.

Article 3

Incorporation and Consolidation of Railroad Companies and Requirements as to Directors and Officers

PART 1

INCORPORATION, ORGANIZATION, SUBSCRIPTION OF CAPITAL STOCK, SELECTION OF OFFICERS AND DIRECTORS

- 46-8-40. Grant of corporate powers and privileges to railroad companies by Secretary of State; procedure in case of disqualification of Secretary of State.
- 46-8-41. Procedures regarding preparation of petition for incorporation; filing of petition and affidavit with Secretary of State; endorsement by Secretary of State; allowance for public inspection of petition and affidavit.
- 46-8-42. Certificate of incorporation; duration of corporate existence; fee for issuance of certificate.
- 46-8-43. Duties of Secretary of State prior to issuance of certificate of incorporation; certificate or duplicate thereof as evidence of existence of corporation and compliance with chapter.
- 46-8-44. Subscription to capital stock; par value of stock; subscription to all capital stock as prerequisite to beginning railroad construction.
- 46-8-45. Payment of subscriptions; proce-

Sec.

PART 2

CONSOLIDATION, MERGER, SURRENDER OF
FRANCHISE, AND DISSOLUTION OF
COMPANIES

- 46-8-46. Procedures regarding organizational meeting; qualifications of directors; selection of officers and agents; annual election of directors; filling of vacancies on board.
- 46-8-47. Determination of directors' compensation; appointment of chairman and vice-presidents; time and place of board meetings; procedures regarding board meetings.
- 46-8-48. Creation of executive committee and other committees; powers of committees; designation of alternate members of committees; committee action by majority vote.
- 46-8-49. Action by board or committee thereof or by shareholder or committee thereof by written consent of members without meeting.
- 46-8-50. Combination of offices of corporation; election of officers by shareholders; terms of office; powers and duties of officers; authority of chairman or president as to legal proceedings.
- 46-8-51. Indemnification of persons by railroad corporation; advance of expenses; insuring against liabilities; reports of payments to shareholders; provisions eliminating or limiting liability of director.
- 46-8-52. Exemption of property of stockholders from debts or liabilities of corporation.
- 46-8-53. Procedure for issuing bonds or increasing capital stock.
- 46-8-54. Adoption of title by railroad companies incorporated, or by persons owning or operating a railroad, prior to December 17, 1892.
- 46-8-55. Standard of care for directors and officers in discharge of duties; reliance upon financial information.
- 46-8-70. Application by railroad company that company surrender its franchises and cease performing as a common carrier; hearing before commission; effect of outstanding debts on company.
- 46-8-71. Dissolution of railroad corporation generally.
- 46-8-72. Adoption of resolution for dissolution by board of directors; meeting of stockholders to consider resolution; filing of petition for dissolution with Secretary of State.
- 46-8-73. Contents of petition for dissolution; certification resolution recommending dissolution; attachment of resolution to petition; verification of petition; fee for filing petition.
- 46-8-74. Advertisement of petition for dissolution.
- 46-8-75. Transfer of copy of petition from Secretary of State to commission.
- 46-8-76. Investigation by commission of proposed dissolution; issuance of certificate approving or disapproving application for dissolution; transfer of certificate; filing of duplicate certificate; effect of disapproval.
- 46-8-77. Certification by judge of the probate court of the fact of advertisement of petition; filing of certificate with Secretary of State.
- 46-8-78. Order of Secretary of State accepting surrender of charter and franchises and dissolving corporation; recording of petition, certificate of approval, certificate of publication, and order by Secretary of State.
- 46-8-79. Effect of issuance of order of dissolution and payment of fees.
- 46-8-80. Contracts between railroad companies for merger, consolidation, lease, or purchase for purposes of connecting the roads of the companies.

Sec.

- 46-8-81. Consolidation, merger, lease, or purchase of railroad companies whose roads form a continuous line; issuance of stocks and bonds by consolidated companies.
- 46-8-82. Forfeiture of powers, privileges, and certificate of incorporation for failure to construct and operate 15 miles of road within three years; extension of time for construction and operation of road.

Article 4**Powers of Companies Generally**

- 46-8-100. General powers.
- 46-8-101. Contracts between railroad companies for common use of tracks within cities.
- 46-8-102. Construction and operation of vessels by railroad companies.
- 46-8-103. Appropriation by railroad corporations of public highways, bridges, and ferries.
- 46-8-104. Power of railroad companies to cross other railroads in order to reach minerals, timber, or other materials.
- 46-8-105. Effect of adoption of Code Section 46-8-104 by railroad corporations not chartered by General Assembly.
- 46-8-106. Sale or lease of property, rights, and franchises of railroad corporation upon termination of prior lease; rights acquired by railroad corporation to whom sale or lease is made.
- 46-8-107. Sale of railroad under trust deed, upon foreclosure of mortgage, or by judicial decree — Description of rights and privileges to be exercised and enjoyed by purchasers.
- 46-8-108. Reorganization of corporation by purchasers or their associates or assigns; procedure for creating liens.
- 46-8-109. Exercise by railroad company of rights, franchises, and privileges in another state or in a territory of the United States.

Article 5**Construction, Improvement, and Repair of Rail Lines, Depots, and Roads**

Sec.

- 46-8-120. Powers of railroad companies generally.
- 46-8-121. Acquisition of property by companies; approval by commission as prerequisite to exercise of power of eminent domain.
- 46-8-122. Effect of Code Sections 46-8-120 and 46-8-121 on other powers and authority granted to railroad companies.
- 46-8-123. Construction of extensions and branch roads generally.
- 46-8-124. Exercise of power of eminent domain by railroad corporations generally.
- 46-8-125. Change of general direction and route of railroad.
- 46-8-126. Relocation of highways necessitated by construction of crossings.
- 46-8-127. Regulation of distance between tracks with the same terminal points.
- 46-8-128. Obstructions located at crossing; disrepair of crossing; removal of obstruction or repair of crossing by county upon failure of company to remove obstruction or repair crossing [Repealed].
- 46-8-129. Construction and maintenance by and at expense of railroad company of cattle guards necessary to protect public roads or private ways crossed by railroad.
- 46-8-130. Liability of company to landowner for failure to build cattle guard pursuant to Code Section 46-8-129.
- 46-8-131. Construction of cattle guard and farm crossing by railroad company upon request of and at expense of owner of land crossed by railroad right of way.
- 46-8-132. Construction and applicability of Code Sections 46-8-129 through 46-8-131.
- 46-8-133. Alteration of railroad tracks, bridges, and other structures to accommodate motor vehicles.

Article 6**Operation of Trains Generally****PART 1****EMPLOYEES ENGAGED IN OPERATION OF TRAINS GENERALLY**

Sec.

- 46-8-150. Qualifications of locomotive engineers.
- 46-8-151. Qualifications of railroad telegraph operators; maintenance of written record of certificate of competency.
- 46-8-152. Limitation of hours of service for railroad employees engaged in train operation.

PART 2**SIGNAL WHISTLES AND LIGHTS ON TRAINS**

- 46-8-170. Equipping locomotives with signal bells, signal whistles, horns, or headlights.
- 46-8-171. Equipping track motor cars with headlights and red rear lights; promulgation by commission of rules and regulations to carry out Code section.
- 46-8-172. Equipping steam locomotives with automatic door to firebox.

PART 3**OPERATION OF TRAINS AT CROSSINGS**

- 46-8-190. Erection of blowposts to warn of crossings; duty of locomotive engineers to blow whistle, keep and maintain lookout, and exercise due care upon reaching blowposts.
- 46-8-191. Duty of railroad companies as to erection of blowposts within city limits; exercise of due care by locomotive engineers within city limits; duty of companies and engineers to observe speed-limit ordinances.
- 46-8-192. Effect of title on duties or liabilities of railroad companies under other laws.
- 46-8-193. Duty of enginemen and conductors to stop trains at railroad crossings.
- 46-8-194. Erection and maintenance of crossbuck signs at highway grade

Sec.

- crossings; conformance of signs to Department of Transportation standards.
- 46-8-195. Bringing of actions to compel railroad companies to post crossbuck signs.
- 46-8-196. Use of standard signs for highway crossings and for advertising or other purposes; mutilation, destruction, and defacement of standard signs; removal of unauthorized signs by county authorities.
- 46-8-197. Legal responsibility of member of train crew, yard crew, or engine crew for occupying or blocking street, road, or highway grade crossing pursuant to employer's order.
- 46-8-198. Erection and placement of signboards to warn of drawbridges, grade crossings, and stations at which there is a switch.

PART 4**INJURY TO LIVESTOCK AND OTHER PROPERTY**

- 46-8-210. Reports by engineers of livestock and other property injured, killed, or destroyed; maintenance of record books.
- 46-8-211. Report by track and section foremen as to livestock killed.
- 46-8-212. Owner's right of recovery against railroad company causing injury to livestock; right of railroad company to put injured livestock to death.

Article 7**Special Officers for Protection of Railroad Property**

- 46-8-230. Appointment of officers by Governor; power of arrest; source of compensation.
- 46-8-231. Powers, duties, and responsibilities of officers generally.
- 46-8-232. Qualifications of officers; posting of bond; duration of appointment and commission; filing notice of termination by corporation; revocation of appointment and commission.

Sec.

- 46-8-233. Return of processes to county of origin.

Article 8

Liens Against Companies Generally

- 46-8-250. Lien for wages of railroad company employees, generally.
- 46-8-251. Manner of payment after placement of company in receivership; manner of payment and rights of employees after seizure of railroad pursuant to conveyance to secure debt.
- 46-8-252. Lien for furnishing materials, supplies, and articles necessary for railroad operation and for damages for killing of livestock generally.
- 46-8-253. Manner of payment after placement of company into receivership by judicial proceeding; manner and order of payment and rights of claimants after seizure of railroad.
- 46-8-254. Duties of receivers of railroads as to payment of liens; duties of successors to receivers.

Article 9

Leases and Conditional Sales of Rolling Stock

- 46-8-270. Contracts for conditional sales of rolling stock and other equipment.
- 46-8-271. Contracts for lease of rolling stock and other equipment; agreements as to conditional sale upon termination of lease.
- 46-8-272. Validity of conditional sales or lease contracts; execution, attestation, and recordation of contracts; marking of locomotive engines and railroad cars so as to indicate ownership.

Article 10

Liability of Companies for Damages Generally

- 46-8-290. Liability of railroad companies and their officers, agents, and employees for injuries to individ-

Sec.

- 46-8-291. uals and for damage or destruction of property generally.
- 46-8-291. Consent and contributory negligence as defenses; comparative negligence as affecting amount of recovery.
- 46-8-292. Proof of injury from running of train as prima-facie evidence of lack of reasonable skill and care.

Article 11

Venue and Service of Process for Actions Against Railroad Companies

- 46-8-310. Venue for actions against lessee or possessor of railroad.
- 46-8-311. Manner of service of process on lessee of railroad.
- 46-8-312. Service of process on lessor railroad company, generally.
- 46-8-313. Manner of service where address of president of company unknown.
- 46-8-314. Venue and service of process in actions against receivers, trustees, and other officers of railroad companies; obtaining leave to sue.

Article 12

Street, Suburban, and Interurban Railroads

- 46-8-330. "Interurban railroads" defined.
- 46-8-331. Incorporation, control, and management of interurban, suburban, and street railroads.
- 46-8-332. Power of street, suburban, or interurban railroad corporation to increase capital stock; manner of increase.
- 46-8-333. Use of electricity, gasoline, or gas by street, suburban, and interurban railroads; operation of gas and electric plants, generation and furnishing of gas and electricity by railroads.
- 46-8-334. Purchase, mortgage, transfer, or disposal of capital stock, bonds, or other indebtedness; acquisition of property, rights, and franchises.
- 46-8-335. Time of effectiveness of guaranty or acquisition of stock, property, and franchises; protection of rights of dissenting stockholders.

- Sec.
 46-8-336. Manner of acquiring property, franchises, and rights; nature of rights and privileges of purchasing or consolidated corporation; Secretary of State's certificate as evidence of existence of corporation.
 46-8-337. Issuance of bonds, notes, or other indebtedness by consolidated corporation; pledge of security.
 46-8-338. Tax exemption for property and capital stock of street, suburban, or interurban railroad companies with tracks and appurtenances extended into adjoining state.
 46-8-339. Authority of street, suburban, and interurban railroad companies to furnish steam for heating and power purposes and to lay and maintain steampipes.
 46-8-340. Free transportation for policemen, firemen, and other members of municipal and county utility departments by street, suburban, and interurban railroad companies.
 46-8-341. Lease and sale of roads, franchises, and property between street, suburban, and interurban railroad companies; property purchaser's liability for debts and claims against lessor or vendor.
 46-8-342. Acquisition, sale, operation, transfer, or disposal of motor buses and trackless trolleys by street, suburban, and interurban railroad companies.
 46-8-343. Utilization of trackless trolleys by street, suburban, or interurban railroad companies.
 46-8-344. Sale of street, suburban, or interurban railroad and bus transportation operations by companies engaged in operating electric generating plants, generally.
 46-8-345. Consent by municipality to sale of street, suburban, or interur-

- Sec.
 ban railroad and bus properties and franchises; hearing for approval of sale; filing of board resolution, resolution of municipality, and order of approval.
 46-8-346. Effect of sale on corporate existence, powers, and liabilities of company.
 46-8-347. Adoption of chapter by railroad companies.
 46-8-348. Jurisdiction of commission over interurban railroads; applicability of laws pertaining to other railroad companies; existing contracts between municipalities and railroad companies; fares established by contract prior to August 16, 1921.

Article 13

Acts or Attempts Resulting in Insolvency or Judicial Seizure of a Company

- 46-8-360. "To wreck" defined.
 46-8-361. Wrecking a railroad company.
 46-8-362. Attempting to wreck a railroad company.
 46-8-363. Conspiring to wreck a railroad company — Successful attempt to wreck.
 46-8-364. Conspiring to wreck a railroad company — Unsuccessful attempt to wreck.
 46-8-365. Acts done with intent and purpose of depreciating the value of stock as prima-facie evidence of intent to wreck.

Article 14

Miscellaneous Offenses

- 46-8-380. Intruding on railroad tracks.
 46-8-381. Hiding on train for purpose of stealing a ride.
 46-8-382. Neglect or refusal of officer, agent, or employee of railroad company to make and furnish report required by commission; obstructing commission.

Cross references. — Department of Transportation aid for continuation of rail service

for which Interstate Commerce Commission has determined a certificate of abandon-

ment should be issued, § 32-9-6. Transportation of freight and passengers by carriers generally, Ch. 9, T. 46. Creation of Railway

Passenger Service Corridor System, Ch. 9A, T. 46. Ownership by state of Western and Atlantic Railroad, § 50-16-100 et seq.

RESEARCH REFERENCES

ALR. — Width or design of lateral space between passenger loading platform and car entrance as affecting carrier's liability to

passenger for injuries incurred from falling into space, 28 ALR4th 748.

ARTICLE 1

GENERAL PROVISIONS

46-8-1. Recording of leases by railroad company in each county through which its road runs, generally.

Any railroad company in this state which leases its property or line of road to another railroad company or to a private person shall have the contract of lease, or other contract of like nature evidencing the change of control and possession of such property or line of road, recorded in the clerk's office of the superior court in each county through which the line of road may run. (Ga. L. 1899, p. 54, § 1; Civil Code 1910, § 2598; Code 1933, § 94-319.)

JUDICIAL DECISIONS

Liability of railroad company extended by Code Sections 46-8-1 and 46-8-2. — Former Code 1933, §§ 94-319 and 94-320 (see O.C.G.A. §§ 46-8-1 and 46-8-2) did not limit liability of a railroad company but extended it. These sections did not affect the right of a member of the general public to hold the lessor railroad liable for the negligent acts of the lessee. *Central of Ga. Ry. v. Leonard*, 49 Ga. App. 689, 176 S.E. 137 (1934).

Failure to record lease makes lessor liable for injuries. — Under the provisions of former Code 1933, §§ 94-319 and 94-320 (see O.C.G.A. §§ 46-8-1 and 46-8-2, where one company leases trackage rights to another railroad and fails to record the lease in the office of the clerk of the superior court of the county through which the tracks run, a person injured by acts of the lessee railroad company may sue the company responsible for the person's injuries or the lessor, or both, since failure to record the lease agreement renders the lessor company liable for the acts of the lessee as well as for its own acts causing the plaintiff's injuries. *Atlantic*

Coast Line R.R. v. Newsome, 90 Ga. App. 509, 83 S.E.2d 333 (1954).

By virtue of former Code 1933, § 94-320 (see O.C.G.A. § 46-8-2), an employee of a lessee railroad had a right of action against the lessor railroad for injuries sustained due to the negligence of a coemployee of the lessee if the lease between the railroads was not recorded in the county wherein the injuries occurred and through which the leased line of road ran, as provided in former Code 1933, § 94-319 (see O.C.G.A. § 46-8-1). *Georgia R.R. & Banking Co. v. Fulmer*, 84 Ga. App. 101, 65 S.E.2d 636 (1951).

Actual notice of existence of lease not relevant. — In the recording statutes for deeds, etc., the legislature expressly provided for actual notice where failure to record occurs, but in former Code 1933, §§ 94-319 and 94-320 (see O.C.G.A. §§ 46-8-1 and 46-8-2) and § 46-8-2 nothing was provided concerning actual notice. Thus, failure to record the lease in the county where the injury occurred gave an

employee a right of action against the lessor railroad for injuries sustained in the county even where the employee and an allegedly negligent coemployee were employees of

one of the lessees. *Georgia R.R. & Banking Co. v. Fulmer*, 84 Ga. App. 101, 65 S.E.2d 636 (1951).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 213.

C.J.S. — 74 C.J.S., Railroads, § 447 et seq.

46-8-2. Effect of failure or refusal to record on rights of action against company.

A failure or refusal by a railroad company to comply with Code Section 46-8-1 will authorize any person having a right of action against the railroad company or its lessee, including an employee of either, to file and prosecute the action against the railroad company in all respects as if the railroad company were the proper party defendant. No plea or other defense attempting to shift liability to such lessee or denying control or possession of such property or line of road, filed either to an action by a member of the general public or to an action by an employee as aforesaid, shall protect any such railroad company failing or refusing to record as provided in Code Section 46-8-1 against liability. (Ga. L. 1899, p. 54, § 2; Civil Code 1910, § 2599; Code 1933, § 94-320.)

JUDICIAL DECISIONS

Liability of railroad company extended by Code Sections 46-8-1 and 46-8-2. — Former Code 1933, §§ 94-319 and 94-320 (see O.C.G.A. §§ 46-8-1 and 46-8-2) did not limit liability of a railroad company but extend it. These sections do not affect the right of a member of the general public to hold the lessor railroad liable for the negligent acts of the lessee. *Central of Ga. Ry. v. Leonard*, 49 Ga. App. 689, 176 S.E. 137 (1934).

Section not restricted to lease agreements outside corporate limits. — Former Code 1933, § 94-320 (see O.C.G.A. § 46-8-2) was not restricted to lease agreements outside of corporate limits only but applied to all such agreements. *Atlantic Coast Line R.R. v. Newsome*, 90 Ga. App. 509, 83 S.E.2d 333 (1954).

Failure to record lease makes lessor liable for injuries. — Under the provisions of former Code 1933, §§ 94-319 and 94-320, where one company leases trackage rights to another railroad and fails to record the lease in the office of the clerk of the superior court of the county through which the tracks

run, a person injured by acts of the lessee railroad company may sue the company responsible for the person's injuries for the lessor, or both, since failure to record the lease agreement renders the lessor company liable for the acts of the lessee as well as for its own acts causing the plaintiff's injuries. *Atlantic Coast Line R.R. v. Newsome*, 90 Ga. App. 509, 83 S.E.2d 333 (1954).

By virtue of former Code 1933, § 94-320 (see O.C.G.A. § 46-8-2), an employee of a lessee railroad had a right of action against the lessor railroad for injuries sustained due to the negligence of a coemployee of the lessee if the lease between the railroads was not recorded in the county wherein the injuries occurred and through which the leased line of road ran, as provided in former Code 1933, § 94-319 (see O.C.G.A. 46-8-1). *Georgia R.R. & Banking Co. v. Fulmer*, 84 Ga. App. 101, 65 S.E.2d 636 (1951).

Notice of lease does not preclude injured employee from initiating action. — Actual notice of lease by injured employee does not

deny the employee a right of action against the lessor railroad given the employee under former Code 1933, § 94-320 (see O.C.G.A. § 46-8-2). *Georgia R.R. & Banking Co. v. Fulmer*, 84 Ga. App. 101, 65 S.E.2d 636 (1951).

In the recording statutes for deeds the legislature expressly provided for actual notice where failure to record occurred, but in former Code 1933, §§ 94-319 and 94-320 (see O.C.G.A. §§ 46-8-1 and 46-8-2) nothing

was provided concerning actual notice. Thus, the failure to record the lease in the county where the injury occurred gave an employee a right of action against the lessor railroad for injuries sustained in the county even where the employee and an allegedly negligent coemployee were employees of one of the lessees. *Georgia R.R. & Banking Co. v. Fulmer*, 84 Ga. App. 101, 65 S.E.2d 636 (1951).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 213.

C.J.S. — 74 C.J.S., Railroads, § 447 et seq.

46-8-3. Maintenance of books and records by railroad company secretary; inspection; furnishing of transcripts of board proceedings by secretary; transfer of custody of records upon resignation or vacation of office by secretary.

(a) The secretary of a railroad company, or other officer or agent of a railroad company who is the custodian of the books, records, papers, or other property of the company, shall keep the same in his possession at all times during business hours and have the same ready to be exhibited to any officer, director, or committee of stockholders of said company and shall furnish them with transcripts from the records of proceedings of the board of directors under his official hand and seal, on the payment to him of the same fee as that provided in Code Section 15-6-77 for the clerk of the superior court for transcripts from the records of his office.

(b) The secretary or other officer or agent shall, on resigning his office or otherwise vacating the same, turn over all such books, records, papers, and all other property of the corporation which are in his possession to his successor in office, or, if no successor has been appointed or elected, to the board of directors, if any, or to the person or persons designated by the stockholders of the company to receive such books, records, papers, and other property. (Ga. L. 1892, p. 37, § 13; Civil Code 1895, § 2175; Civil Code 1910, § 2593; Code 1933, § 94-314.)

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 31. 18A Am. Jur. 2d, Corporations, §§ 333, 335, 336, 338, 339, 348-354, 356-370, 372, 379-394, 399-406, 409-411, 413, 415, 416, 418, 421.

C.J.S. — 18 C.J.S., Corporations, §§ 110, 332-338. 19 C.J.S., Corporations, §§ 505, 506.

46-8-4. Applicability of Article 14 of Chapter 2 of Title 14 to chapter.

The provisions of Article 14 of Chapter 2 of Title 14 shall be applicable to railroad corporations dissolved under this chapter. (Ga. L. 1953, Ex. Sess., p. 213, § 10; Ga. L. 1989, p. 946, § 113.)

ARTICLE 2**POWERS AND DUTIES OF COMMISSION AS TO RAILROAD COMPANIES GENERALLY****46-8-20. Exclusive power of commission to determine just and reasonable rates and charges; establishing rates and tariffs generally; locating of depots and construction of freight and passenger buildings.**

(a) The power to determine what are just and reasonable rates and charges is vested exclusively in the commission.

(b) The commission:

(1) Shall make reasonable and just rates of freight and passenger tariffs, such rates to be observed by all railroad companies doing business in this state;

(2) Shall make reasonable and just rules and regulations as to charges at any and all points for the necessary handling and delivering of freights, such rules and regulations to be observed by all railroad companies doing business in this state;

(3) Shall make such just and reasonable rules and regulations as may be necessary for preventing unjust discrimination in the transportation of freight and passengers on the railroads in this state;

(4) Shall have the power to make, for all connecting railroads doing business in this state, just and reasonable joint rates as to all traffic or business passing from one of those railroads to another, provided that before applying joint rates to railroads that are not under the management and control of a single company, the commission shall give 30 days' notice to the railroads of the joint rate contemplated and of the manner in which it proposes to divide the rate between the railroads, and shall accord a hearing to any company desiring to object to the rates or the manner of their division;

(5) Shall make reasonable and just rates for the use of railroad cars, no matter by whom owned or carried, carrying any kind of freight and passengers on the railroads; and

(6) Shall make just and reasonable rules and regulations to prevent the giving or paying of any rebate or bonus, directly or indirectly, and to

prevent the misleading or deceiving of the public in any manner as to the real rates charged for freight and passengers.

(c) The commission shall have full power, by rule and regulation, to designate and fix the difference in rates of freight and passenger transportation to be allowed for long and short distances on the same or different railroads and to ascertain what shall be the limits of long and short distances.

(d) The commission shall have the power to require the location of such depots and the construction of such freight and passenger buildings as the condition of the railroad, the safety of freight, and the public comfort and convenience may require, upon the giving to such railroad company to be affected thereby the same notice as is provided in paragraph (4) of subsection (b) of this Code section. (Ga. L. 1878-79, p. 125, § 5; Code 1882, § 719e; Ga. L. 1889, p. 131, § 1; Civil Code 1895, § 2189; Ga. L. 1907, p. 72, § 5; Civil Code 1910, § 2630; Code 1933, § 93-309.)

Cross references. — Authority of General Assembly regarding regulation of public utility rates, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Prohibition against rebates, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Further provisions regarding establishment, revision,

etc., of rates and charges for railroad transportation, § 46-9-20 et seq.

Law reviews. — For comment on *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975), see 27 Mercer L. Rev. 341 (1975).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION RATE-MAKING

General Consideration

Constitutionality of amendment. — Georgia Laws 1907, p. 72 does not offend the Constitution of Georgia. *Wadley S. Ry. v. State*, 137 Ga. 497, 73 S.E. 741 (1912), aff'd, 235 U.S. 651, 35 S. Ct. 214, 59 L. Ed. 405 (1914).

Nature of commission. — The Railroad Commission (now Public Service Commission) is an administrative, and not a legislative, body. It has only such powers as the legislature has expressly, or by fair implication, conferred upon it. *Southern Ry. v. Melton*, 133 Ga. 277, 65 S.E. 665 (1909); *Zuber v. Southern Ry.*, 9 Ga. App. 539, 71 S.E. 937 (1911).

Powers of commission in general. — Public Service Commission has only such powers as are granted to it by statute. *Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618 (1949).

Public Service Commission has power to regulate rates and practices of public utilities. *Gas Light Co. v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), cert. denied, 404 U.S. 1062, 92 S. Ct. 732, 30 L. Ed. 2d 750 (1972).

Commission has power to prevent unjust discrimination in handling of freight. — The commission has power to promulgate a rule requiring railroad companies, in the conduct of their intrastate business, to afford to all persons equal facilities in the transportation and delivery of freight, without unjust discrimination against any. *Augusta Brokerage Co. v. Central of Ga. Ry.*, 121 Ga. 48, 48 S.E. 714 (1904); *Southern Ry. v. Georgia Pub. Serv. Comm'n*, 218 Ga. 157, 127 S.E.2d 12 (1962).

Commission may declare unlawful practice of dispensing with prepayment of charges. — Under the power given by former Civil Code 1910, § 2630 (see

O.C.G.A. § 46-8-20) it was competent for the commission to declare as an unlawful discrimination a course of conduct whereby a railroad company, connecting with other railroad companies at each of its termini, which converge to a common point, affording a choice of routes from the common point to stations on its own line, received from one of its connections freights destined to points on its own line without requiring repayment of the earned charges of the favored carrier, and declined to receive from the connecting carrier at the other terminus freight destined to points on its own line without prepayment of the freight charges earned by that connecting carrier, where the conditions were substantially similar, and the effect of the course of conduct was to seriously curtail competition in rates and service to the patrons on its own line. *Wadley S. Ry. v. State*, 137 Ga. 497, 73 S.E. 741 (1912), *aff'd*, 235 U.S. 651, 35 S. Ct. 214, 59 L. Ed. 405 (1914).

Authority of carrier to make regulations must yield to state. — Construing former Ga. Civil Code 1910, §§ 2729, 2750, 2630 et seq., and 2662 et. seq. (see O.C.G.A. §§ 46-2-21, 46-8-20, 46-9-130, and 46-9-131), it was evident that the power of a common carrier to make reasonable regulations must yield where regulations have been made by authority of the state, unless they are invalid. *Railroad Comm'n v. Louisville & N.R.R.*, 140 Ga. 817, 80 S.E. 327, 1915E L.R.A. 902, 1915A Ann. Cas. 1018 (1913).

Distinction between "transportation" and "switching" or "transfer" service. — The test of distinction between "transportation" service relative to loaned freight-cars for which a railway company can lawfully charge tonnage rates, and "switching" or "transfer" service for which it was restricted to a fixed charge per car under former Civil Code 1895, § 2189 (see O.C.G.A. § 46-8-20), was not whether the movement of the cars involved the use of a portion of the company's main line, or that of another, for there may be a transportation service over one or more spur-tracks of the same company, if the contract of affreightment required no movement over other tracks or lines of railway; whereas a switching or transfer service was one which preceded or followed a transportation service, and applied only to a shipment on which legal freight charges have

already been earned, or were to be earned. *Dixon v. Central of Ga. Ry.*, 110 Ga. 173, 35 S.E. 369 (1900).

Venue upon failure to erect depot. — If a railroad company of this state refused to comply with an order passed by the Commissioners, requiring it to erect a depot building as empowered by former Civil Code 1895, § 2189 (see O.C.G.A. § 46-8-20), such refusal, in contemplation of law, was at the company's principal office, or place of business, and consequently controled the venue. *Central of Ga. Ry. v. State*, 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518 (1898).

Cited in *Brown v. Georgia C. & N. Ry.*, 119 Ga. 88, 46 S.E. 71 (1903); *Central of Ga. Ry. v. Georgia R.R. Comm'n*, 215 F. 421 (N.D. Ga. 1914); *Wight v. Pelham & H.R.R.*, 18 Ga. App. 195, 89 S.E. 176 (1916); *Henry Talmadge & Co. v. Seaboard Air Line Ry.*, 170 Ga. 225, 152 S.E. 243 (1930); *Atlanta Gas Light Co. v. Georgia Pub. Serv. Comm'n*, 229 Ga. 659, 193 S.E.2d 835 (1972).

Rate-making

Commission's exclusive power to make intrastate rates. — Power to make intrastate rates is exclusive prerogative of Public Service Commission. *Seaboard Air Line Ry. v. Lumberman's Co.*, 168 Ga. 851, 149 S.E. 128 (1929).

Under former Civil Code 1910, § 2630 (see O.C.G.A. § 46-8-20) the commission had the power to determine what are just and reasonable rates and charges for transportation of passengers of each of the railroads doing business in this state. *Georgia Pub. Serv. Comm'n v. Atlanta & W.P.R.R.*, 164 Ga. 822, 139 S.E. 725 (1927).

What matters to be considered in rate-making. — What is just and reasonable to be charged, what is actuarially sound, what limitations of liability are necessary to reach this result, are matters which need to be taken into account in the determination of public utility rates, just as there are proper actuarial considerations in fixing insurance premiums. *Southern Bell Tel. & Tel. Co. v. Invenchek, Inc.*, 130 Ga. App. 798, 204 S.E.2d 457 (1974).

Meaning of term "joint rate." — A "joint rate" under former Civil Code 1895, § 2189 (see O.C.G.A. § 46-8-20) was one prescribed to be charged for the transportation of goods or passengers over the connecting

Rate-making (Cont'd)

lines of two or more railroads, and to be divided among them for the service rendered by each respectively. *Hill v. Wadley S. Ry.*, 128 Ga. 705, 57 S.E. 795 (1907).

No fixed and arbitrary rule for making of joint rate. — There was no fixed and arbitrary rule for making of joint rate. It was often done by deducting some prescribed percent from each of the local rates and adding together the two rates thus reduced; but this was not the only possible method of fixing a rate which will fall within the term, "joint rate," as used in former Civil Code 1895, § 2189 (see O.C.G.A. § 46-8-20). *Hill v. Wadley S. Ry.*, 128 Ga. 705, 57 S.E. 795 (1907).

No retroactive application of rates. — A rate is made to operate in the future and cannot be made to apply retroactively. *Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618 (1949).

Action by consumer seeking to enjoin rate collection. — For decision holding that consumer had no standing to seek to enjoin collection of rates set by order of Public Service Commission on the ground that the rates were unreasonably high, prior to revision of Ga. L. 1965, p. 283, UU 2-4 (see O.C.G.A. § 50-13-2) by Ga. L. 1975, p. 404, see *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975), commented on in 27 Mercer L. Rev. 341 (1975).

Courts have no power to make rates. — Making and controlling utility rates is a legislative function delegated to a quasi-legislative body and the courts have no

power to control and make such rates. *DeKalb County v. Southern Bell Tel. & Tel. Co.*, 358 F. Supp. 498 (N.D. Ga. 1972), *aff'd*, 478 F.2d 700 (5th Cir. 1973).

Customers lack property interest in utility rate increases. — Utility customers have no sufficient property interest in given utility rate increase to invoke procedural protections of due process clause of U.S. Const., Amend. 14. *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975).

Utility customers have no vested rights in fixed utility rates. *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975).

Entitlement to lower rate must be shown to challenge increase on constitutional grounds. — Utility customers must show they have a legal entitlement to or a vested right in the utility rates being charged before any proposed increase, before they can claim any property rights protected by the United States Constitution. *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975).

Courts can not fix telephone rates. — Function of making telephone rates is legislative in nature and rates cannot be fixed by courts. *Southern Bell Tel. & Tel. Co. v. Georgia Pub. Serv. Comm'n*, 203 Ga. 832, 49 S.E.2d 38 (1948).

Liability for damages for interrupted telephone service. — Reasonable limitation of liability for damages for interrupted telephone service may be considered part of telephone rate-making function. *Southern Bell Tel. & Tel. Co. v. Invenchek, Inc.*, 130 Ga. App. 798, 204 S.E.2d 457 (1974).

OPINIONS OF THE ATTORNEY GENERAL

Federal preemption of railroads in interstate commerce. — As to railroads which are in interstate commerce, commission is preempted from imposing any safety regula-

tions concerning any subject over which federal government has an existing regulation. 1980 Op. Att'y Gen. No. 80-36.

RESEARCH REFERENCES

Am. Jur. 2d. — 64 Am. Jur. 2d, Public Utilities, § 166 et seq.

C.J.S. — 73B C.J.S., Public Utilities, §§ 15, 18-22, 34, 36-41, 45-49, 53-55, 57.

ALR. — Franchise provisions for free or reduced rates of public service corporations

as within constitutional or statutory provision prohibiting discrimination, 10 ALR 504; 15 ALR 1200.

Right of electrical company to discriminate against a concern which desires service for resale, 12 ALR 327; 112 ALR 773.

Discrimination by public utility company in respect of extension of credit, 12 ALR 964.

Franchise provision for free or reduced rates by public service corporation as within constitutional or statutory provision prohibiting discrimination, 15 ALR 1200.

Right of public utility to discontinue one of several different kinds of service, 21 ALR 578.

Power of state to require interstate carrier to make track connections with other roads, 22 ALR 1078.

Power of Public Service Commission to increase franchise rates, 28 ALR 587; 29 ALR 356.

Service contract by public utility in consideration of conveyance of property by individual or private corporations as affected by public utility acts, 41 ALR 257.

Right to fix new rate for public utility where court sets aside rate fixed by commission as confiscatory, 57 ALR 146.

Right to make charge for telephone or other public utility service in excess of that fixed by public utility, 73 ALR 1194.

46-8-21. Powers of commission regarding railroads generally.

The commission shall have power and authority:

(1) To ascertain the cost of construction and the present value of properties in Georgia owned by railroad companies; and to that end, the commission may employ necessary experts;

(2) To prescribe rules with reference to the use, construction, removal, or change of spurtracks and sidetracks, with full power to compel service to be furnished to manufacturing plants, warehouses, and similar places of business along the line of railroads where practicable and where in the judgment of the commission the business is sufficient to justify the same and on such terms and conditions as the commission may prescribe;

(3) To order and compel the operation of sufficient and proper passenger service when in its judgment inefficient or insufficient service is being rendered to the public or any community;

(4) To order and compel the making and operating of physical connections between lines of railroads crossing or intersecting each other or entering the same incorporated city, when in its judgment such connections are practicable and in the public interest;

(5) To fix penalties for neglect on the part of railroad companies to adjust overcharges and losses, or failure to decline to do so, if deemed unjust, in a reasonable time;

(6) To prescribe rules requiring the prompt receipt, carriage, and delivery of freight and the prompt furnishing of cars to shippers desiring to ship freight, and to prescribe penalties for failure to observe such rules, and to prescribe rules and penalties regarding the transfer of cars through yards of connecting roads;

(7) To order the erection of depots and stations where it deems the same necessary and to order the appointment and service of depot or station agents; and

(8) To regulate schedules and compel connections at junction points of competing lines. (Ga. L. 1907, p. 72, § 7; Civil Code 1910, § 2664; Code 1933, § 93-308.)

JUDICIAL DECISIONS

Code section allowing railroads to cross each other not repealed. — Former Civil Code 1910, § 2664 (see O.C.G.A. § 46-8-21) did not repeal paragraph (6) of former Civil Code 1910, § 2585 (see O.C.G.A. § 46-8-100), allowing railroads to cross each other. *Savannah River Terms. Co. v. Southern Ry.*, 148 Ga. 180, 96 S.E. 257 (1918).

Courts have no power to make or control utility rates. — Making and controlling utility rates is a legislative function delegated to a quasi-legislative body and courts have no power to control and make such rates. *DeKalb County v. Southern Bell Tel. & Tel. Co.*, 358 F. Supp. 498 (N.D. Ga. 1972), *aff'd*, 478 F.2d 700 (5th Cir. 1973) (decided prior to revision of § 50-13-2 by Ga. L. 1975, p. 404).

Matters to be considered in determining necessity of physical track connections. — In determining whether public necessity exists to require railroad companies to make physical track connections just regard should be given on the one side to probably resulting advantages, and, on the other side, to the necessary expenses to be incurred. *Seaboard Air Line Ry. v. Railroad Comm'n*, 240 U.S. 324, 36 S. Ct. 260, 60 L. Ed. 669 (1916).

Evidence required for finding necessity for track connection. — Finding of public necessity for physical track connection cannot be supported by mere declaration of commission; there must be sufficient evidence to support it. *Seaboard Air Line Ry. v. Railroad Comm'n*, 240 U.S. 324, 36 S. Ct. 260, 60 L. Ed. 669 (1916).

Commission's power to allow removal of spur tracks by carrier. — Commission has power under former Civil Code 1910, § 2664 (see O.C.G.A. § 46-8-21) to permit carrier to remove spur tracks and side tracks. *Railroad Comm'n v. Macon Ry. & Light Co.*, 151 Ga. 256, 106 S.E. 282 (1921).

When railroad may be required to build spur and side tracks. — Under former Civil Code 1910, § 2664 (see O.C.G.A. § 46-8-21), the commission has power and

authority to require railroad companies to build spur tracks and side tracks: (1) when such construction was practicable, and the business to be derived by the railroad company showed the order to be reasonable; and (2) when the facts show that such track was a public track and constructed for the benefit of the public. *Railroad Comm'n v. Louisville & N.R.R.*, 148 Ga. 442, 96 S.E. 855 (1918).

Requiring side track to remain in service not violation of company's due process rights. — Requiring continuance of service of side track does not deprive company of its property without due process of law in violation of U.S. Const., Amend. 14, where the service rendered by a side track is much greater in out-of-pocket cost than the compensation. The requirement that such a service should not be discontinued without notice and hearing is within the police power of the state. *Southern Ry. v. Georgia Pub. Serv. Comm'n*, 218 Ga. 157, 127 S.E.2d 12 (1962).

Depreciation and expenses to be included in damages for unconstitutional order. — In action by a railroad attacking as unconstitutional a state order under former Civil Code 1910, § 2664 (see O.C.G.A. § 46-8-21) requiring it to establish and operate an industrial spur track, the pecuniary amount involved included, not only the cost of construction, but also interest thereon, depreciation, maintenance and operating expenses, capitalized at a reasonable rate. *Western & Atl. R.R. v. Railroad Comm'n*, 261 U.S. 264, 43 S. Ct. 252, 67 L. Ed. 645 (1923).

Cited in *Atlantic Coast Line R.R. v. A. T. Snodgrass & Co.*, 14 Ga. App. 668, 82 S.E. 153 (1914); *Farmers Cotton Oil Co. v. Brooke*, 14 Ga. App. 778, 82 S.E. 372 (1914); *Georgia Pub. Serv. Comm'n v. Georgia Power Co.*, 182 Ga. 706, 186 S.E. 839 (1936); *Louisville N.R.R. v. Atlantic Co.*, 66 Ga. App. 791, 19 S.E.2d 364 (1942); *City of Doraville v. Southern Ry.*, 227 Ga. 504, 181 S.E.2d 346 (1971).

OPINIONS OF THE ATTORNEY GENERAL

Railroad yard constructional details not within commission's authority. — Public Service Commission is without authority to regulate constructional details as to spacing of railroad tracks within railroad yards. 1952-53 Op. Att'y Gen. p. 496.

Requiring railroad to begin or maintain passenger service. — Commission does not have authority to require railroad not presently providing passenger service to com-

mence passenger service if railroad does not desire to do so. If the railroad has voluntarily undertaken to provide passenger service to the citizens of this state the commission would have the authority to require the railroad to maintain such public service and facilities as may be reasonable and just. However, the commission cannot require the railroad to operate at a loss. 1980 Op. Att'y Gen. No. 80-36.

RESEARCH REFERENCES

ALR. — Power of Public Service Commission to increase franchise rates, 9 ALR 1165; 28 ALR 587; 29 ALR 356.

Duty of railroad to operate side and switch tracks and spurs, 18 ALR 722.

Power of state to require interstate carrier to make track connections with other roads, 22 ALR 1078.

Special services or facilities afforded by shipper as a factor in carrier's rates, 25 ALR 191.

Power of Public Service Commission to require railroad or street railway to extend its line or build new line to new territory, 30 ALR 73.

Street easements as a factor in fixing a rate base for a street railway company, 49 ALR 1477.

Power of Public Service Commission in respect to alteration or extension of passenger service, 70 ALR 841.

Construction and effect of liability exemption or indemnity clause in spur track agreement, 20 ALR2d 711.

Validity, construction, and effect of § 102(a) of Railroad Revitalization and Regulatory Reform Act (49 USCS § 11501), 143 ALR Fed. 347.

46-8-22. Investigation by commission of books and papers of railroad companies; inspection of railroad offices and stations; examination of railroad's agents and employees; rules and regulations concerning investigations and inspections.

(a) It shall be the duty of the commission to investigate the books and papers of all railroad companies doing business in this state in order to ascertain if the rules and regulations of the commission have been complied with, to make personal visitation to railroad offices, stations, and other places of business for the purpose of examinations, and to make rules and regulations concerning such examinations, which rules and regulations shall be observed and obeyed as the other rules and regulations of the commission.

(b) The commission shall have full power and authority to examine any person, including agents and employees of railroad companies, under oath or otherwise, in order to procure the information necessary to make just and reasonable freight and passenger rates and to ascertain whether rules and regulations of the commission are observed or violated. The commission shall have the power to make necessary and proper rules and regulations concerning such examinations, which rules and regulations

shall be obeyed and enforced as all other rules and regulations of the commission. (Ga. L. 1878-79, p. 125, § 7; Code 1882, § 719; Civil Code 1895, § 2192; Civil Code 1910, § 2633; Code 1933, § 93-301.)

JUDICIAL DECISIONS

No authority for commission to order utility to pay damages to customer. — There is no statutory provision which grants to commission any authority to order public utility to pay damages to a customer. The only power to make a rule that relates to the payment of money is the power given to the commission to prescribe rules and regulations, penalties under which are to be paid

by railroads, to adjust overcharges, losses, or for failure to promptly receive, carry, and deliver freight, or to furnish cars. Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co., 205 Ga. 863, 55 S.E.2d 618 (1949).

Cited in Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co., 205 Ga. 863, 55 S.E.2d 618 (1949).

RESEARCH REFERENCES

ALR. — Constitutionality and construction of statute imposing upon public service corporation expense of investigation of its affairs, 101 ALR 197.

46-8-23. Prescription and enforcement by commission of rules, regulations, and orders as to receipt, transportation, and delivery of freight by railroads.

The commission is vested with full power and authority to make, prescribe, and enforce all such reasonable rules, regulations, and orders as may be necessary to compel and require the several railroad companies in this state to receive, receipt for, forward, and deliver promptly to destination all freight of every character which may be tendered or received by them for transportation. In addition, the commission shall have full power and authority to make, prescribe, and enforce such reasonable rules, regulations, and orders as may be necessary to compel and require prompt delivery to the consignee of all freights on arrival at destination. (Ga. L. 1905, p. 120, § 1; Civil Code 1910, § 2634; Code 1933, § 93-302.)

JUDICIAL DECISIONS

Cited in Zuber v. Southern Ry., 9 Ga. App. 540, 71 S.E. 937 (1911); Shurman v. City of Atlanta, 148 Ga. 1, 95 S.E. 698 (1918); Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co., 205 Ga. 863, 55 S.E.2d 618 (1949); City of Doraville v. Southern Ry., 227 Ga. 504, 181 S.E.2d 346 (1971).

RESEARCH REFERENCES

ALR. — Regulation by public service commission as to checking and handling of baggage, 21 ALR 323. Power of state to require interstate carrier to make track connections with other roads, 22 ALR 1078.

Power of Public Service Commission to require carrier to furnish cars of special type, 23 ALR 411.

Power of Public Service Commission to require railroad or street railway to extend its line or build new line to new territory, 30 ALR 73.

Validity of statute, ordinance, or other public regulation prescribing minimum number of employees for train or street car, 69 ALR 343.

46-8-24. Inspection by commission of contracts and agreements between railroad companies; disapproval of agreements; inclusion in agreements of rates exceeding rates fixed by commission.

All contracts and agreements as to freight and passenger rates between railroad companies doing business in this state shall be submitted to the commission for inspection and correction so that it may be ascertained whether or not such contracts and agreements are in violation of the laws of this state, of the Constitution of Georgia, or of the rules and regulations of the commission. All arrangements and agreements whatever as to the division of earnings of any kind by competing railroad companies doing business in this state shall be submitted to the commission for inspection and approval, insofar as such arrangements and agreements affect rules and regulations made by the commission to secure to all persons doing business with such companies just and reasonable freight and passenger rates. The commission may make such rules and regulations as to such contracts and agreements as may be then deemed necessary and proper. Any such agreements not approved by the commission, or by virtue of which rates are charged exceeding the rates fixed by the commission for freight and passengers, shall be deemed to be violations of Article III, Section VI, Paragraph V(c) of the Constitution of Georgia and shall be illegal and void. (Ga. L. 1878-79, p. 125, § 8; Code 1882, § 719h; Civil Code 1895, § 2193; Civil Code 1910, § 2638; Code 1933, § 93-303; Ga. L. 1983, p. 3, § 62.)

JUDICIAL DECISIONS

Constitutionality. — Former Civil Code 1910, § 2638 (see O.C.G.A. § 46-8-24) was not in violation of U.S. Const., Amend. XIV, as being an unlawful interference with the liberty of contract, or a taking of property without due process of law, nor did it violate the due-process clause of Ga. Const. 1976, Art. I, Sec. I, Para. I (Ga. Const. 1983, Art. I,

Sec. I, Para. I). *Railroad Comm'n v. Louisville & N.R.R.*, 140 Ga. 817, 80 S.E. 327, 1915E L.R.A. 902, 1915A Ann. Cas. 1018 (1913).

Cited in Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co., 205 Ga. 863, 55 S.E.2d 618 (1949).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 249.

ALR. — Power of public service commission to require railroad or street railway to extend its line or build new line to new

territory, 2 ALR 983; 30 ALR 73.

Constitutionality of statutes providing for consolidation or merger of public utility corporations, 66 ALR 1568.

46-8-25. Inspection of railroads by commission; requiring repair of railroads; allotment of reasonable time for repairs; effect of Code section on liability of railroads.

The commission, upon complaint, shall inspect any railroad or any part of any railroad in this state. If the railroad is found to be in an unsafe or dangerous condition, the commission shall require the same to be put and kept in such condition as will render travel over the same safe and expeditious. Reasonable time shall be given the railroad authorities in which to accomplish the work or repairs required under this Code section. This Code section shall not limit or affect the liability of railroads in cases of injury or damage to persons or property. (Ga. L. 1890-91, p. 150, § 1; Civil Code 1895, § 2194; Civil Code 1910, § 2639; Code 1933, § 93-316.)

JUDICIAL DECISIONS

Courts have no power to make or control utility rates. — Making and controlling utility rates is legislative function delegated to quasi-legislative body and courts have no power to control and make such rates.

DeKalb County v. Southern Bell Tel. & Tel. Co., 358 F. Supp. 498 (N.D. Ga. 1972), aff'd, 478 F.2d 700 (5th Cir. 1973) (decided prior to revision of § 50-13-2 by Ga. L. 1975, p. 404).

OPINIONS OF THE ATTORNEY GENERAL

Commission may act upon own motion. — Former Code 1933, § 93-316 (see O.C.G.A. § 46-8-25), while making certain actions on the part of the commission compulsory

upon a complaint, does not preclude the commission from fulfilling the same responsibility on its own motion. 1980 Op. Att'y Gen. No. 80-36.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 36. 65 Am. Jur. 2d, Railroads, §§ 152, 159, 161.

ARTICLE 3

INCORPORATION AND CONSOLIDATION OF RAILROAD COMPANIES AND REQUIREMENTS AS TO DIRECTORS AND OFFICERS

Cross references. — Secretary of State corporations generally, Ga. Const. 1983, Art.

III, Sec. VI, Para V. and Ch. 4, T. 14. Business corporations generally, Ch. 2, T. 14.

PART 1

INCORPORATION, ORGANIZATION, SUBSCRIPTION OF CAPITAL STOCK,
SELECTION OF OFFICERS AND DIRECTORS**46-8-40. Grant of corporate powers and privileges to railroad companies by Secretary of State; procedure in case of disqualification of Secretary of State.**

All corporate powers and privileges of railroad companies shall be issued and granted by the Secretary of State upon the terms, liabilities, and restrictions expressed in and subject to all the provisions of this chapter and of the Constitution of Georgia. If by reason of interest in the proposed corporation the Secretary of State is disqualified, the duties required to be performed by the Secretary of State shall be performed by the Commissioner of Insurance. (Ga. L. 1880-81, p. 156, § 1; Code 1882, § 1689a; Ga. L. 1882-83, p. 135, § 1; Civil Code 1895, § 2159; Civil Code 1910, § 2577; Code 1933, § 94-101; Ga. L. 1986, p. 855, § 26.)

JUDICIAL DECISIONS

Railroad company may exist as corporation de facto. — Where special charters of two railroad companies are unconstitutional and therefore wholly void, each of said companies is nevertheless a corporation de facto, and as such can acquire and own property and are bound to its creditors by all acts which would bind it had it been duly incorporated under the general law. *McTighe v. Macon Constr. Co.*, 94 Ga. 306, 21 S.E. 701, 47 Am. St. R. 153, 32 L.R.A. 208 (1894).

Special charter may be granted to street railroads. — Even if, after the passage of former Civil Code 1895, § 2159 (see O.C.G.A. § 46-8-40) the General Assembly could not constitutionally grant a special

charter to a railroad company of the kind contemplated by the provisions of that law, inasmuch as that law is not applicable to street railroad companies, the General Assembly could, after its enactment, constitutionally grant a special charter to a railroad company of the latter kind, and in doing so, could authorize such a company to extend its line to a suburban terminus beyond the limits of the town or city in which the same was to be located. *Dieter v. Estill*, 95 Ga. 370, 22 S.E. 622 (1895); *Brown v. Atlanta Ry. & Power Co.*, 113 Ga. 462, 39 S.E. 71 (1901).

Cited in *English v. Rosenkrantz*, 152 Ga. 726, 111 S.E. 198 (1922); *Dame v. Lee*, 180 Ga. 315, 178 S.E. 752 (1935).

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, §§ 150, 151, 214. 65 Am. Jur. 2d, Railroads, § 6.

C.J.S. — 18 C.J.S., Corporations, § 37. 74 C.J.S., Railroads, § 27.

ALR. — Grant of perpetual franchise to public service corporation, 2 ALR 1105.

46-8-41. Procedures regarding preparation of petition for incorporation; filing of petition and affidavit with Secretary of State; endorsement by Secretary of State; allowance for public inspection of petition and affidavit.

(a) Any group of ten or more persons who desire to be incorporated as a railroad company shall prepare a petition in writing, addressed to the Secretary of State, in which shall be stated:

(1) The names and residences of each of the persons desiring to form the corporation;

(2) The name of the railroad company they desire to have incorporated, provided that in no event shall the name selected be the name of any existing railway corporation in this state;

(3) The length of the road, as near as can be estimated;

(4) The general direction of the road;

(5) The counties through which the road will probably run;

(6) The names of the principal places from which and to which the road is to be constructed;

(7) The amount of the proposed capital stock;

(8) The number of years the company is to continue in existence;

(9) If the capital stock is to consist of common or preferred stock, the amount of each class and the rights and privileges of the latter over the former;

(10) The location of the principal office of the corporation;

(11) A statement that the incorporators intend in good faith to go forward without delay to secure subscriptions to the capital stock and to construct, equip, maintain, and operate the railroad;

(12) A request to be incorporated under the laws of this state; and

(13) A statement that the incorporators have given four weeks' notice of their intention to apply for said charter by the publication of the petition in a newspaper in which the sheriff's advertisements are published in each of the counties through which the proposed road will probably run (if there is a newspaper in each of those counties), once a week for four weeks before the filing of said petition.

(b) There shall be annexed to the petition an affidavit made by three of the persons forming the company, which affidavit shall state that the names subscribed are the genuine signatures of the persons named therein and that the facts stated in the petition are true to the best of petitioners' knowledge, information, and belief.

(c) The petition thus sworn to shall be filed in the office of the Secretary of State, who shall endorse thereon the date of the filing and record the same in a book to be kept by him for that purpose, which book shall be open for inspection by the public at all times during the office hours of the Secretary of State. (Ga. L. 1892, p. 37, § 2; Civil Code 1895, § 2160; Civil Code 1910, § 2578; Code 1933, § 94-102.)

JUDICIAL DECISIONS

Cited in *Bridwell v. Gate City Term. Co.*, (1907); *Heist v. Dunlap & Co.*, 193 Ga. 462, 127 Ga. 520, 56 S.E. 624, 10 L.R.A. (n.s.) 909 18 S.E.2d 837 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, §§ 151, 189, 190, 199, 202-209, 211, 213. **C.J.S.** — 18 C.J.S., Corporations, §§ 32-37, 39. 74 C.J.S., Railroads, §§ 34, 36.

46-8-42. Certificate of incorporation; duration of corporate existence; fee for issuance of certificate.

(a) When the petition has been filed with the Secretary of State, he shall issue to the company under the great seal of the state the following form of certificate:

To all to whom these presents may come — Greetings:

Whereas, In pursuance of an Act of the General Assembly of the State of Georgia, approved December 17, 1892, _____ and _____ (naming the persons who sign the petition) having filed in the office of the Secretary of State a certain petition seeking the formation of a corporation to be known as (here insert name), with a capital stock of \$_____, for the purpose of constructing, equipping, maintaining, and operating a railroad from _____ to _____, and having complied with the statutes in such cases made and provided; therefore, the State of Georgia hereby grants unto the above-named persons, their successors and assigns, full authority, by and under the said name of _____, to exercise the powers and privileges of a corporation for the purposes above stated, subject to the provisions of the Constitution of Georgia, and all the laws governing railroad companies of force at the date of this certificate, or that may hereafter become of force, either by constitutional or statute law, or by any rules and regulations of the Public Service Commission of this state, or otherwise, which govern and control the operation of railroads in this state.

In witness whereof, these presents have been signed by the Secretary of State, and to which is annexed the great seal of the state, at Atlanta, Georgia, this _____ day of _____, _____.

(b) Upon the issuance of the certificate, the persons who signed the petition and all persons who shall become stockholders in the company shall be a corporation by the name specified in the petition and certificate and shall possess the powers and privileges granted by, and be subject to the provisions of, this title.

(c) The rights, powers, and privileges granted railroad corporations shall continue for a period no longer than 101 years, unless the corporation is continued by the laws in force at the expiration of 101 years.

(d) Before the Secretary issues the certificate, the petitioners shall pay a fee of \$100.00 to the Secretary of State. (Ga. L. 1892, p. 37, § 3; Civil Code 1895, §§ 2161, 2166; Ga. L. 1903, p. 34, § 1; Civil Code 1910, §§ 2579, 2584; Code 1933, § 94-103; Ga. L. 1984, p. 22, § 46; Ga. L. 1999, p. 81, § 46.)

JUDICIAL DECISIONS

Cited in *Ammons v. Central of Ga. Ry.*, 215 Ga. 758, 113 S.E.2d 438 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, § 68. 18A Am. Jur. 2d, Corporations, §§ 151, 199, 202-206, 212.

C.J.S. — 18 C.J.S., Corporations, §§ 37, 44, 52. 74 C.J.S., Railroads, §§ 38, 52, 53.

46-8-43. Duties of Secretary of State prior to issuance of certificate of incorporation; certificate or duplicate thereof as evidence of existence of corporation and compliance with chapter.

Before the Secretary of State issues a certificate of incorporation pursuant to Code Section 46-8-42, he shall satisfy himself that all of the requirements of this chapter have been substantially complied with prior to the filing of said petition. Any certificate or duplicate thereof issued under this chapter by the Secretary of State shall be conclusive evidence of the existence of the corporation in all the courts in this state and of compliance with all the requirements of this chapter. (Ga. L. 1892, p. 37, § 4; Civil Code 1895, § 2162; Civil Code 1910, § 2580; Code 1933, § 94-104.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, §§ 151, 199, 202-206, 214. 19 Am. Jur. 2d, Corporations, § 2231.

C.J.S. — 18 C.J.S., Corporations, §§ 37, 49, 50.

46-8-44. Subscription to capital stock; par value of stock; subscription to all capital stock as prerequisite to beginning railroad construction.

(a) When the certificate of incorporation has been issued, the persons named therein, in case they have not subscribed to the entire capital stock, may open books of subscription to complete the subscription to the capital stock of the company, in such places and after giving such notice as they may deem expedient, and may from time to time receive subscriptions until all of the capital stock is subscribed to.

(b) The capital stock of the company shall be divided into shares of \$100.00 each.

(c) The company shall not begin the construction of the railroad until all of the capital stock specified in the petition for incorporation has been subscribed to. (Ga. L. 1892, p. 37, § 4; Civil Code 1895, §§ 2162, 2164; Civil Code 1910, §§ 2580, 2582; Code 1933, § 94-201.)

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, §§ 222, 452, 505, 587, 589.

C.J.S. — 18 C.J.S., Corporations, §§ 41, 42, 131. 74 C.J.S., Railroads, § 35.

46-8-45. Payment of subscriptions; procedure by directors in case of default by subscriber.

(a) The directors may require the subscribers to the capital stock to pay the amounts variously subscribed by them, in such installments as they may deem proper; and the directors may receive cash or property, either real or personal, at the agreed value thereof, in payment of such installments.

(b) If any subscriber neglects to pay any installment as required by resolution of the board of directors, the directors may direct an action to be brought against him forthwith for the amount of such call or may in their discretion, after 30 days' notice to such stockholder, cause his stock, after such advertisement as may seem to them proper, to be put up at auction and sold to the highest bidder for cash. If the proceeds of sale are less than the amount of the call, the delinquent shall pay the difference; and any surplus over the amount of the call and the expenses of the advertisement and sale shall be paid to him. A new certificate of stock shall be issued to the purchaser, and he shall stand in the same relation to the company as the delinquent would have stood had he not defaulted. Such sale shall be in the city where the principal office of the company may be located, at such time and place as the board of directors may prescribe.

(c) If for any reason it is not practicable to serve such delinquent stockholder with notice of such sale personally or by mail, or if he is a nonresident of this state, notice may be given by publication in any

newspaper published in the city where the principal office of such company may be located, once a week for four weeks prior to the date of such sale.

(d) The company may collect from delinquent subscribers by sale of the stock, by civil action, or by both remedies. (Ga. L. 1892, p. 37, § 6; Civil Code 1895, § 2164; Civil Code 1910, § 2582; Code 1933, § 94-202; Ga. L. 1982, p. 3, § 46.)

JUDICIAL DECISIONS

Cited in *Heist v. Dunlap & Co.*, 193 Ga. 462, 18 S.E.2d 837 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, § 20. 18A Am. Jur. 2d, Corporations, §§ 494-504, 586, 608, 611, 643, 644, 647-649, 651-653, 660-669, 677-680.

C.J.S. — 18 C.J.S., Corporations, §§ 43, 212-216. 74 C.J.S., Railroads, §§ 39, 40.

46-8-46. Procedures regarding organizational meeting; qualifications of directors; selection of officers and agents; annual election of directors; filling of vacancies on board.

(a) When all of the capital stock has been subscribed to, the persons named in the certificate of incorporation or a majority of them are authorized to call a meeting of the stockholders for the purpose of organization, which meeting shall be held in the city in which the principal office of the company is located, and of which meeting every subscribing stockholder shall be given notice. At the meeting, persons holding a majority of the stock subscribed to shall constitute a quorum, and there shall be elected a board of directors of not less than three to manage the affairs of the company. Stock shall be represented at the meeting in person or by written proxy, each share of stock being entitled to one vote, and a plurality of votes cast being necessary to elect, said election to be governed by such bylaws as the company may prescribe, and the persons elected as directors to continue in office until others are elected to fill their places. If for any reason the election is not held at the time appointed, the same may be held at any time thereafter, of which meeting every subscribing stockholder shall be given notice. Notice of any organizational meeting under this Code section shall be effected by giving to each stockholder written notification stating the purpose of the meeting, served upon the stockholder personally or by depositing the notice in the post office, postage prepaid, directed to the stockholder at the post office nearest his usual residence, at least ten days before the meeting.

(b) Directors of railroad corporations shall be natural persons of at least 18 years of age but need not be residents of this state or shareholders of the

corporation unless the charter or bylaws so require. The charter or bylaws may prescribe additional qualifications for directors.

(c) Except as provided in subsection (b) of Code Section 46-8-50, the board of directors shall select from their number a president, may elect one or more vice-presidents, and may appoint a secretary, a treasurer, and such other officers and agents as they may deem necessary.

(d) The regular election for directors shall be held annually, and, unless the bylaws otherwise provide, the meeting at which such elections are held may be held within or without the state.

(e) Vacancies in the board of directors occasioned by death, resignation, or otherwise shall be filled in such manner as shall be prescribed by the bylaws of the company. (Ga. L. 1892, p. 37, § 5; Civil Code 1895, § 2163; Civil Code 1910, § 2581; Code 1933, § 94-203; Ga. L. 1969, p. 589, §§ 1, 8; Ga. L. 1983, p. 445, § 1.)

JUDICIAL DECISIONS

Stockholders may fill vacancy where number of directors falls below minimum. — Where the directors are reduced by death below the minimum number prescribed by the charter, and there is no provision in the charter or by-laws for filling the vacancy by the directors, the stockholders may supply the vacancy. *Sylvania & G.R.R. v. Hoge*, 129 Ga. 734, 59 S.E. 806 (1907).

Presence of majority not necessary. — Where stockholders attend a regular annual meeting of stockholders provided for in former Civil Code 1895, § 2163 (see O.C.G.A. § 46-8-46), they may transact the business of that meeting, and elect officers, although a majority in interest or in number of the stockholders were not present. *Sylvania & G.R.R. v. Hoge*, 129 Ga. 734, 59 S.E. 806 (1907).

Absent shareholder loses only right to participate in meeting. — Shareholder who designedly absents oneself from stockholders' meeting surrenders no right appertaining to ownership of that person's stock, except the right to participate in the meeting which the shareholder refuses to attend.

Sylvania & G.R.R. v. Hoge, 129 Ga. 734, 59 S.E. 806 (1907).

Meeting of old board not reelection upon failure to hold stockholders' meeting. — Where stockholders have failed to hold a regular annual stockholders' meeting and elect directors, a meeting of the old board of directors on the day when the stockholders should have acted, in which they resolve to hold over until their successors are elected, is not in effect a reelection of them by the stockholders for another term. *Sylvania & G.R.R. v. Hoge*, 129 Ga. 734, 59 S.E. 806 (1907).

Mandamus available to compel election. — If at any meeting the stockholders fail or refuse to elect directors, any stockholder may by mandamus compel the corporation and the directors holding over to call a meeting for the purpose of electing a board of directors. *Sylvania & G.R.R. v. Hoge*, 129 Ga. 734, 59 S.E. 806 (1907).

Cited in English v. Rosenkrantz, 152 Ga. 726, 111 S.E. 198 (1922); *Salomon v. Central of Ga. Ry.*, 220 Ga. 671, 141 S.E.2d 424 (1965).

OPINIONS OF THE ATTORNEY GENERAL

Applicability of §§ 46-8-46 through 46-8-51 to railroads incorporated under Art. 12, Ch. 8, T. 46. — Provisions of Senate Bill 73, Act. No. 436 (1969) (see O.C.G.A.

§§ 46-8-47 through 46-8-51) apply to railroad companies incorporated under former Code 1933, Ch. 94-10 (see O.C.G.A. Art. 12, Ch. 8, T. 46), dealing with street and inter-

urban railways. 1969 Op. Att'y Gen. No. 69-290.

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, §§ 220, 221, 953-956, 963-966, 969-983, 993-997, 1004, 1006, 1019, 1020, 1069-1080. 18B Am. Jur. 2d, Corporations, §§ 1349-1360, 1362, 1363, 1365, 1366, 1368-1370, 1372, 1379, 1381, 1386, 1395, 1396, 1399, 1400, 1436.

C.J.S. — 18 C.J.S., Corporations, §§ 363-367, 369, 370, 375-378, 383, 385-393. 74 C.J.S., Railroads, §§ 41, 42, 43 et seq. 19 C.J.S., Corporations, §§ 434-444, 447, 448, 451.

46-8-47. Determination of directors' compensation; appointment of chairman and vice-presidents; time and place of board meetings; procedures regarding board meetings.

(a) The board of directors shall have the authority to fix the compensation of directors for services in any capacity unless otherwise provided in the charter or the bylaws.

(b) The board of directors may select or appoint one of their number to be chairman of the board of directors. The chairman of the board of directors or the president may appoint such vice-presidents as he deems necessary and prescribe their terms of office, compensation, and duties when authorized to do so by the bylaws of the corporation.

(c) Unless the bylaws otherwise provide, meetings of the board of directors, whether regular or special, may be held within or without this state. The time and place for holding meetings of the board of directors may be fixed by or under the bylaws, or, if not so fixed, by the board.

(d) Regular meetings of the board of directors may be held with or without notice, as may be prescribed in the bylaws. Special meetings of the board of directors shall be held upon such notice as is prescribed in the bylaws. Unless otherwise prescribed in the bylaws, written notice of the time and place of special meetings of the board of directors shall be given to each director either by personal delivery or by mail, telegram, cablegram, or radiogram at least two days before the meeting.

(e) Notice of a meeting of the board of directors need not be given to any director who signs a waiver of notice either before, during, or after a meeting. Attendance of a director at a meeting shall constitute a waiver of notice of such meeting and a waiver of all objections to the place of the meeting, the time of the meeting, and the manner in which it was called or convened, provided that a director may state at the beginning of the meeting any such objection to the transaction of business.

(f) Neither the business to be transacted at nor the purpose of any regular or special meeting of the board of directors need be specified in the notice or waiver of notice of such meeting, unless required by the bylaws.

(g) A majority of the directors present, whether or not a quorum exists, may adjourn any meeting of the board of directors to another time and place. Unless the bylaws otherwise provide, notice of any such adjourned meeting shall be given to the directors who were not present at the time of the adjournment and, unless the time and place of the adjourned meeting are announced at the time of the adjournment, to the other directors.

(h) Meetings of the board of directors may be called as prescribed by the bylaws or, if there is no such provision in the bylaws, by the chairman of the board, or, if there is no chairman, by the president of the company.

(i) Unless the articles of incorporation or the bylaws provide that a different number shall constitute a quorum, a majority of the number of directors fixed by the bylaws, or, in the absence of a bylaw fixing the number of directors, then of the number stated in the articles of incorporation or of the number last fixed by the shareholders, shall constitute a quorum for the transaction of business. In no case shall less than one-third of the total number of directors or fewer than two directors constitute a quorum.

(j) The vote of a majority of the directors present at the time of the vote, if a quorum is present at such time, shall be the act of the board of directors, unless the vote of a greater number is required by the articles of incorporation or the bylaws. (Ga. L. 1969, p. 589, §§ 3, 8.)

OPINIONS OF THE ATTORNEY GENERAL

Applicability of §§ 46-8-46 through 46-8-51 to railroads incorporated under Art. 12, Ch. 8, T. 46. — Provisions of Senate Bill 73, Act. No. 436 (1969) (see O.C.G.A. §§ 46-8-46 through 46-8-51 applied to rail-

road companies incorporated under former Code 1933, Ch. 94-10 (see O.C.G.A. Art. 12, Ch. 8, T. 46), dealing with street and inter-urban railways. 1969 Op. Att'y Gen. No. 69-290.

RESEARCH REFERENCES

Am. Jur. 2d. — 18B Am. Jur. 2d, Corporations, §§ 1360, 1475, 1464-1467, 1470, 1471, 1476, 1452-1457, 1459-1463.

C.J.S. — 19 C.J.S., Corporations, §§ 443, 462-464, 466.

46-8-48. Creation of executive committee and other committees; powers of committees; designation of alternate members of committees; committee action by majority vote.

(a) If the charter or the bylaws of a railroad company incorporated under the laws of this state so provide, the board of directors, by resolution adopted by a majority of the full board of directors, may designate from among its members an executive committee and one or more other committees, each consisting of three or more directors, and each of which, to the extent provided in such resolution or in the charter or the bylaws of the corporation, shall have and may exercise all the authority of the board

of directors, provided that no such committee shall have the authority of the board of directors in reference to:

- (1) Amending the charter or the bylaws of the corporation;
- (2) Adopting a plan of merger or consolidation;
- (3) The sale, lease, exchange, or other disposition of all or substantially all the property and assets of the corporation; or
- (4) A voluntary dissolution of the corporation or a revocation thereof.

(b) The board, by resolution adopted in accordance with subsection (a) of this Code section, may designate one or more directors as alternate members of any such committee, which director may act in place of any absent member at any meeting of such committee.

(c) Unless otherwise provided in the charter or the bylaws, or unless otherwise ordered by the board of directors, any such committee shall act by a majority of its members.

(d) The designation of any such committee and the delegation thereto of authority shall not operate to relieve the board of directors or any member thereof of any responsibility imposed by law. (Ga. L. 1969, p. 589, § 4.)

OPINIONS OF THE ATTORNEY GENERAL

Applicability of §§ 46-8-46 through 46-8-51 to railroads incorporated under Art. 12, Ch. 8, T. 46. — Provisions of Senate Bill 73, Act No. 436 (1969) (see O.C.G.A. §§ 46-8-46 through 46-8-51) applied to rail-

road companies incorporated under former Code 1933, Ch. 94-10 (see O.C.G.A. Art. 12, Ch. 8, T. 46), dealing with street and inter-urban railways. 1969 Op. Att'y Gen. No. 69-290.

RESEARCH REFERENCES

Am. Jur. 2d. — 18B Am. Jur. 2d, Corporations, §§ 1507, 1508, 1510-1512, 1519.

C.J.S. — 19 C.J.S., Corporations, §§ 473, 474.

46-8-49. Action by board or committee thereof or by shareholder or committee thereof by written consent of members without meeting.

(a) Unless otherwise provided by the charter or bylaws, any action required by this title to be taken by a railroad company at a meeting of the directors of the corporation, or any action which may be taken at a meeting of the directors or of a committee thereof, may be taken without a meeting if written consent setting forth the action so taken is signed by all the directors, or all the members of the committee, as the case may be, and filed with the minutes of the proceedings of the board or of the committee. Such consent shall have the same force and effect as a unanimous vote and may

be stated as such in any articles or any document filed with any official of the state under this title.

(b) Unless otherwise provided by the charter or bylaws, any action required by the shareholders of a railroad company or any committee thereof may be taken at a meeting of the shareholders. Any action which may be taken at a meeting of the shareholders or by a committee thereof may be taken without a meeting if written consent setting forth the action so taken is signed by all the shareholders or all the members of the committee, as the case may be, and filed with the minutes of the proceedings of the shareholders or committee. Such consent shall have the same force and effect as a unanimous vote and may be stated as such in any articles or documents filed with any official of this state under this title. (Ga. L. 1969, p. 589, § 5; Ga. L. 1983, p. 445, § 2.)

OPINIONS OF THE ATTORNEY GENERAL

Applicability to §§ 46-8-46 through 46-8-51 to railroads incorporated under Art. 12, Ch. 8, T. 46. — Provisions of Senate Bill 73, Act No. 436 (1969) (see O.C.G.A. §§ 46-8-46 through 46-8-51) applied to rail-

road companies incorporated under former Code 1933, Ch. 94-10 (see O.C.G.A. Art. 12, Ch. 8, T. 46), dealing with street and inter-urban railways. 1969 Op. Att'y Gen. No. 69-290.

RESEARCH REFERENCES

Am. Jur. 2d. — 18B Am. Jur. 2d, Corporations, §§ 1448-1450.

C.J.S. — 19 C.J.S., Corporations, § 462.

46-8-50. Combination of offices of corporation; election of officers by shareholders; terms of office; powers and duties of officers; authority of chairman or president as to legal proceedings.

(a) Any two or more offices provided for by Code Section 46-8-46 may be held by the same person, except the offices of president and secretary.

(b) The charter granted to any railroad corporation under this chapter may provide that all officers or certain specified officers shall be elected by the shareholders instead of by the board of directors.

(c) Unless otherwise provided in the charter, bylaws, or resolution of the board of directors, all officers shall be elected or appointed for a term of office running until the meeting of the board following the next annual meeting of shareholders or, in the case of officers elected by the shareholders, until the next annual meeting of shareholders.

(d) Each officer shall hold office for the term for which he is elected or appointed and until his successor has been elected or appointed and has qualified.

(e) All officers and agents of a railroad company shall have such authority and shall perform such duties in the management of the

corporation as may be provided in the bylaws or as may be determined by action of the board of directors not inconsistent with the bylaws.

(f) The chairman of the board of directors or the president of the company shall have authority to institute or defend legal proceedings by or against the company either when the directors are in disagreement or when circumstances require action in the name of the company before a meeting of the board of directors can be called. (Ga. L. 1969, p. 589, § 6.)

OPINIONS OF THE ATTORNEY GENERAL

Applicability of §§ 46-8-46 through 46-8-51 to railroads incorporated under Art. 12, Ch. 8, T. 46. — Provisions of Senate Bill 73, Act No. 436 (1969) (see O.C.G.A. §§ 46-8-46 through 46-8-51) applied to rail-

road companies incorporated under former Code 1933, Ch. 94-10 (see O.C.G.A. Art. 12, Ch. 8, T. 46), dealing with street and inter-urban railways. 1969 Op. Att'y Gen. No. 69-290.

RESEARCH REFERENCES

Am. Jur. 2d. — 18B Am. Jur. 2d, Corporations, §§ 1360, 1395, 1396, 1399, 1521, 1523, 1525, 1566-1568.

C.J.S. — 19 C.J.S., Corporations, §§ 443, 447, 448, 450, 451, 468, 629.

46-8-51. Indemnification of persons by railroad corporation; advance of expenses; insuring against liabilities; reports of payments to shareholders; provisions eliminating or limiting liability of director.

(a) A railroad corporation shall have power to indemnify persons, to advance expenses prior to final disposition, and to insure against liabilities and expenses of any proceeding to the full extent permitted by Code Sections 14-2-850 through 14-2-859; provided, however, that such corporation shall comply with the requirements of Code Section 14-2-1621 with respect to reports of such payments to shareholders.

(b) The charter or articles of incorporation of a railroad corporation may, as a matter of election, also set forth a provision eliminating or limiting the personal liability of a director to the railroad corporation or its shareholders for monetary damages for breach of duty of care or other duty as a director, provided that such provision shall not eliminate or limit the liability of a director:

- (1) For any appropriation, in violation of his duties, of any business opportunity of the corporation;
- (2) For acts or omissions which involve intentional misconduct or a knowing violation of law;
- (3) For the types of liability set forth in Code Section 14-2-832; or
- (4) For any transaction from which the director derived an improper personal benefit.

No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. (Ga. L. 1969, p. 589, § 7; Ga. L. 1982, p. 3, § 46; Ga. L. 1987, p. 849, § 6; Ga. L. 1989, p. 946, § 114.)

OPINIONS OF THE ATTORNEY GENERAL

Applicability of §§ 46-8-46 through 46-8-51 to railroads incorporated under Art. 12, Ch. 8, T. 46. — Provisions of Senate Bill 73, Act No. 436 (1969) (see O.C.G.A. §§ 46-8-47 through 46-8-51) applied to rail-

road companies incorporated under former Code 1933, Ch. 94-10 (see O.C.G.A. Art. 12, Ch. 8, T. 46), dealing with street and inter-urban railways. 1969 Op. Att'y Gen. No. 69-290.

RESEARCH REFERENCES

Am. Jur. 2d. — 18B Am. Jur. 2d, Corporations, §§ 1897, 1898.

C.J.S. — 3 C.J.S., Agency, §§ 303, 305, 306.

46-8-52. Exemption of property of stockholders from debts or liabilities of corporation.

All property, whether real or personal, of any stockholder in this state shall be exempt from the debts or liabilities of a railroad corporation, provided that this exemption shall not operate as to the amount of the unpaid subscription of the stockholder to the capital stock of the corporation. (Ga. L. 1892, p. 37, § 7; Civil Code 1895, § 2165; Civil Code 1910, § 2583; Code 1933, § 94-205.)

JUDICIAL DECISIONS

Cited in *Hilton v. Sylvania & G.R.R.*, 8 Ga. App. 10, 68 S.E. 746 (1910).

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 20, 25, 55-57. 18A Am. Jur. 2d, Corporations, §§ 850-852, 855-857, 859-861, 863-915, 917-924.

C.J.S. — 18 C.J.S., Corporations, §§ 414-421, 423-432. 74 C.J.S., Railroads, §§ 41, 42. 19 C.J.S., Corporations, § 498.

46-8-53. Procedure for issuing bonds or increasing capital stock.

In no case shall a railroad corporation issue bonds or increase its capital stock except by a vote of two-thirds of the capital stock of the corporation represented at an annual or special meeting of stockholders called for that purpose, and after each stockholder has been notified in the manner prescribed by the bylaws. In addition to such notice, there shall be published in a newspaper in the city where the principal office of the corporation is located, once a week for four weeks prior to the meeting, a notice stating that an increase of the stock or an issuance of bonds for the

road, or both, will be considered at the meeting. No action contemplated under this Code section as to an increase of stock or the issuance of bonds shall be legal unless there is represented at the meeting, in person or by written proxy, a majority of the stock. (Ga. L. 1892, p. 37, § 7; Civil Code 1895, § 2165; Civil Code 1910, § 2583; Code 1933, § 94-206.)

JUDICIAL DECISIONS

Section not applicable to amendment of charter under § 46-8-54. — Requirement of former Civil Code 1895, § 2165 (see O.C.G.A. § 46-8-53) for two-thirds vote had no application to amendment of charter under former Civil Code 1895, § 2178 (see O.C.G.A. § 46-8-54). *Alexander v. Atlanta & W.P.R.R.*, 108 Ga. 151, 33 S.E. 866 (1899).

Waiver of notice by railroad stockholders as to meeting creating bonded indebtedness.

— Provision of former Civil Code 1910, § 2583 (see O.C.G.A. § 46-8-532) requiring notice of meeting of stockholders of railroad to authorize creation of bonded indebtedness may be waived by them so far as their interest was concerned. *Georgia G.R.R. v. Miller*, 144 Ga. 665, 87 S.E. 897 (1916).

Cited in *Hilton v. Sylvania & G.R.R.*, 8 Ga. App. 10, 68 S.E. 746 (1910); *Heist v. Dunlap & Co.*, 193 Ga. 462, 18 S.E.2d 837 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, §§ 466-469, 551, 973, 974.

C.J.S. — 74 C.J.S., Railroads, §§ 39, 40.

46-8-54. Adoption of title by railroad companies incorporated, or by persons owning or operating a railroad, prior to December 17, 1892.

(a) Any railroad company incorporated before December 17, 1892, whether by Act of the General Assembly incorporating the same by name or under the general railroad law of the state, may amend its charter either by adopting the provisions of this title or by extending its corporate existence for a period of 50 years from the time of the expiration of its original charter. When any such company shall so amend its charter, it may retain its original organization and the same amount of capital stock provided for in its original charter, and any other powers and privileges, except exemption from taxation, granted in its original charter, which may not be in conflict with this title or any other law relating to the powers and duties of railroad companies, and such amendments shall be without prejudice to any of its prior rights or contracts. The provisions of this title may also be adopted by any persons owning or operating a railroad in this state as of December 17, 1892, without prejudice to such organization as they may have already effected and without prejudice to their existing contracts and obligations.

(b) Whenever any railroad company desires to amend its charter, or whenever any persons desire to adopt the provisions of this title as provided in this Code section, it or they shall file a petition with the Secretary of State setting forth particularly in what manner it is desired to amend such charter or adopt the provisions of this title. When such petition is filed, the

Secretary of State shall issue to the company or persons, under the great seal of the state, a certificate setting forth the manner in which the charter is amended, if the petition is for amendment; or, if the petition is to adopt the provisions of this title, then the Secretary of State shall issue a certificate setting forth that said persons are a body corporate with all the powers, duties, and liabilities provided in this title. Before the certificate shall issue, the petitioner or petitioners shall pay to the Secretary of State the fee provided for in Code Section 14-4-183. (Ga. L. 1892, p. 37, § 17; Civil Code 1895, § 2178; Civil Code 1910, § 2596; Code 1933, § 94-317.)

JUDICIAL DECISIONS

Charter amendment held valid. — A 1970 charter amendment authorizing a railroad company, originally chartered by the General Assembly in 1847, to amend its charter by a vote of the majority of its stockholders, which amendment was approved by all 21,205 shares present, none dissenting, was valid and, therefore, that company's share-

holder action was now governed by majority vote. *Long v. Atlanta & W.P.R.R.*, 253 Ga. 257, 320 S.E.2d 530 (1984).

Cited in *Alexander v. Atlanta & W.P.R.R.*, 108 Ga. 151, 33 S.E. 866 (1899); *Gardner v. Georgia R.R. & Banking Co.*, 117 Ga. 522, 43 S.E. 863 (1903).

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, § 79. 19 Am. Jur. 2d, Corporations, §§ 2914, 2915, 2917, 2919.

C.J.S. — 18 C.J.S., Corporations, §§ 44,

53-61. 74 C.J.S., Railroads, § 54 et seq.

ALR. — Grant of perpetual franchise to public service corporation, 2 ALR 1105.

46-8-55. Standard of care for directors and officers in discharge of duties; reliance upon financial information.

(a)(1) A director shall discharge his duties as a director, including his duties as a member of a committee:

(A) In good faith; and

(B) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(2) In discharging his duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(A) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(B) Legal counsel, public accountants, investment bankers, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or

(C) A committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

(3) A director is not acting in good faith if he has knowledge concerning the matter in question that makes unwarranted the reliance otherwise permitted by paragraph (2) of this subsection.

(4) A director is not liable for any action taken as a director or any failure to take any action if he performed the duties of his office in compliance with this subsection.

(b)(1) An officer with discretionary authority shall discharge his duties under that authority:

(A) In good faith; and

(B) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(2) In discharging his duties, an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(A) One or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or

(B) Legal counsel, public accountants, investment bankers, or other persons as to matters the officer reasonably believes are within the person's professional or expert competence.

(3) An officer is not acting in good faith if he has knowledge concerning the matter in question that makes unwarranted the reliance otherwise permitted by paragraph (2) of this subsection.

(4) An officer is not liable for any action as an officer or any failure to take any action if he performed the duties of his office in compliance with this subsection.

(c) This Code section shall not relieve any director or officer from liability for the payment of taxes. (Code 1981, § 46-8-55, enacted by Ga. L. 1987, p. 849, § 7.)

PART 2

CONSOLIDATION, MERGER, SURRENDER OF FRANCHISE, AND DISSOLUTION OF COMPANIES

46-8-70. Application by railroad company that company surrender its franchises and cease performing as a common carrier; hearing before commission; effect of outstanding debts on company.

(a) Any railroad corporation chartered by the Secretary of State and owning and operating in this state any railroad, other than a street railroad,

not over five miles long may cease, temporarily or permanently, to exercise its franchises and to perform its duties as a common carrier and may surrender its franchises to the state by order of the commission.

(b) Before any such order under subsection (a) of this Code section shall be granted, such corporation shall file with the commission an application for the same, verified by the affidavit of the president and secretary of such corporation, containing a copy of a resolution adopted by a unanimous vote of the stockholders of such corporation authorizing such application.

(c) The commission shall fix a date for the hearing of such application, and before such date such application shall be published once a week for four weeks in the official organ of each county through which said railroad may run.

(d) The commission shall have authority to investigate fully the matter of such application and to grant such an order if it concludes that the condition of the affairs of such corporation and the public convenience warrant it. No such railroad company shall be allowed to surrender its franchises as provided in this Code section so long as it owes any debts whatever. (Ga. L. 1918, p. 211, §§ 1-4; Code 1933, §§ 94-324, 94-325, 94-326, 94-327.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2738, 2739, 2748, 2750-2752, 2805.
C.J.S. — 19 C.J.S., Corporations, §§ 813-815, 829, 838. 74 C.J.S., Railroads, §§ 26, 54 et seq.

46-8-71. Dissolution of railroad corporation generally.

A railroad corporation which is organized under the laws of this state and chartered by the Secretary of State and which has surrendered its franchises to the state in accordance with Code Section 46-8-70 or which has sold its property, rights, and franchises to another corporation in accordance with Code Section 46-8-106, and which has satisfied all its outstanding debts and obligations, or which has arranged for all its outstanding debts and obligations to be assumed by the transferee of its property, rights, and franchises, may be dissolved in the manner provided in Code Sections 46-8-72 through 46-8-79. (Ga. L. 1953, Nov.-Dec. Sess., p. 213, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2735, 2738, 2739, 2745.
C.J.S. — 19 C.J.S., Corporations, §§ 811, 812, 813, 835, 837. 74 C.J.S., Railroads, § 54 et seq.

46-8-72. Adoption of resolution for dissolution by board of directors; meeting of stockholders to consider resolution; filing of petition for dissolution with Secretary of State.

If the board of directors of a railroad corporation organized under the laws of this state deems it desirable that the corporation be dissolved, the board of directors may adopt a resolution to that effect and may call a meeting of the stockholders having voting powers to consider a proposal to dissolve and to take action upon the resolution so adopted. Such meeting of the stockholders shall be held upon notice given in the manner provided in Code Section 46-8-46 for notice of organization meetings of railroad corporations or upon written waiver of notice. If at such meeting or any adjournment thereof the holders of record of two-thirds of all the stock entitled to vote thereon determine that the dissolution should take place, a petition for dissolution shall be filed in triplicate with the Secretary of State. (Ga. L. 1953, Nov.-Dec. Sess., p. 213, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2748, 2751, 2754-2756.

C.J.S. — 19 C.J.S., Corporations, §§ 813, 814.

46-8-73. Contents of petition for dissolution; certification resolution recommending dissolution; attachment of resolution to petition; verification of petition; fee for filing petition.

(a) The petition for dissolution shall include:

- (1) The name of the corporation;
- (2) The date upon which its charter was granted;
- (3) A statement that it no longer is possessed of any franchises to operate in this or any other state;
- (4) A statement that all of its debts, liabilities, and obligations have been satisfied or that such debts, liabilities, and obligations have been assumed by the transferee of its property, rights, and franchises; and
- (5) A statement that the transfer or surrender of its franchises has been completed in accordance with an order of the Public Service Commission.

(b) A copy of the stockholders' resolution recommending dissolution shall be certified by the secretary of the corporation and attached to the petition. The petition shall be verified by the president and the treasurer of the corporation.

(c) On filing the petition, the corporation shall pay to the Secretary of State a fee of \$100.00 to be deposited by him into the general fund of the

state treasury. (Ga. L. 1953, Nov.-Dec. Sess., p. 213, § 3; Ga. L. 1982, p. 3, § 46.)

RESEARCH REFERENCES

C.J.S. — 19 C.J.S., Corporations, § 838.

46-8-74. Advertisement of petition for dissolution.

When the petition for dissolution is filed, the Secretary of State shall certify one of the copies thereof and shall deliver the same to the corporation, which shall cause the certified copy to be published once a week for four weeks in the official organ of the county in which the corporation has its principal office. (Ga. L. 1953, Nov.-Dec. Sess., p. 213, § 4.)

46-8-75. Transfer of copy of petition from Secretary of State to commission.

Immediately upon the filing of the petition for dissolution, the Secretary of State shall transmit one copy thereof to the Public Service Commission for investigation. (Ga. L. 1953, Nov.-Dec. Sess., p. 213, § 5; Ga. L. 1982, p. 3, § 46.)

46-8-76. Investigation by commission of proposed dissolution; issuance of certificate approving or disapproving application for dissolution; transfer of certificate; filing of duplicate certificate; effect of disapproval.

(a) Upon receipt of the copy of the petition for dissolution, the commission shall immediately investigate or cause an investigation to be made, and shall satisfy itself that:

(1) The surrender of the franchise and charter and the dissolution of the corporation may be allowed without injustice to any stockholder or to any person or corporation having any claim or demand of any character against the corporation seeking dissolution;

(2) That creditors are paid or properly provided for;

(3) That the surrender of the charter and franchises has been authorized by proper corporate action; and

(4) That all requirements of law have been complied with.

(b) Within 30 days after the copy of the petition for dissolution has been filed with the commission, the commission shall issue under its hand and official seal a certificate either approving or disapproving the application, depending upon the results of the investigation, and shall transmit a copy

of the certificate to the Secretary of State, who shall enter the same of record in his office. The commission shall also keep on file a duplicate of the certificate in its own office.

(c) If the commission does not approve the application, no order shall be granted by the Secretary of State dissolving the corporation or authorizing the surrender of its charter. (Ga. L. 1953, Nov.-Dec. Sess., p. 213, § 6.)

RESEARCH REFERENCES

C.J.S. — 19 C.J.S., Corporations, §§ 815, 817.

46-8-77. Certification by judge of the probate court of the fact of advertisement of petition; filing of certificate with Secretary of State.

When the copy of the petition for dissolution has been published as required by Code Section 46-8-74, the corporation may apply to the judge of the probate court of the county in which its principal office is situated for certification of the fact of such publication, and the judge shall certify the fact. The certificate shall thereupon be filed by the corporation in the office of the Secretary of State. (Ga. L. 1953, Nov.-Dec. Sess., p. 213, § 7.)

46-8-78. Order of Secretary of State accepting surrender of charter and franchises and dissolving corporation; recording of petition, certificate of approval, certificate of publication, and order by Secretary of State.

When the certificate of the judge of the probate court is filed with the Secretary of State pursuant to Code Section 46-8-77, and when the certificate of the Public Service Commission approving the application is likewise filed with the Secretary of State, the Secretary of State shall pass an order under the seal of the state accepting the surrender of the charter and franchises and dissolving the corporation. The Secretary of State shall record the petition for dissolution, the certificate of approval of the Public Service Commission, the certificate of the judge of the probate court as to the publication, and an order accepting the surrender of the charter and franchises and dissolving the corporation named in the order. (Ga. L. 1953, Nov.-Dec. Sess., p. 213, § 8; Ga. L. 1982, p. 3, § 46.)

RESEARCH REFERENCES

C.J.S. — 19 C.J.S., Corporations, § 815.

46-8-79. Effect of issuance of order of dissolution and payment of fees.

After the order of dissolution has been issued, and after all fees for filing and certificates have been paid, the corporation shall be dissolved and shall

have no further existence, except as provided in Code Section 14-4-161. (Ga. L. 1953, Nov.-Dec. Sess., p. 213, § 9.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2828-2830, 2834, 2835, 2838-2851, 2854-2867, 2869-2871, 2873-2876, 2880-2893, 2895-2897, 2902-2906, 2908, 2910, 2912. 65

Am. Jur. 2d, Railroads, § 7.

C.J.S. — 19 C.J.S., Corporations, §§ 852-860. 74 C.J.S., Railroads, § 54 et seq.

46-8-80. Contracts between railroad companies for merger, consolidation, lease, or purchase for purposes of connecting the roads of the companies.

Any railroad company incorporated under this chapter shall have the power to make contracts with any other railroad company which has constructed or hereafter constructs any railroad within this state for the purpose of enabling the companies to run their roads in connection with each other and merge their stocks, or to consolidate with each other, or to lease or purchase property and to hold, use, and occupy the same in such manner as they may deem most beneficial to their interests, provided that no railroad shall purchase a competing line of railroad or enter into any contract with a competing line of railroad calculated to defeat or lessen competition in this state. Any violation of this Code section shall subject the corporation to all the penalties incident to such violation of the law. (Ga. L. 1892, p. 37, § 13; Civil Code 1895, § 2173; Civil Code 1910, § 2591; Code 1933, § 94-311.)

JUDICIAL DECISIONS

Lease of franchises lawful. — Under the charter of a railroad company and the amendment thereto adopting the general law including former Civil Code 1895, § 2173 (see O.C.G.A. § 46-8-80) it had lawful authority to lease to another its franchises as to the transportation of both freight and passengers on another road. *Georgia R.R. & Banking Co. v. Maddox*, 116 Ga. 64, 42 S.E. 315 (1902).

Cited in *State v. Central of Ga. Ry.*, 109 Ga.

716, 35 S.E. 37, 48 L.R.A. 351 (1900); *Bridwell v. Gate City Term. Co.*, 127 Ga. 520, 56 S.E. 624, 10 L.R.A. (n.s.) 909 (1907); *Gregory v. Georgia G.R.R.*, 132 Ga. 587, 64 S.E. 686 (1909); *Norman v. Southwestern R.R.*, 42 Ga. App. 812, 157 S.E. 531 (1931); *South W.R.R. v. Benton*, 206 Ga. 770, 58 S.E.2d 905 (1950); *Long v. Atlanta & W.P.R.R.*, 253 Ga. 257, 320 S.E.2d 530 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 55 et seq., 93. 19 Am. Jur. 2d, Corporations, §§ 2608, 2609. 65 Am. Jur. 2d, Railroads, § 198 et seq.

C.J.S. — 19 C.J.S., Corporations, §§ 794,

795. 74 C.J.S., Railroads, §§ 477, 478 et seq.

ALR. — Period covered by covenant or condition subsequent for maintenance of railroad, 7 ALR 817.

46-8-81. Consolidation, merger, lease, or purchase of railroad companies whose roads form a continuous line; issuance of stocks and bonds by consolidated companies.

(a) Any railroad company incorporated under this chapter shall have authority to sell, lease, assign, or transfer its stock, property, and franchises to, or to consolidate the same with those of, any other railroad company which is incorporated under the laws of this or any other state or of the United States and whose railroad within this state connects with or forms a continuous line with the railroad of the company incorporated under this chapter, upon such terms as may be agreed upon. Conversely, any such corporation organized under this chapter may purchase, lease, consolidate with, absorb, and merge into itself the stock, property, and franchises of any other railroad company incorporated under the laws of this or any other state or the United States whose railroad within this state connects with or forms a continuous line or system with the railroad of such company incorporated under this chapter upon such terms as may be agreed upon.

(b) Any railroad corporation formed by the consolidation of one or more railroad corporations, organized under the laws of this state or under the laws of this state and any other states, with one or more corporations, organized under the laws of any other state or under the laws of this and of other states, may issue stocks and bonds as provided for in this chapter in such amounts as it may deem necessary for the purpose of paying, or exchanging the same for, or retiring, any bonds or stocks theretofore issued by either of the corporations so merged, purchased, or consolidated, or for any other purpose. Such stocks and bonds may be issued to the amount authorized by the laws of the state under which either of the corporations so consolidated was organized. Any bonds issued by the corporation may be secured by mortgage or trust deeds upon its real or personal property, franchises, rights, and privileges, whether within or without this state.

(c) No railroad company shall make any contract under this Code section with any other railroad company which is a competing line if such contract is calculated to defeat or lessen competition in this state or to encourage monopoly. (Ga. L. 1892, p. 37, § 18; Civil Code 1895, § 2179; Civil Code 1910, § 2597; Code 1933, § 94-318.)

JUDICIAL DECISIONS

Rights and liabilities of new corporation.

— Where by reason of the consolidation of two corporations one of them goes entirely out of existence, and no arrangements are made respecting the liabilities of the one which ceases to exist, the corporation resulting from such combination will, as a general rule, be entitled to all the property and answerable for all the liabilities of the corpo-

ration thus absorbed. *Tompkins v. Augusta S.R.R.*, 102 Ga. 436, 30 S.E. 992 (1897).

Monopoly not created where consolidating lines both cross same rivers. — Where separate lines of railway start out at a right angle from a seaport, transport freight and passengers from widely separated sections of two states, and no point on either road can be reached in any reasonable time by a

passenger starting out on the other, such consolidation does not tend to defeat competition and create monopoly merely because both lines cross two shallow rivers, on which steamboats carrying freight and passengers occasionally ply. *Dady v. Georgia & Ala. Ry.*, 112 F. 838 (E.D. Ga. 1900).

Majority vote of stock needed. — Under former Civil Code 1895, § 2179 (see O.C.G.A. § 46-8-81) proper corporate action for the purpose of merger and consolidation of railroads was a majority vote of the stock of the corporation. *Dady v. Georgia & Ala. Ry.*, 112 F. 838 (E.D. Ga. 1900).

Validity of vote by corporate officer also member of voting trust. — Where officer of corporation is also member of voting trust, merger or consolidation brought about

through officer's vote is not necessarily void; but the burden is on the interest for which the officer acts to show that the transaction was free from any taint of wrongdoing, bona fide, lawful, and for a fair consideration to the parties, at interest. *Dady v. Georgia & Ala. Ry.*, 112 F. 838 (E.D. Ga. 1900).

Cited in *State v. Central of Ga. Ry.*, 109 Ga. 716, 35 S.E. 37 (1900); *Georgia R.R. & Banking Co. v. Maddox*, 116 Ga. 64, 42 S.E. 315 (1902); *Bridwell v. Gate City Term. Co.*, 127 Ga. 520, 56 S.E. 624, 10 L.R.A. (n.s.) 909 (1907); *Morrison v. Cook*, 146 Ga. 570, 91 S.E. 671 (1917); *South W.R.R. v. Benton*, 206 Ga. 770, 58 S.E.2d 905 (1950); *Long v. Atlanta & W.P.R.R.*, 253 Ga. 257, 320 S.E.2d 530 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 55 et seq., 93. 19 Am. Jur. 2d, Corporations, §§ 2608, 2609, 2629, 2630. 65 Am. Jur. 2d, Railroads, §§ 198 et seq., 207.

C.J.S. — 19 C.J.S., Corporation, §§ 794-796, 809. 74 C.J.S., Railroads, §§ 478

et seq., 485, 486, 487, 490 et seq.

ALR. — Carrier's certificate of convenience and necessity, franchise, or permit as subject to transfer or encumbrance, 15 ALR2d 883.

46-8-82. Forfeiture of powers, privileges, and certificate of incorporation for failure to construct and operate 15 miles of road within three years; extension of time for construction and operation of road.

All the powers and privileges and the certificate of incorporation of a railroad company shall be forfeited at the expiration of three years from the date of the certificate if at the expiration of those three years the company has not constructed and equipped the road, and is not operating the same, for at least 15 miles, or for the entire length of the road if the same is less than 15 miles long, provided that the Secretary of State, for cause shown, may relieve against any forfeiture provided for in this Code section and extend the time of construction, equipment, and operation of said 15 miles of road, or of the entire length of the road if the same is less than 15 miles long, in favor of any such railroad company. Such relief shall not be granted unless applied for within one year after cause for forfeiture has arisen. (Ga. L. 1892, p. 37, § 8; Civil Code 1895, § 2166; Ga. L. 1903, p. 34, § 1; Ga. L. 1910, p. 109, § 1; Civil Code 1910, § 2584; Ga. L. 1913, p. 32, § 1; Code 1933, § 94-302.)

JUDICIAL DECISIONS

Railroads may be more or less than 15 miles in length. — Former Civil Code 1895, § 2166 (see O.C.G.A. § 46-8-82) contemplated that there may be railroads more than

15 miles in length or less than that length. *Bridwell v. Gate City Term. Co.*, 127 Ga. 520, 56 S.E. 624, 10 L.R.A. (n.s.) 909 (1907).

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2794-2799, 2806, 2807. 65 Am. Jur. 2d, Railroads, § 7.

C.J.S. — 19 C.J.S., Corporations, §§ 818, 825, 860. 74 C.J.S., Railroads, §§ 26, 54 et seq., 287.

ALR. — Right of railroad company to use or grant use of land in right of way for other than railroad purpose, 94 ALR 522; 149 ALR 378.

Right of railroad company to discontinue or reduce service on branch line or part of road which is unprofitable, 123 ALR 922.

Who is entitled to land upon its abandonment for railroad purposes, where railroad's original interest or title was less than fee simple absolute, 136 ALR 296.

ARTICLE 4

POWERS OF COMPANIES GENERALLY

46-8-100. General powers.

A railroad company organized and incorporated as provided in this chapter shall be empowered:

(1) To cause such examinations and surveys to be made for the proposed railroad as shall be necessary for the selection of the most advantageous route, and, by its officers, agents, servants, or employees, to enter upon the land or water of any person for that purpose, provided that the company shall be responsible for all damage done to such property;

(2) To take and hold such voluntary grants of real estate and other property as may be made to it to aid in the construction, maintenance, and accommodation of said road; but the real estate received by voluntary grant shall be held and used for the purpose of such grant only;

(3) To acquire, purchase, hold, and use all such real estate and other property as may be necessary for the construction and maintenance of said road and of the stations, wharves, docks, terminal facilities, and all other accommodations necessary to accomplish the object of the corporation; and to condemn, lease, or buy any land necessary for its use;

(4) To lay out its road, not exceeding in width 200 feet, and to construct the same, and, for the purpose of cuttings and embankments and for obtaining gravel and other material, to take as much land as may be necessary for the proper construction, operation, and security of said

road; and to cut down any trees that may be in danger of falling on the track or obstructing the right of way, making compensation therefor as provided by law;

(5) To construct its road across, along, or upon or otherwise to use any stream of water, watercourse, street, highway, or canal which the route of its road intersects or touches, provided that no railroad shall be constructed along and upon any street or highway without the written consent of the municipal or county authorities. Whenever the track of any such railroad shall touch, intersect, or cross any road, highway, or street, it may be carried over or under the road, highway, or street, or cross at a grade level or otherwise, as may be found most expedient for the public good;

(6) To cross, intersect, join, or unite its railroad with any other railroad at any point on its route, or upon the ground of any other railroad company, with the necessary turnouts, sidings, switches, and other conveniences necessary for the construction of said road, and to run over any part of any other railroad's right of way as may be necessary to reach its freight depot in any city through or near which said railroad may run, provided that the crossing of another railroad, either over or under or at grade level or otherwise, shall be at the expense of the company making the crossing, and in such way and manner, and at such time, as not to interfere with the railroad in the operation of its trains or the conduct of its regular business;

(7) To receive and convey persons or property over their railroads by the use of steam, electricity, or any other motive power, and to receive compensation therefor, and to do all things incident to railroad business;

(8) To erect and maintain convenient buildings, wharves, docks, stations, fixtures, and machinery, within or without a city, for the accommodation and use of its passenger and freight business;

(9) To regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor, subject to any law of this state upon the subject, or any rule or regulation governing such matters by the commission;

(10) To borrow such sums of money, at such rates of interest and upon such terms, as the company or its board of directors shall deem necessary or expedient, and to execute trust deeds or mortgages, or both, if the occasion requires, on the railroad in process of construction, or after the same has been constructed, for the amounts borrowed or owed by the company. The company may make such provisions in such trust deed or mortgage for transferring, as security for any bonds, debts, or sums of money secured by such trust deeds or mortgages, its railroad track, depots, grounds, rights, privileges, franchises, immunities, machine shops, roundhouses, rolling stock, furniture, tools, implements, and

appurtenances used in connection with the railroad, then owned by said company, or which thereafter it may acquire, as it thinks proper; and all such deeds of trust and mortgages shall be recorded as provided by law for the record of mortgages, in each county through which the road runs, provided that all rights to borrow money, issue bonds or other evidences of debt, and execute trust deeds or mortgages to secure the same shall be exercised within the limitations and in the manner which shall be prescribed by law, and no debt, trust deed, mortgage, or other lien shall be made or created except on terms and conditions similar to those prescribed in Code Section 46-8-53 for the increase of capital stock or the issuance of bonds. (Ga. L. 1892, p. 37, § 9; Civil Code 1895, § 2167; Civil Code 1910, § 2585; Code 1933, § 94-301; Ga. L. 1982, p. 3, § 46; Ga. L. 1984, p. 22, § 46.)

Cross references. — Authority of railroad companies to operate motor vehicles for hire upon public highways, § 46-7-67.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

AUTHORITY TO HOLD AND USE REAL ESTATE

AUTHORITY TO TAKE LAND FOR RIGHT OF WAY

AUTHORITY TO CONSTRUCT ROAD ALONG STREETS AND WATERWAYS

AUTHORITY TO CROSS OR JOIN OTHER RAILROADS

General Consideration

Cited in Georgia G.R.R. v. Venable, 129 Ga. 341, 58 S.E. 864 (1907); Piedmont Cotton Mills v. Georgia Ry. & Elec. Co., 131 Ga. 129, 62 S.E. 52 (1908); Seaboard Air-Line Ry. v. Blackwell, 143 Ga. 237, 84 S.E. 472, 1917A Ann. Cas. 967 (1915); Harrold v. Central of Ga. Ry., 144 Ga. 199, 86 S.E. 552 (1915); Georgia G.R.R. v. Miller, 144 Ga. 665, 87 S.E. 897 (1916); Savannah River Terms. Co. v. Southern Ry., 148 Ga. 180, 96 S.E. 257 (1918); Townsend v. Georgia Power Co., 44 Ga. App. 132, 160 S.E. 712 (1931); Southern Ry. v. Leonard, 58 Ga. App. 574, 199 S.E. 433 (1938); Atlantic Coast Line R.R. v. Southern Ry., 214 Ga. 178, 104 S.E.2d 77 (1958); Pickett v. Georgia, F. & A.R.R., 98 Ga. App. 709, 106 S.E.2d 285 (1958); Ammons v. Central of Ga. Ry., 215 Ga. 758, 113 S.E.2d 438 (1960); Hightower v. Chattahoochee Indus. R.R., 218 Ga. 122, 126 S.E.2d 664 (1962); Georgia Pub. Serv. Comm'n v. Central of Ga. R.R., 179 Ga. App. 415, 346 S.E.2d 568 (1986).

Authority to Hold and Use Real Estate

Quantity of land necessary for construction of terminals not fixed. — The exact quantity of land that may be necessary for the construction and maintenance of stations, terminal facilities, and the like cannot be definitely fixed, even by prescribing a maximum amount, as in case of the right of way; and therefore the General Assembly prescribed by paragraph (3) of former Civil Code 1895, § 2167 (see O.C.G.A. § 46-8-100) that the company may acquire as much "as may be necessary" for this purpose. Atlantic & B.R.R. v. Penny, 119 Ga. 479, 46 S.E. 665 (1904).

Acceptance by one railroad from another of land lease for terminal yard. — Railroad chartered under general law can accept lease of land for use as terminal yard from another railroad which had power under its charter to make the lease. Georgia R.R. & Banking Co. v. Maddox, 116 Ga. 64, 42 S.E. 315 (1902).

Conveyance by fee-simple of land no longer used for railroad purposes. — It is

immaterial that land has ceased to be used for railroad purposes where deed under which one claims title conveys fee-simple estate, and not a mere easement for railroad purposes. *Woods v. Flanders*, 180 Ga. 835, 181 S.E. 83 (1935).

Construction of safety islands proper. — Municipalities and street railroad companies operating within their limits have the power, without being guilty of maintaining a nuisance or committing thereby an act of negligence per se, to authorize the construction and maintenance of, and to construct and maintain under such municipal authority, what are termed "safety islands" or "safety zones" in streets at the side of a streetcar line, for the use and safety of the public from automobile and other traffic when entering and departing from streetcars. *Butler v. City of Atlanta*, 47 Ga. App. 341, 170 S.E. 539 (1933).

Authority to Take Land for Right of Way

Meaning of right of way. — Right of way is construed as amounting only to an easement appurtenant to the land, however extensive its duration and however exclusive and paramount may be the rights conveyed for the necessary purposes intended. *Central of Ga. Ry. v. Lawley*, 33 Ga. App. 375, 126 S.E. 273, cert. denied, 33 Ga. App. 828 (1925).

Lesser width may be taken. — A railroad company is allowed to appropriate under paragraph (4) of former Civil Code 1895, § 2167 (see O.C.G.A. § 46-8-100) for a right of way a strip of land not exceeding in width 200 feet. Whether a less quantity shall be taken for this purpose is left to the discretion of the company. *Atlantic & B.R.R. v. Penny*, 119 Ga. 479, 46 S.E. 665 (1904).

Condemning power may be exercised against corporate property. — The power of condemnation conferred by paragraphs (3) and (6) of former Civil Code 1895, § 2167 (see O.C.G.A. § 46-8-100) may be exercised by a railroad company to appropriate to its use not only the property of an individual, but also the property of a corporation. *Atlanta & W.P.R.R. v. Atlanta, B. & A.R.R.*, 124 Ga. 125, 52 S.E. 320 (1905).

Condemning power may be exercised against another railroad. — The property of another railroad company may be condemned if the property thus sought to be acquired is not actually used by the other

company for railroad purposes, and will not be needed by that company for such purposes in the immediate future. *Atlanta & W.P.R.R. v. Atlanta, B. & A.R.R.*, 124 Ga. 125, 52 S.E. 320 (1905).

Railroad lessee requires legislative authority to exercise eminent domain. — Lessee of a railroad company cannot exercise power of eminent domain, conferred by the legislature on the lessor, without legislative authority for that purpose. *Harrold v. Central of Ga. Ry.*, 144 Ga. 199, 86 S.E. 552 (1915).

Injunction available against abuse of discretion. — If the company abuses the discretion vested in it by paragraph (4) of former Civil Code 1895, § 2167 (see O.C.G.A. § 46-8-100) and that preceding, a court may grant an injunction. *Atlantic & B.R.R. v. Penny*, 119 Ga. 479, 46 S.E. 665 (1904).

Authority to Construct Road Along Streets and Waterways

Compensation must be paid. — Although the General Assembly may empower a commercial railroad company to occupy the streets of a town or city with the consent of the municipal authorities, yet such permission is subject to the constitutional restraint that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid. *Athens Term. Co. v. Athens Foundry & Mach. Works*, 129 Ga. 393, 58 S.E. 891 (1907).

Use of street limited. — Where by virtue of paragraph (5) of former Civil Code 1895, § 2167 (see O.C.G.A. § 46-8-100), and a contract with the city, the plaintiff had a right to construct and maintain a railroad track through a street, this would not authorize the company to use the street for drilling, switching, or transferring cars. *Atlantic & B. Ry. v. Mayor of Montezuma*, 122 Ga. 1, 49 S.E. 738 (1905).

Injunction not available to abutting lot owner. — Under paragraph (5) of former Civil Code 1895, § 2167 (see O.C.G.A. § 46-8-100), a lot owner cannot enjoin the construction of a railroad along a street on which the owner's lot abuts, with the consent of the city council, on the ground that the contemplated change of grade, also approved by the council, will result in incidental damages to the owner's lot which have not been ascertained or paid. *Whittaker v.*

Authority to Construct Road Along Streets and Waterways (Cont'd)

Atlanta, B. & Atl. R.R., 143 F. 583 (N.D. Ga. 1906).

Railroad must obtain consent of municipality for use of street. — As a general rule, a railroad company must obtain the written consent of the municipal authorities before it can lay a track on any street of a city in this state. *Tift v. Atlantic Coast Line R.R.*, 161 Ga. 432, 131 S.E. 46 (1925).

Municipality's power of consent to construction. — Power to consent to construction of street railroad inhered in municipality under of former Civil Code 1910, § 2585 (see O.C.G.A. § 46-8-100). *Harrold Bros. v. Mayor of Americus*, 142 Ga. 686, 83 S.E. 534 (1914).

Authority to Cross or Join Other Railroads

Paragraph (6) of former Civil Code 1910, § 2585 (see O.C.G.A. § 46-8-100) was not repealed by of former Code 1933, § 93-308 (see O.C.G.A. § 46-8-21), setting forth the power of the Public Service Commission over railroads. *Savannah River Terms. Co. v. Southern Ry.*, 148 Ga. 180, 96 S.E. 257 (1918).

Right to join tracks not absolute. — The right of a railroad company to join its tracks with the tracks of another railroad company is not absolute in all circumstances and without qualification. *Savannah River Terms. Co. v. Southern Ry.*, 148 Ga. 180, 96 S.E. 257 (1918).

Road may be extended into town. — When the charter of a railroad company authorized the construction of the railroad "to" a given town, the company may construct its line of road "into" the town; and if in constructing its road into the town it was necessary to cross the line of another railroad in order to reach its terminal point, it may cross such other railroad under the provisions of former Civil Code 1895, § 2167 (see O.C.G.A. § 46-8-100). *Waycross Air-Line R.R. v. Offerman & W.R.R.*, 109 Ga. 827, 35 S.E. 275 (1900).

Paragraph (6) may be incorporated by charter amendment. — Where a charter was amended in certain specified particulars and also to adopt the provisions of the general railroad law of this state, "as far as applicable," and such application was granted, paragraph (6) of former Civil Code 1895, § 2167 (see O.C.G.A. § 46-8-100) became incorporated into its charter, although under the original charter such right of way could be acquired only by contract, lease, or purchase. *Atlantic & B.R.R. v. Seaboard Air-Line Ry.*, 116 Ga. 412, 42 S.E. 761 (1902).

Amendment to charter allowing railroad to lease another road. — Amendment to charter of railroad by adopting provisions of general law confers on such railroad power to lease another road. *Georgia R.R. & Banking Co. v. Maddox*, 116 Ga. 64, 42 S.E. 315 (1902).

Court may inquire into necessity of connection. — Where a terminal company seeks, under the right of eminent domain, to make an additional connection with the main line track of the other railroad company at a point within the length of a city block from the present switch connection, and, in order to do so, finds it necessary to cross two spur tracks of the railroad company leading from its main line, a court will inquire whether a reasonable necessity exists for the additional connection, and whether the additional connection, if made, will materially interfere with the railroad company in the discharge of its public duties and in the free exercise of its franchises. *Savannah River Terms. Co. v. Southern Ry.*, 148 Ga. 180, 96 S.E. 257 (1918).

Injunction available to restrain crossing. — Where a railroad company is about to cross the track of another railroad company without having acquired the right to do so, it is proper to grant an injunction at the instance of the latter company; but it is error for the court to provide in its order that the defendant company may cross the track of the plaintiff upon condition that it put in a certain described system of switches. *Atlantic & B.R.R. v. Seaboard Air-Line Ry.*, 116 Ga. 412, 42 S.E. 761 (1902).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d., Carriers, §§ 156, 404, 755 et seq., 815 et seq. 18 Am. Jur. 2d., Corporations, §§ 19, 20. 18A Am. Jur. 2d., Corporations, §§ 485, 487, 488,

490-492, 494-515, 518-520, 522-523, 525-539, 541-544, 546-549, 578-581, 583, 584, 586-627, 632-644. 18B Am. Jur. 2d, Corporations, §§ 1957-1960, 1962, 1963, 1968, 1969, 1971-1976, 1979, 1981-1983, 2097, 2113. 26 Am. Jur. 2d, Eminent Domain, §§ 24, 25, 90. 27 Am. Jur. 2d., Eminent Domain, § 927. 65 Am. Jur. 2d, Railroads, §§ 16 et seq., 39, 40 et seq., 68, 75, 82 et seq., 90, 91, 103 et seq., 166 et seq., 236, 241, 242.

C.J.S. — 13 C.J.S., Carriers, §§ 138, 140, 367, 368, 387, 492, 495. 19 C.J.S., Corporations, §§ 672-676, 678-680, 692. 29A C.J.S., Eminent Domain, §§ 24, 37, 38. 74 C.J.S., Railroads, §§ 851, 853, 896, 897 et seq., 971 et seq., 1040 et seq., 1078, 1207 et seq., 1269.

ALR. — Constitutionality of statute requiring railroad to construct and maintain private crossing, 12 ALR 227.

Use of city streets for interurban railway traffic as an additional servitude, 13 ALR 809.

Right to give exclusive privilege of soliciting patronage at railroad stations or on trains, 15 ALR 356.

Spur or switch track as fixture, 21 ALR 1089.

Failure to fence as rendering railroad company liable for damage to or by livestock after leaving right of way, 24 ALR 1057.

Right of railroad company to use right of way for housing or boarding employees or others, 59 ALR 1287.

Right of owner of fee to complain of use of railroad right of way as a place for driving or keeping livestock, 61 ALR 731.

Private railway as additional burden on highway, 61 ALR 1046.

Right of railroad company to prevent operations for gas or oil or other mining operations on right of way, 61 ALR 1068.

Constitutional power to compel railroad company to relocate or reconstruct highway crossing, or to pay or contribute to expense thereof, 62 ALR 815.

Right of railroad company to use or grant use of land in right of way for other than railroad purpose, 94 ALR 522; 149 ALR 378.

Scope and content of term "right of way" as employed in statute relating to taxation, or exemption from taxation, of railroads or railroad property, 108 ALR 242.

Elimination of railroad grade crossing as local improvement for which property spe-

cially benefited may be assessed, 111 ALR 1222.

Right in respect of private crossing in absence of statutory or contractual provision in that regard where land is taken by or deeded to railroad for right of way, 122 ALR 1171.

Nature and extent of interest acquired by railroad in right of way by adverse possession or prescription, 127 ALR 517.

Who entitled to land upon its abandonment for railroad purposes, where railroad's original interest or title was less than fee simple absolute, 136 ALR 296.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.

Condemner's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 ALR2d 724.

Width of way created by express grant, reservation, or exception not specifying width, 28 ALR2d 253.

Spur track and the like as constituting a use for which railroad can validly exercise right of eminent domain, 35 ALR2d 1326.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

What constitutes abandonment of a railroad right of way, 95 ALR2d 468.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 ALR3d 752.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific owner, 26 ALR4th 68.

46-8-101. Contracts between railroad companies for common use of tracks within cities.

Any two or more chartered railroad companies whose lines terminate in the same city may contract to use within the corporate limits the same track in common, with or without common ownership. (Civil Code 1895, § 1865; Civil Code 1910, § 2229; Code 1933, § 94-312.)

JUDICIAL DECISIONS

Cited in *Lovett v. Calloway*, 69 F. Supp. 532 (N.D. Ga. 1946).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, §§ 48, 132. **C.J.S.** — 74 C.J.S., Railroads, §§ 261, et seq., 467, 468.

46-8-102. Construction and operation of vessels by railroad companies.

Railroad companies may build and operate as part of their corporate property such number of vessels as they shall deem necessary to facilitate their business operations. (Ga. L. 1892, p. 37, § 13; Civil Code 1895, § 2174; Civil Code 1910, § 2592; Code 1933, § 94-313; Ga. L. 1982, p. 3, § 46.)

JUDICIAL DECISIONS

Contract to operate steamboat permissible. — There is no public policy which prohibits a railroad company from entering into a contract with a firm, by which the latter is to acquire and operate a steamboat, and each party is to receive and deliver its freight to the other at the usual rates, in consideration of which the railroad company agrees to erect a hoist for the speedy and economical handling of freight between the cars. *Graham & Ward v. Macon, D. & S.R.R.*, 120 Ga. 757, 49 S.E. 75 (1904).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 18. **C.J.S.** — 74 C.J.S., Railroads, § 48 et seq.

46-8-103. Appropriation by railroad corporations of public highways, bridges, and ferries.

Public highways, bridges, or ferries shall not be appropriated by railroads unless express authority is granted by some constitutional provision of their charters. (Orig. Code 1863, § 691; Code 1868, § 753; Code 1873, § 719; Code 1882, § 719; Civil Code 1895, § 2233; Civil Code 1910, § 2686; Code 1933, § 94-306.)

JUDICIAL DECISIONS

Under former Code 1882, § 719 (see O.C.G.A. § 46-8-103) highways included streets. *Davis v. East Tenn., V. & Ga. Ry.*, 87 Ga. 605, 13 S.E. 567 (1891).

City may consent to use of streets for street railway. — Where street railway has power under its charter to lay tracks along streets a city may consent to such use of streets, though it is not expressly authorized by its charter to grant such a privilege. *Almand v. Atlanta Consol. S. Ry.*, 108 Ga. 417, 34 S.E. 6 (1899).

Railroad track connecting two properties may be built across street. — Where a railroad company and another are owners of

property lying upon the opposite sides of, and abutting upon, a street, the fee to which is in them, it is primarily no abuse of discretion for the municipal authorities, holding the mere easement as for a right of way, to authorize such lot owners to so construct across such street a railroad track as to connect the premises of the two respective lot owners; provided the proposed plan of construction be not inconsistent with the reasonable exercise upon the part of the public of its right of way. *Hanbury v. Woodward Lumber Co.*, 98 Ga. 54, 26 S.E. 477 (1895).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, §§ 39, 46.

C.J.S. — 74 C.J.S., Railroads, § 235 et seq.

ALR. — Right in respect of private cross-

ing in absence of statutory or contractual provision in that regard where land is taken by or deeded to railroad for right of way, 122 ALR 1171.

46-8-104. Power of railroad companies to cross other railroads in order to reach minerals, timber, or other materials.

Any railroad company chartered by the General Assembly, and also any person or persons or any company owning or operating a public or private railroad in this state, shall, when necessary to reach minerals, timber, or other materials, have the right to cross any other railroad at grade points or at any other point where such crossing will not obstruct the other road, or, if necessary, by means of a tunnel or bridge, said tunnel or bridge being absolutely secure. (Ga. L. 1870, p. 428, § 1; Code 1873, § 705; Code 1882, § 705; Civil Code 1895, § 2219; Ga. L. 1899, p. 31, § 1; Civil Code 1910, § 2671; Code 1933, § 94-501.)

JUDICIAL DECISIONS

Street-railroad company chartered by General Assembly. — Former Civil Code 1895, § 2219 (see O.C.G.A. § 46-8-104) embraced a street-railroad company whose charter, though granted by the Secretary of State, had been confirmed and made valid by an Act of the General Assembly. A company having such a charter may properly be termed one chartered by the General Assembly. *Southern Ry. v. Atlanta Ry. & Power Co.*,

111 Ga. 679, 36 S.E. 873, 51 L.R.A. 125 (1900).

Applicability to taking by private railroad.

— Even if former Civil Code 1895, § 2219 (see O.C.G.A. § 46-8-104) was construed to authorize the taking of private property by a private railroad for the purpose of crossing another road, and when so construed was a valid and constitutional law, there was no law which provided a method for fixing the

compensation to be paid the owner of the railroad sought to be crossed, when the right to cross was refused. *Garbutt Lumber Co. v. Georgia & A. Ry.*, 111 Ga. 714, 36 S.E. 942 (1900).

Condition attached to crossing. — A railroad corporation which is permitted to construct its tracks across an existing city street or public road does so subject to the condi-

tion that it must submit to the increased inconvenience to it which may result from the growth and development of the city or county and the consequent increase of travel in the usual methods along such street or road. *Southern Ry. v. Atlanta Ry. & Power Co.*, 111 Ga. 679, 36 S.E. 873, 51 L.R.A. 125 (1900).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 166 et seq.

C.J.S. — 74 C.J.S., Railroads, §§ 119 et seq., 303 et seq.

ALR. — Right of railroad at crossing to construct and maintain piers, pillars, or abutments within street or highway, 62 ALR 1519.

Extent and character of use of farm or other private crossing over railroad right of way, 139 ALR 460.

Liability of railroad for injury or damage resulting from motor vehicle striking bridge or underpass because of insufficient vertical clearance, 67 A.L.R.2d 1364.

46-8-105. Effect of adoption of Code Section 46-8-104 by railroad corporations not chartered by General Assembly.

Any public or private railroad availing itself of the privileges of Code Section 46-8-104 shall be subject to such restrictions, liabilities, and penalties as to crossings, and shall be governed by such rules as to crossings, as are provided by law for chartered railroads, provided that where any tram or unchartered road crosses a chartered road, that the company owning or operating the tram or unchartered road may be required to put in the necessary and proper safety switches and signal service on both sides of the chartered road. (Ga. L. 1899, p. 31, § 2; Civil Code 1910, § 2672; Code 1933, § 94-502.)

JUDICIAL DECISIONS

Cited in *Central of Ga. R.R. v. Schnadig Corp.*, 139 Ga. App. 193, 228 S.E.2d 165 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, §§ 271, 273.

C.J.S. — 74 C.J.S., Railroads, §§ 306 et seq., 766, 816 et seq., 821 et seq.

ALR. — Validity and construction of rail-

road stop statute, 2 ALR 156.

Extent and character of use of farm or other private crossing over railroad right of way, 139 ALR 460.

46-8-106. Sale or lease of property, rights, and franchises of railroad corporation upon termination of prior lease; rights acquired by railroad corporation to whom sale or lease is made.

(a) If any railroad corporation organized under the laws of this state has prior to March 10, 1933, leased its property for a long term of years to another corporation, if that lease has terminated, and if the lessor is not a going concern or equipped to conduct the operations of a railroad company, that railroad corporation may sell or lease its property, rights, and franchises to another railroad corporation upon such terms as may be agreed upon by the board of directors of the selling or lessor corporation and assented to by the holders of a majority of its stock.

(b) The railroad corporation to which a sale or lease is made under subsection (a) of this Code section shall acquire all the property, rights, and franchises of the selling or lessor corporation. (Ga. L. 1933, p. 235, §§ 1, 2; Code 1933, §§ 94-328, 94-329.)

JUDICIAL DECISIONS

Cited in *South W.R.R. v. Benton*, 206 Ga. 770, 58 S.E.2d 905 (1950).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, §§ 199, 209, 210, 213, 230.

C.J.S. — 19 C.J.S., Corporations, §§ 794-796, 809. 74 C.J.S., Railroads, §§ 431, 435, 436 et seq., 453.

ALR. — Power of Public Utility Commis-

sion to require railroad company to grant or renew leases or other privileges on its right of way, 47 ALR 109.

Carrier's certificate of convenience and necessity, franchise, or permit as subject to transfer or encumbrance, 15 ALR2d 883.

46-8-107. Sale of railroad under trust deed, upon foreclosure of mortgage, or by judicial decree — Description of rights and privileges to be exercised and enjoyed by purchasers.

If any railroad or any part thereof, either completed or in course of construction, is sold under any trust deed, or upon the foreclosure of any mortgage thereon, or by any judicial sale, the parties acquiring title under such sale and their associates, successors, and assigns shall have and acquire and may exercise and enjoy the same rights, privileges, grants, franchises, immunities, and advantages enumerated in or conveyed by said trust deed or mortgage which belonged to and were enjoyed by the company making such deed or mortgage or contracting such debt, as far as the same relate or appertain to that portion of the road or the part or line thereof mentioned or described and conveyed by the mortgage or trust deed, and no further, as fully and absolutely in all respects as the railroad company, or the officers, shareholders, and agents of such company, might or could have

had, had not such sale or purchase taken place, provided that nothing in this title shall be construed to reserve or authorize the conveyance of any exemption from taxation, either state, municipal, or county, or any special rights, privileges, and immunities that are not authorized by this title to be granted to all railroads alike, in conformity with the Constitution of Georgia. (Ga. L. 1892, p. 37, § 9; Civil Code 1895, § 2167; Civil Code 1910, § 2585; Code 1933, § 94-303.)

Cross references. — Judicial sales generally, § 9-13-140 et seq. Trust deeds, § 44-14-120 et seq. Foreclosure on mortgages, § 44-14-160 et seq.

JUDICIAL DECISIONS

New charter not necessary. — Under former Civil Code 1895, § 2167 (see O.C.G.A. § 46-8-107) the party or parties acquiring by purchase the title to the property and franchise of a railway company, sold under judicial process, may, if they choose, operate the railroad without obtaining a new charter. If they do this, they are, of course, responsible to the public and to their employees for the manner in which their business is conducted. *Watson v. Albany & N. Ry.*, 111 Ga. 10, 36 S.E. 324 (1900).
Cited in *Harrold v. Central of Ga. Ry.*, 144 Ga. 199, 86 S.E. 552 (1915); *Ammons v. Central of Ga. Ry.*, 215 Ga. 758, 113 S.E.2d 438 (1960).

RESEARCH REFERENCES

C.J.S. — 74 C.J.S., Railroads, §§ 436 et seq., 651 et seq. way for local improvements, 37 ALR 219; 82 ALR 425.

ALR. — Assessment of railroad right of

46-8-108. Reorganization of corporation by purchasers or their associates or assigns; procedure for creating liens.

(a) Any party making a purchase under Code Section 46-8-107, or his associates or assigns, may organize anew by filing a petition with the Secretary of State requesting to be substituted for the original petitioners and stockholders, with all their powers, rights, privileges, duties, and liabilities under this title. The petition shall set forth only the facts showing the sale and purchase as provided in Code Section 46-8-107. If the purchasers desire any additional powers not contained in the original charter of the railroad company but which may be obtained under this title, the said petition shall set forth specifically which additional powers are so desired.

(b) The petition shall be verified by one of the purchasers or by his counsel.

(c) When the petition is filed as aforesaid, the Secretary of State shall examine the same and issue a certificate under the great seal of the state in the form prescribed in Code Section 46-8-42, varied to suit the particular case. The petitioners shall pay to the Secretary of State the fee required by Code Section 14-4-183 for the filing of a petition for the renewal of a

charter. Upon their substitution, the new incorporators may proceed anew by electing new directors as provided by this title, may distribute and dispose of stock, and may conduct their business generally as provided by this title; and such purchasers and their associates or assigns shall thereupon be a corporation and shall have all the powers, privileges, and franchises conferred by and shall be subject to Code Section 46-8-100. No debt, trust deeds, mortgages, or other liens shall be made or created by the purchasers except on terms and conditions similar to those prescribed in Code Section 46-8-53 for the increase of capital stock or the insurance of bonds. (Ga. L. 1892, p. 37, § 9; Ga. L. 1894, p. 65, § 1; Civil Code 1895, §§ 2167, 2168; Civil Code 1910, §§ 2585, 2586; Code 1933, §§ 94-304, 94-305.)

Cross references. — Amendments of charter and changes in capitalization of railroad

companies undergoing reorganization in bankruptcy, § 14-4-105.

JUDICIAL DECISIONS

Purchasers may be given right to organize anew. — The purchasers of a railroad may be, under the provisions of former Civil Code 1895, §§ 2167 and 2168 (see O.C.G.A. § 46-8-108), given the right to organize anew by filing the prescribed petition with the Secretary of State; and upon so doing, the “new incorporators” may be further authorized to proceed anew by electing directors, distributing and disposing of stock, and conducting generally the business of the newly-formed corporation. *Watson v. Albany & N. Ry.*, 111 Ga. 10, 36 S.E. 324 (1900).

Meaning of phrase “purchasers shall be corporation”. — The phrase declaring that the “purchasers and their associates shall thereupon be a corporation” means that they shall be a corporation duly authorized to exercise the franchises of a railway company only after having proceeded to elect

directors, etc. *Watson v. Albany & N. Ry.*, 111 Ga. 10, 36 S.E. 324 (1900).

Mere issuance of certificate does not create corporation. — The issuance by the Secretary of State of a certificate of incorporation to those who had purchased at judicial sale the property and franchises of a railway company does not, ipso facto, create a corporation authorized to operate the railroad and exercise the franchises of that company. Such a corporation does not come into complete existence until after organization under the certificate in the manner prescribed by law. *Watson v. Albany & N. Ry.*, 111 Ga. 10, 36 S.E. 324 (1900).

Cited in *Harrold v. Central of Ga. Ry.*, 144 Ga. 199, 86 S.E. 552 (1915); *Norman v. Southwestern R.R.*, 42 Ga. App. 812, 157 S.E. 531 (1931); *Ammons v. Central of Ga. Ry.*, 215 Ga. 758, 113 S.E.2d 438 (1960).

RESEARCH REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d, Corporations, § 212. 19 Am. Jur. 2d, Corporations, § 2700.

C.J.S. — 18 C.J.S., Corporations, § 44. 74 C.J.S., Railroads, §§ 38, 660 et seq., 664, 665.

46-8-109. Exercise by railroad company of rights, franchises, and privileges in another state or in a territory of the United States.

A railroad company incorporated under this chapter may exercise all its rights, franchises, and privileges in any other state or territory of the United States, under and subject to the laws of the state or territory where it may exercise or attempt to exercise the same. A railroad company may accept

from any other state or territory, and use, any other additional power and privilege applicable to the carrying of persons and property by railway, and ships in such state, territory, or on the high seas, or otherwise applicable to the operations of such company as provided in this chapter. (Ga. L. 1892, p. 37, § 14; Civil Code 1895, § 2177; Civil Code 1910, § 2595; Code 1933, § 94-316.)

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 19. **ALR.** — Grant of perpetual franchise to public service corporation, 2 ALR 1105.
C.J.S. — 74 C.J.S., Railroads, § 65.

ARTICLE 5

CONSTRUCTION, IMPROVEMENT, AND REPAIR OF RAIL LINES, DEPOTS, AND ROADS

Cross references. — Requirement that railroad companies pave street crossed by its tracks and pay for other street and utility improvements, §§ 36-39-6, 36-39-7.

46-8-120. Powers of railroad companies generally.

(a) Any railroad company owning or operating a railroad in this state, whether such company is chartered under the laws of this state or under the laws of any other state, is authorized and empowered:

(1) To reconstruct its lines or tracks, to build one or more additional main tracks, to relocate any line or portions of a line, and to build, as a substitute for trestles, embankments upon which tracks may be laid or to widen cuts where necessary for proper construction or maintenance;

(2) For obtaining gravel and other material, to take as much land as may be necessary for the purpose of construction, operation, and maintenance of such road;

(3) To cut any trees that may be in any danger of falling on the tracks or obstructing the right of way, making compensation therefor as provided by law;

(4) To build and maintain such additional depots, tracks, and terminal facilities as may be necessary for the proper accommodation of the business of the company; and

(5) To construct, maintain, and operate tracks for the purpose of connecting two or more lines of railroad operated by the same company not more than ten miles apart.

(b) Notwithstanding subsection (a) of this Code section, no railroad company shall be authorized so to change the location of an existing line as

to leave off of the line of railroad to be operated by it any of the passenger or freight stations now existing under the same without the express approval of the commission. (Ga. L. 1914, p. 144, § 1; Code 1933, § 94-321; Ga. L. 1957, p. 403, § 1.)

JUDICIAL DECISIONS

Approval of Public Service Commission required. — The right of condemnation given by former Code 1933, § 94-321 (see O.C.G.A. §§ 46-8-120 and 46-8-121) cannot be exercised until the Railroad Commission (now Public Service Commission) shall first approve the taking of the property or right of way designated for the public use or uses desired. *Tift v. Atlantic Coast Line R.R.*, 161 Ga. 432, 131 S.E. 46 (1925).

Protection of condemnee's property rights. — Former Code 1933, § 94-321 (see O.C.G.A. § 46-8-120) was for protection of condemnee's property rights, and was a valuable safeguard against the condemnee's property being improvidently taken by railroad companies, and an attempt by a railroad to take the plaintiffs' property without complying with the mandate of the section amounts to an attempt to take the same without due process of law. *Pickett v. Georgia, F. & A.R.R.*, 98 Ga. App. 709, 106 S.E.2d 285 (1958).

Applicability to railroad wanting to improve or replace previously constructed

rights of way. — Former Code 1933, § 94-321 (see O.C.G.A. § 46-8-120) did not apply to original construction, but was applicable to railroads which have previously laid out and constructed their rights of way and wish to improve their lines or relocate their tracks. *Hightower v. Chattahoochee Indus. R.R.*, 218 Ga. 122, 126 S.E.2d 664 (1962).

Acquisition of unimproved land and condemnation of inhabited land by railroads. — Former Code 1933, § 94-321 (see O.C.G.A. § 46-8-120) did not limit acquisition by railroad companies to unimproved land and did not restrict their power to condemn lands on which houses were situated. *Landers v. Georgia Pub. Serv. Comm'n*, 217 Ga. 804, 125 S.E.2d 495 (1962).

Cited in *Ammons v. Central of Ga. Ry.*, 215 Ga. 758, 113 S.E.2d 438 (1960); *Landers v. Georgia Pub. Serv. Comm'n*, 217 Ga. 804, 125 S.E.2d 495 (1962); *City of Doraville v. Southern Ry.*, 227 Ga. 504, 181 S.E.2d 346 (1971).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, §§ 110 et seq., 241 et seq.

C.J.S. — 74 C.J.S., Railroads, §§ 133 et seq., 743 et seq., 783, 802 et seq.

ALR. — Right of grantor of railroad right of way or his privy to recover damages for interference with surface water by construction of road, 19 ALR 487.

Right of railroad company in respect of material or mineral within right of way, 21 ALR 1131.

Right of abutting owner to compensation for railroad in street under constitutional provision against damaging property for public use without compensation, 22 ALR 145.

Assessment of railroad right of way for local improvements, 37 ALR 219; 82 ALR 425.

Liability of railroad company to property owner for change of grade incident to construction of overhead or underground crossing, 57 ALR 657.

Limitation applicable to action or proceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 ALR 676.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.

Condemner's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 ALR2d 724.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to

character of use or undertakings to be performed by it, 7 ALR2d 364.

Spur track and the like as constituting a use for which railroad can validly exercise right of eminent domain, 35 ALR2d 1326.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

What constitutes abandonment of railroad right of way, 95 ALR2d 468.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement

of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 ALR3d 752.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific owner, 26 ALR4th 68.

Interstate Commerce Commission's exercise of authority under § 223 of Staggers Rail Act of 1980 (49 USCS § 11103(c)) to require rail carriers to enter into reciprocal switching agreement, 105 ALR Fed. 637.

46-8-121. Acquisition of property by companies; approval by commission as prerequisite to exercise of power of eminent domain.

Authority and power are granted to railroad companies to acquire by purchase or gift and to hold such real estate as may be necessary for all of the purposes mentioned in Code Section 46-8-120. If the real estate cannot be acquired by purchase or gift, then it may be acquired by condemnation in the manner provided in Title 22, provided that the right of condemnation under this Code section shall not be exercised until the commission, under such rules of procedure as it may provide, first approves the taking of the property. (Ga. L. 1914, p. 144, §§ 1, 2; Code 1933, §§ 94-321, 94-322.)

JUDICIAL DECISIONS

Acquisition of unimproved land and condemnation of inhabited land by railroads. — Former Code 1933, §§ 84-321 and 94-322 (see O.C.G.A. § 46-8-121) did not limit acquisition by railroad companies to unimproved land and did not restrict their power to condemn lands on which houses were situated. *Landers v. Georgia Pub. Serv. Comm'n*, 217 Ga. 804, 125 S.E.2d 495 (1962).

Scope of Public Service Commission's approval power. — The Public Service Commission's power to approve a railroad's condemnation for the relocation and expansion of its existing rail yard facilities includes the power to determine the necessity, propriety and expediency of the condemnation. *Georgia Pub. Serv. Comm'n v. Central of Ga. R.R.*, 179 Ga. App. 415, 346 S.E.2d 568 (1986).

Commission determines whether condem-

nation serves public purpose. — The commission, in ruling on the propriety of a condemnation of property by a railroad for the purpose of expansion and improvement, should seek to determine whether the condemnation serves a public purpose, not whether the condemnation "best serves" the public interest. *Central of Ga. R.R. v. Georgia Pub. Serv. Comm'n*, 257 Ga. 217, 356 S.E.2d 865 (1987).

Commission not obliged to approve condemnation for proposed purpose. — Whether a more suitable site is proposed is not controlling because the Public Service Commission is not obliged to approve a condemnation under O.C.G.A. § 46-8-121 for a proposed purpose. *Georgia Pub. Serv. Comm'n v. Central of Ga. R.R.*, 179 Ga. App. 415, 346 S.E.2d 568 (1986).

Cited in *Ammons v. Central of Ga. Ry.*, 215

Ga. 758, 113 S.E.2d 438 (1960); Georgia Pub. Serv. Comm'n v. Central of Ga. R.R., 184 Ga. App. 241, 361 S.E.2d 723 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 20, 23, 51, 123, 137. 65 Am. Jur. 2d, Railroads, §§ 39, 42 et seq.

C.J.S. — 29A C.J.S., Eminent Domain, § 33. 74 C.J.S., Railroads, §§ 133 et seq., 147, 148 et seq.

ALR. — Assessment of railroad right of way for local improvements, 37 ALR 219; 82 ALR 425.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.

Condemner's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 ALR2d 724.

Spur track and the like as constituting a use for which railroad can validly exercise right of eminent domain, 35 ALR2d 1326.

Right to intervene in court review of zoning proceeding, 46 ALR2d 1059.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceed-

ing, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

What constitutes abandonment of a railroad right of way, 95 ALR2d 468.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 ALR3d 752.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific owner, 26 ALR4th 68.

46-8-122. Effect of Code Sections 46-8-120 and 46-8-121 on other powers and authority granted to railroad companies.

The powers and authority conferred by Code Sections 46-8-120 and 46-8-121 are in addition to the powers and authority which railroad companies may have by virtue of their charters or by virtue of the general laws of this state. (Ga. L. 1914, p. 144, § 3; Code 1933, § 94-323.)

46-8-123. Construction of extensions and branch roads generally.

(a) Any railroad company may extend its railroad from any point named in the petition for charter or may build branch roads from any point on its line of road. Before making any such extensions or building any such branch roads, the company shall, by resolution of its board of directors, to be entered in the records of its proceedings, designate the route of such proposed extension or branch and advertise the route in all of the counties through which such extension or branch road will run, for the time and in the manner provided by Code Section 46-8-41, and shall file a certified copy of such resolution and advertisements in the office of the Secretary of State,

which shall be filed and recorded as are original petitions for charters. As a fee for such filing, the company shall pay to the Office of Treasury and Fiscal Services \$25.00 for each extension or branch road.

(b) Within one year after the filing of the resolution with the Secretary of State, the railroad company shall have the right to begin the construction and equipment of such branch or extension. If the railroad company fails to construct as much as 20 miles within two years, or fails to complete the branch or extension if it is to be less than 20 miles in length, the powers and privileges to do so shall cease.

(c) For the purpose of such extension or branch road, the company shall have all the rights and privileges of condemning or acquiring the rights of way that are provided for constructing and building the main line.

(d) All the provisions of this title relating to the issuance of stocks and bonds for the road authorized under the original petition for incorporation shall be applicable to and control the issuance of stocks and bonds for the proposed extensions and branches. (Ga. L. 1892, p. 37, § 10; Civil Code 1895, § 2169; Civil Code 1910, § 2587; Code 1933, § 94-307; Ga. L. 1993, p. 1402, § 18.)

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 23, 51, 123, 124, 137. 65 Am. Jur. 2d, Railroads, § 112.

C.J.S. — 29A C.J.S., Eminent Domain, § 34. 74 C.J.S., Railroads, §§ 113, 115, 287.

ALR. — Power of federal authorities to discontinue a branch, wholly within the state, of an interstate railroad or interurban system, 30 ALR 439.

Nature and extent of interest acquired by railroad in right of way by adverse possession or prescription, 127 ALR 517.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.

Condemner's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 ALR2d 724.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

What constitutes abandonment of a railroad right of way, 95 ALR2d 468.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific owner, 26 ALR4th 68.

46-8-124. Exercise of power of eminent domain by railroad corporations generally.

In the event a railroad company does not procure, by contract, lease, or purchase, the title to the lands, rights of way, or other property necessary for the construction or connection of the railroad and of such branches and extensions as are necessary or proper for the company to reach its freight

or passenger depot in any city in this state or as are necessary to reach its wharves, docks, or other necessary terminal facilities, the company may construct its railroad over any lands, any rights of way, or the tracks of other railroads upon paying or tendering to the owner thereof, or to the legally authorized representative of such owner, just and reasonable compensation for said lands or said right of way. If the compensation cannot be agreed upon, it shall be assessed and determined in the manner provided in Title 22. (Ga. L. 1892, p. 37, § 11; Ga. L. 1895, p. 95, §§ 2, 3; Civil Code 1895, § 2170; Civil Code 1910, § 2588; Code 1933, § 94-308.)

JUDICIAL DECISIONS

Large discretion in location of route. — Where a railroad company has the right to condemn private property for public uses in the construction and operation of its road, it has a large discretion in the selection of a location for its route over such property; and unless such discretion has been abused, it will not be controlled or interfered with by the courts. *Piedmont Cotton Mills v. Georgia Ry. & Elec. Co.*, 131 Ga. 129, 62 S.E. 52 (1908).

Testimony regarding road location admissible as to bad faith in selection. — Upon the trial of a case wherein the owner of the property through which it is proposed to run such road complains that such discretion of the company has been abused by it, it is error to exclude testimony relevant and material upon the issue as to whether or not the company has acted in bad faith in the selection of such location. *Piedmont Cotton Mills v. Georgia Ry. & Elec. Co.*, 131 Ga. 129, 62 S.E. 52 (1908).

Testimony of attempts by condemnor to acquire property admissible for injunction against condemnation. — Upon the trial of a case wherein the owner of land seeks to have a party having the right of condemnation enjoined from condemning his land, it is not error to admit testimony of such condemnor that he made an effort, before instituting such condemnation proceeding, to acquire by contract the property sought to be condemned and failed in such effort. *Piedmont Cotton Mills v. Georgia Ry. & Elec. Co.*, 131 Ga. 129, 62 S.E. 52 (1908).

Manner of exercise of eminent domain power. — It was provided by former Civil

Code 1910, § 2588 (see O.C.G.A. § 46-8-124) that in the event the company cannot procure from the owners title to the right of way or other lands necessary and proper for the construction of stations, terminal facilities, and the like, such property may be acquired in the manner prescribed in T. 22. *Atlantic & B.R.R. v. Penny*, 119 Ga. 479, 46 S.E. 665 (1904); *Bibb Brick Co. v. Central of Ga. Ry.*, 151 Ga. 83, 105 S.E. 833 (1921).

When property of other railroad may be condemned. — The property of another railroad company may be condemned if the property thus sought to be acquired is not actually used by the other company for railroad purposes, and will not be needed by that company for such purposes in the immediate future. *Atlanta & W.P.R.R. v. Atlanta, B. & A.R.R.*, 124 Ga. 125, 52 S.E. 320 (1905).

Railroad taking easement of other railroad must pay compensation. — Where a railroad lays its track in a city street with the permission of the city, it acquires an easement, and such easement will be as much protected from unlawful invasion as any other property right. The construction of a railroad track by another railroad across the street and its track amounts to a taking of its property by the crossing railroad, and the easement holder is entitled to have such construction enjoined until compensation is paid. *Atlantic Coast Line R.R. v. Southern Ry.*, 214 Ga. 178, 104 S.E.2d 77 (1958).

Cited in Georgia Pub. Serv. Comm'n v. Central of Ga. R.R., 179 Ga. App. 415, 346 S.E.2d 568 (1986).

RESEARCH REFERENCES

C.J.S. — 74 C.J.S., Railroads, § 133 et seq.

ALR. — Right and measure of compensation to owner of fee when telegraph or telephone line is erected along railroad right of way or highway, 8 ALR 1293; 19 ALR 383.

Nonperformance of executory promise by railroad company as ground for cancellation or rescission of deed to it, 13 ALR 566.

Power of Public Utility Commission to require railroad company to grant or renew leases or other privileges on its right of way, 47 ALR 109.

Right in respect of private crossing in absence of statutory or contractual provision in that regard where land is taken by or deeded to railroad for right of way, 122 ALR 1171.

Condemner's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 ALR2d 724.

Width of way created by express grant, reservation, or exception not specifying width, 28 ALR2d 253.

Spur track and the like as constituting a use for which railroad can validly exercise right of eminent domain, 35 ALR2d 1326.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

What constitutes abandonment of a railroad right of way, 95 ALR2d 468.

Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of others for the same undertaking, 59 ALR3d 488.

Eminent domain: consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages, 59 ALR3d 534.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land — state cases, 95 ALR3d 752.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 ALR4th 840.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific owner, 26 ALR4th 68.

46-8-125. Change of general direction and route of railroad.

(a) Any railroad company incorporated under this chapter shall have the power to change the general direction and route of its railroad from that stated in the original petition by a two-thirds' vote of the capital stock of the corporation represented in person or by written proxy at any annual or special meeting of the stockholders of the corporation. When the direction and route are so changed, the railroad company shall have the right and power to enter upon, condemn for rights of way, and construct said road on the land along the new or changed line, as it had on the original line.

(b) After the road has been constructed, no change in the direction and route of a railroad shall be made in any city without the consent of such city expressed through its proper authorities.

(c) In case the route is changed after grading is commenced, compensation shall be made to all persons owning lands on the original route which have been damaged by such grading or other work on such original route. If no agreement as to the amount of compensation is made, such amount shall be assessed as provided in Title 22. (Ga. L. 1892, p. 37, § 12; Civil Code 1895, § 2171; Ga. L. 1903, p. 36, § 1; Civil Code 1910, § 2589; Code 1933, § 94-309; Ga. L. 2004, p. 631, § 46.)

The 2004 amendment, effective May 13, 2004, part of an Act to revise, modernize,

and correct the Code, revised punctuation in subsection (a).

JUDICIAL DECISIONS

Relocation not allowed after road constructed and put in operation. — Former Civil Code 1895, § 2171 (see O.C.G.A. § 46-8-115) did not authorize a railroad company which obtained its charter from the Secretary of State under the general law for the incorporation of railroads, after having located, constructed, and put in operation its road, at its mere volition to tear up such road, or a section thereof nineteen miles in length, and relocate the same at a different place; nor was such authority conferred although the portion of the road sought to be taken up and relocated lied outside the limits of a town or city. *Brown v. Atlantic & B. Ry.*, 126 Ga. 248, 55 S.E. 24, 7 Ann. Cas. 1026 (1906).

Exercise of discretion exhausts power of choice. — Where a railroad company to which has been given the power to choose its particular route between designated termini has exercised its discretion in this regard, its power of choice is exhausted, and it can not subsequently change its location without express legislative authority. *Brown v. Atlantic & B. Ry.*, 126 Ga. 248, 55 S.E. 24, 7 Ann. Cas. 1026 (1906).

Discretion allowed where charter provides for road to run in easterly direction. — Where the charter of a railroad company fixes one of its termini at a station some

distance outside of the corporate limits of a city, and described the road to be located as running easterly to a point at or near the center of the city, but in fact a line run due east would not enter the city at all, the corporation has a discretion to locate the other terminus at a point within the city, at or near its center; and where a line was located from the initial point to the terminus so fixed, running in a general southeasterly direction, this was not a violation of the charter, nor a change of direction under former Civil Code 1895, § 2171 (see O.C.G.A. § 46-8-125). *Bridwell v. Gate City Term. Co.*, 127 Ga. 520, 56 S.E. 624, 10 L.R.A. (n.s.) 909 (1907).

Amendment of charter under § 46-8-54 does not require two-thirds vote. — Requirement of former Civil Code 1895, § 2171 (see O.C.G.A. § 46-8-125) as to two-thirds vote had no application to amendment of charter under former Civil Code 1895, § 2178 see O.C.G.A. § 46-8-54). *Alexander v. Atlanta & W.P.R.R.*, 108 Ga. 151, 33 S.E. 866 (1899).

Municipal authority to change location of railroad track. — Provisions of ordinances are sufficient to express municipal authority to change location of track and employ same in the operation of railroad. *Louisville & N.R.R. v. Merchants & Farmers Bank*, 166 Ga. 310, 143 S.E. 506 (1928).

OPINIONS OF THE ATTORNEY GENERAL

Rules and regulations as to track relocation by railroad. — It was intention of General Assembly in enactment of former Code 1933, § 94-309 (see O.C.G.A. § 46-8-125) to set down certain rules and regulations as to

how railroad might relocate its tracks. 1950-51 Op. Att'y Gen. p. 206.

Special legislative act required for railroad company to change main track location. — Under former Code 1933, § 94-309 (see

O.C.G.A. § 46-8-125) the only way railroad company can change location of its main tracks was through special legislative act. 1950-51 Op. Att'y Gen. p. 206.

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 110 et seq.

C.J.S. — 74 C.J.S., Railroads, § 133 et seq.

ALR. — Right of railroad company to discontinue or reduce service on branch line or part of road which is unprofitable, 123 ALR 922.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.

Condemner's waiver, surrender, or limitation, after award, of right or part of property acquired by condemnation, 5 ALR2d 724.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it, 7 ALR2d 364.

Spur track and the like as constituting a use for which railroad can validly exercise right of eminent domain, 35 ALR2d 1326.

Admissibility, in eminent domain proceed-

ing, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

What constitutes abandonment of a railroad right of way, 95 ALR2d 468.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific owner, 26 ALR4th 68.

46-8-126. Relocation of highways necessitated by construction of crossings.

In all cases where a railroad crosses a highway and the cutting makes a change in the route of any such highway or a change is desirable with a view to easier ascent or descent, the railroad company may take such additional lands for the construction of such highway upon a new route as may be deemed necessary by the directors. In taking property under this Code section, the railroad company shall proceed in the manner provided in Title 22 for condemning rights of way and other property. (Ga. L. 1892, p. 37, § 12; Civil Code 1895, § 2172; Civil Code 1910, § 2590; Code 1933, § 94-310.)

Cross references. — Railroad grade crossings generally, § 32-6-190 et seq.

JUDICIAL DECISIONS

Cited in Central of Ga. Ry. v. Keating, 177 Ga. 345, 170 S.E. 493 (1933).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 175.

C.J.S. — 74 C.J.S., Railroads, § 328.

ALR. — Right of railroad company in

respect of material or mineral within right of way, 21 ALR 1131.

Constitutional power to compel railroad company to relocate or reconstruct highway crossing, or to pay or contribute to expense thereof, 62 ALR 815.

Part or extent of highway adjoining railroad crossing for condition of which railroad is responsible, 105 ALR 547.

Elimination of railroad grade crossing as local improvement for which property specially benefited may be assessed, 111 ALR 1222.

Nature and extent of interest acquired by railroad in right of way by adverse possession or prescription, 127 ALR 517.

Condemnation of premises or part thereof as affecting rights of landlord and tenant inter se, 163 ALR 679.

Condemner's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation, 5 ALR2d 724.

Spur track and the like as constituting a use for which railroad can validly exercise right of eminent domain, 35 ALR2d 1326.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 ALR2d 781.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property on sale prior to the proceeding, 55 ALR2d 791.

Right of adjoining landowners to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 ALR2d 1292.

What constitutes abandonment of a railroad right of way, 95 ALR2d 468.

Eminent domain: validity of appropriation of property for anticipated future use, 80 ALR3d 1071.

Eminent domain: recovery of value of improvements made with knowledge of impending condemnation, 98 ALR3d 504.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific owner, 26 ALR4th 68.

46-8-127. Regulation of distance between tracks with the same terminal points.

In the selection of the general route for, and in the construction of, a railroad between termini, if another railroad has already been constructed or if the route for another railroad has been selected and the road chartered between the same termini, then the general direction and location of the railroad shall be at least ten miles from the railroad already constructed or the route laid out and selected to be constructed, provided that this Code section shall not be construed to refer to any point within ten miles of either terminus or to prevent the two roads from running as near to each other for the first ten miles from either terminus as the interest of the company building the new route may dictate; provided, further, that whenever the conditions imposed by this Code section are impracticable by reason of the physical formation of the country surrounding any initial or terminal point, or by reason of the number of railroads centering in an initial or terminal point, and the railroad companies interested fail to agree on the route for the new railroad, this Code section shall not apply; rather, in all such cases the location of such proposed new railroad with reference to initial or terminal points shall be made and fixed under the order and by direction of the commission, which shall locate the new railroad on such a route as may be found practicable and as will the least interfere with existing lines; provided, further, that the power given to the commission by this Code section shall extend only to fixing and providing the location by which

any new railroad may have access to either of its terminal points. Nothing in this Code section shall be so construed as otherwise to change the general policy of this state, which requires the general direction and location of railroads sought to be constructed to be not less than ten miles from a railroad already constructed. (Ga. L. 1892, p. 37, § 15; Ga. L. 1895, p. 60, § 1; Civil Code 1895, § 2176; Civil Code 1910, § 2594; Code 1933, § 94-315.)

JUDICIAL DECISIONS

Applicability to parallel running railroads. — Former Civil Code 1895, § 2176 (see O.C.G.A. § 46-8-127) only applies to railroads which run practically parallel with each other. *Waycross Air-Line R.R. v. Offerman & W.R.R.*, 109 Ga. 827, 35 S.E. 275 (1900).

Applicability to railroads connecting same terminal points. — Former Civil Code 1895, § 2176 (see O.C.G.A. § 46-8-127) only applied when two railroad companies involved connect by their lines the same terminal points. *Hawkinsville & F.S. Ry. v. Waycross Air-Line R.R.*, 114 Ga. 239, 39 S.E. 844 (1901).

Three mile road not restricted by this Code section. — Road only about three miles in length did not fall within restriction contained in former Civil Code 1895, § 2176 (see O.C.G.A. § 46-8-127). *Bridwell v. Gate*

City Term. Co., 127 Ga. 520, 56 S.E. 624, 10 L.R.A. (n.s.) 909 (1907).

Tramroad of private corporation not restricted by this Code section. — Former Civil Code 1895, § 2176 (see O.C.G.A. § 46-8-127) did not prevent a purely private corporation from constructing, and itself operating for its own exclusive use upon its own land, a tramroad. *Waycross Air-Line R.R. v. Southern Pine Co.*, 111 Ga. 233, 36 S.E. 641 (1900).

Use of injunction to prevent interference with route. — Injunction lied against interference with route by locating another line within distance prohibited by former Civil Code 1895, § 2176 (see O.C.G.A. § 46-8-127). *Waycross Air-Line R.R. v. Offerman & W.R.R.*, 109 Ga. 827, 35 S.E. 275 (1900).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, §§ 106, 107.

C.J.S. — 74 C.J.S., Railroads, § 107 et seq.

46-8-128. Obstructions located at crossing; disrepair of crossing; removal of obstruction or repair of crossing by county upon failure of company to remove obstruction or repair crossing.

Reserved. Repealed by Ga. L. 2002, p. 1050, § 7, effective July 1, 2002.

Editor's notes. — This Code section was based on Laws 1838, Cobb's 1851 Digest, p. 956; Code 1863, §§ 685, 686, 687, 688, 689; Code 1868, §§ 747, 748, 749, 750, 751; Code 1873, §§ 713, 714, 715, 716, 717; Code 1882, §§ 713, 714, 715, 716, 717; Ga. L. 1894, p.

37, § 1; Civil Code 1895, §§ 2227, 2228, 2229, 2230, 2231; Civil Code 1910, §§ 2680, 2681, 2682, 2683, 2684; Code 1933, §§ 94-512, 94-513, 94-514, 94-515, 94-516; Ga. L. 1982, p. 3, § 46.

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, §§ 360, 366.

C.J.S. — 74 C.J.S., Railroads, §§ 331, 826, 827.

46-8-129. Construction and maintenance by and at expense of railroad company of cattle guards necessary to protect public roads or private ways crossed by railroad.

(a) Every railroad company shall be required to build and maintain, at its own expense, good and sufficient cattle guards on each side of every public road or private way and on the dividing line of adjoining landowners, at such points where the railroad may cross such public roads, private ways, or dividing lines, when necessary to protect said lands.

(b) Thirty days' written notice to build such cattle guards shall be served on any agent or officer of the railroad company by the owner of the lands to be affected by such cattle guards. The notice shall be directed to the railroad company, shall contain a description of the point where such cattle guard is desired, and shall be signed by the landowner or his agent or attorney and attested by some officer under his official seal. A certified copy of the notice shall constitute prima-facie evidence of the contents of the original notice. (Ga. L. 1889, p. 158, § 1; Civil Code 1895, § 2243; Civil Code 1910, § 2699; Code 1933, § 94-601.)

JUDICIAL DECISIONS

Meaning of word "owner". — The word "owner" has no technical meaning, and, being nomen generalissimum, should be construed liberally in favor of the parties whom it is the duty and intention of the legislature to protect. *Hardin v. Chattanooga S.R.R.*, 113 Ga. 357, 38 S.E. 839 (1901); *Elberton & E.R.R. v. Campbell*, 46 Ga. App. 203, 167 S.E. 215 (1932).

Land possessor under bond for title held not "owner". — One in possession of land under bond for title with part of purchase-money paid was not "owner" of such land within the meaning of former Civil Code 1895, § 2243 (see O.C.G.A. § 46-8-129). *Hardin v. Chattanooga S.R.R.*, 113 Ga. 357, 38 S.E. 839 (1901).

Son of owner may not maintain action. — For a breach of duty imposed by former Civil Code 1895, § 2243 (see O.C.G.A. § 46-8-129) the owner of the lands only was entitled to maintain an action; a son of the owner cannot recover. *Florida C. & P.R.R. v. Judge*, 100 Ga. 600, 28 S.E. 379 (1897).

Tenant may not maintain action. — The

right of action given by former Civil Code 1910, § 2699 (see O.C.G.A. § 46-8-129), et seq., was a statutory right, and applies only to the owner of the land, and not to a tenant. *Louisville & N.R.R. v. Nanny*, 137 Ga. 607, 73 S.E. 1052 (1912).

Landlord may not maintain action for crop damage. — A landlord cannot recover in a suit for damages against a railroad company for failure to keep in good repair a stock guard, where the sole damage alleged is to the crop of a tenant. *Louisville & N.R.R. v. Nanny*, 137 Ga. 607, 73 S.E. 1052 (1912).

Abutting landowner may not maintain action. — Former Civil Code 1910, § 2699 (see O.C.G.A. § 46-8-129) was intended for the protection of landowners, whose lands are intersected by a railroad right of way, and not for the benefit or protection of the owners of land abutting on a railroad right of way. *Louisville & N.R.R. v. Butler*, 140 Ga. 717, 79 S.E. 776 (1913).

Railroad bound to maintain guard on dividing line of two owners. — Where a railroad company builds a cattle guard on the

dividing line between adjacent land of different owners, it was bound to maintain it, and former Civil Code 1910, § 2699 (see O.C.G.A. § 46-8-129) did not require the landowner to give the railroad company 30 days notice to repair the same. *Alabama G.S.R.R. v. Dawkins*, 143 Ga. 415, 85 S.E. 343 (1915).

Guard must embrace entire width of right of way. — The cattle guard required by former Civil Code 1910, § 2699 (see O.C.G.A. § 46-8-129) was intended to protect the adjacent land from the trespass of live stock going over the railroad right of way; and the contrivance must be sufficiently extensive to embrace the entire width of the right of way. *Alabama G.S.R.R. v. Dawkins*, 143 Ga. 415, 85 S.E. 343 (1915).

Proper instruction as to good and sufficient cattle guard. — Former Civil Code 1910, § 2699 (see O.C.G.A. § 46-8-129) required a railroad company to build and maintain "good and sufficient" cattle guards on each side of every public road where the railroad crosses it. It was inaccurate to instruct the jury that the character of the cattle guards should be such as first-class roads use in the construction of their road; but such inaccuracy of instruction will not require a new trial in every case. *Louisville & N.R.R. v. Plemons*, 139 Ga. 67, 76 S.E. 562 (1912).

Plaintiff must show necessity for guard. — In a suit against a railroad company by a landowner for a failure to erect cattle guards as required by former Civil Code 1895, § 2243 (see O.C.G.A. § 46-8-129), it was incumbent upon the plaintiff to show upon the trial that such cattle guards were necessary to protect plaintiff's lands. *Alabama G.S.R.R. v. Fowler*, 104 Ga. 148, 30 S.E. 243 (1898).

No necessity to show notice where guards built voluntarily. — It is immaterial whether the notice to build cattle guards required by former Civil Code 1910, § 2699 (see O.C.G.A. § 46-8-129) was given, where they were voluntarily built by the railroad company without such notice, at a public road, or private way established pursuant to law.

Savannah & A. Ry. v. Hart, 27 Ga. App. 743, 110 S.E. 410 (1921).

Duty of railway company to build proper and effective cattle guards. — Where railway company has voluntarily built cattle guards it is estopped from saying that they were not erected at a private way established pursuant to law. Having built the cattle guards "for the convenience of the plaintiff" as shown by the defendant's evidence, it was the duty of the railway company to build proper and effective ones and to keep them in good repair. *Savannah & A. Ry. v. Hart*, 27 Ga. App. 743, 110 S.E. 410 (1921); *Elberton & E.R.R. v. Campbell*, 46 Ga. App. 203, 167 S.E. 215 (1932).

Sufficiency of complaint. — To recover the penalty for failure of a railroad company to build and maintain good and sufficient cattle guards as provided for in former Civil Code 1910, §§ 2699 and 2700 (see O.C.G.A. § 46-8-129 and 46-8-130), the plaintiff's complaint must allege such facts as bring it within the provisions of this law. *Gill v. Atlanta, B. & Atl. Ry.*, 24 Ga. App. 780, 102 S.E. 457 (1920).

Sufficiency of notice. — A notice served upon a railroad company under former Civil Code 1893, § 2243 (see O.C.G.A. § 46-8-129), calling upon the company to erect a cattle guard between two named land lots, "where your line of road crosses said line," sufficiently described the point where it was desired that the cattle guard be erected to require a compliance therewith by the railroad company, the notice otherwise meeting all requirements. *Fenn v. Georgia N. Ry.*, 116 Ga. 942, 43 S.E. 378 (1903).

Service of notice improper where not made on agent. — This being a suit for a penalty under former Civil Code 1895, § 2244 (see O.C.G.A. § 46-8-130), and it appearing from the evidence that the chief clerk on whom service of the notice was made was not an agent or officer of the defendant, the court committed no error in awarding a nonsuit. *Smith v. Southern Ry.*, 132 Ga. 57, 63 S.E. 801 (1909).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 92.

C.J.S. — 74 C.J.S., Railroads, § 392 et seq.

ALR. — Failure to fence as rendering

railroad company liable for damage to or by livestock after leaving right of way, 24 ALR 1057.

Liability of railroad company where fence

or cattle guard becomes ineffective because of snow, 26 ALR 679.

Sufficiency as to type of cattle guards at public or private crossings, 75 ALR 936.

46-8-130. Liability of company to landowner for failure to build cattle guard pursuant to Code Section 46-8-129.

If the railroad company fails to build cattle guards pursuant to Code Section 46-8-129 within 30 days after notice, the company shall be liable to the owner of the land for all damages resulting from the failure so to build. For each day elapsing after the 30 day period has expired until the cattle guard is built, the company shall be liable to such landowner in the sum of \$25.00, to be recovered by the landowner in any court having jurisdiction over the same. (Ga. L. 1889, p. 158, § 1; Civil Code 1895, § 2244; Civil Code 1910, § 2700; Code 1933, § 94-602.)

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 101.

C.J.S. — 74 C.J.S., Railroads, §§ 404, 405.

ALR. — Interpretation of statute relating to construction or maintenance of crossing

in case of intersecting railroad or street railway lines, 40 ALR 712.

Recovery of cumulative statutory penalties, 71 ALR2d 986.

46-8-131. Construction of cattle guard and farm crossing by railroad company upon request of and at expense of owner of land crossed by railroad right of way.

Whenever the owner of any lands over which any railroad company has acquired a right of way desires cattle guards other than those provided for in Code Section 46-8-129, or desires any farm crossing on his land, it shall be the duty of the railroad company, upon written notice as provided in Code Section 46-8-129, within ten days after the service of the notice, to submit to the landowner or his agent, if found, a written estimate of the cost of such cattle guard or farm crossing. Thereupon the landowner or his agent, if satisfied with the estimate, shall pay to the company the sum so estimated; and the company shall at once proceed to build such cattle guards or farm crossings, the cost of the farm crossings to be confined to the portion on the roadbed of the railroad. In the event the landowner and the company cannot agree as to the correctness of the estimate, the same shall be determined in the manner provided for the determination of damages for rights of way. The award may be had at the instance of the landowner or his agent, as well as at the instance of the railroad company. In the event the railroad company fails to comply with this Code section or fails to keep in good repair the guards or crossings, it shall be liable for all damages resulting to such landowner by the failure to build or keep in good

repair such cattle guards or farm crossings, such damages to be recovered in any court having jurisdiction thereof. (Ga. L. 1889, p. 158, § 2; Civil Code 1895, § 2245; Civil Code 1910, § 2701; Code 1933, § 94-603.)

JUDICIAL DECISIONS

Meaning of word "owner". — The word "owner" has no technical meaning, and, by nomen generalissimum, should be construed liberally in favor of the parties whom the legislature intended to protect in passing former Civil Code 1910, § 2701 (see O.C.G.A. § 46-8-131). *Elberton & E.R.R. v. Campbell*, 46 Ga. App. 203, 167 S.E. 215 (1932).

Duty of railroad to maintain cattle guard. — Even where the cattle guard was not

erected at a public crossing, a private way established by law, or on the dividing line between plaintiff's lands and the lands of other persons, after having erected the cattle guard, it was the duty of the defendant to keep and maintain in repair a proper and sufficient cattle guard or stock gap at this place. *Elberton & E.R.R. v. Campbell*, 46 Ga. App. 203, 167 S.E. 215 (1932).

Cited in *Iler v. Seaboard Air Line R.R.*, 214 F.2d 385 (5th Cir. 1954).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 67.

ALR. — Liability of railroad company where fence or cattle guard becomes ineffective because of snow, 26 ALR 679.

Elimination of railroad grade crossing as local improvement for which property specially benefited may be assessed, 111 ALR 1222.

46-8-132. Construction and applicability of Code Sections 46-8-129 through 46-8-131.

Nothing in Code Sections 46-8-129 through 46-8-131 shall be construed in any way to change the liability of railroad companies for damages to livestock, or to prevent landowners from joining their fences to stock gaps, or to prevent free access from and to the farm crossing. This Code section and Code Sections 46-8-129 through 46-8-131 shall not apply to any roads, ways, or crossings within the limits of any incorporated city. (Ga. L. 1889, p. 158, § 3; Civil Code 1895, § 2246; Civil Code 1910, § 2702; Code 1933, § 94-604.)

JUDICIAL DECISIONS

Landowners not required to extend fences across railroad right of way. — Former Civil Code 1910, § 2702 (see O.C.G.A. § 46-8-132) did not require landowners to extend their fences across the entire railroad

right of way, in order to connect with the cattle guard on the track of the railroad. *Alabama G.S.R.R. v. Dawkins*, 143 Ga. 415, 85 S.E. 343 (1915).

RESEARCH REFERENCES

ALR. — Failure to fence as rendering railroad company liable for damage to or by

live stock after leaving right of way, 24 ALR 1057.

46-8-133. Alteration of railroad tracks, bridges, and other structures to accommodate motor vehicles.

No railroad, railroad company, railway company, or person, firm, or corporation operating any line of railway in this state shall be required by the commission, or otherwise, to alter its tracks at any underpass, railroad trestle, or bridge; to alter the grade of any public road or highway at any such underpass, railroad trestle, or bridge; or to otherwise relay or reconstruct any portion of its tracks, or other structures, or any portion of any public road or highway, in order to accommodate any motor vehicle exceeding 12 feet six inches in height. (Ga. L. 1941, p. 449, § 10.)

Cross references. — Railroad grade crossings generally, § 32-6-190 et seq.

ARTICLE 6

OPERATION OF TRAINS GENERALLY

PART 1

EMPLOYEES ENGAGED IN OPERATION OF TRAINS GENERALLY

Cross references. — Liability of railroad employers for injuries to employees caused by negligence of other employees, § 34-7-21.

Liability of railroad employers for injuries to employees generally, § 34-7-40 et seq.

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 277.

C.J.S. — 74 C.J.S., Railroads, §§ 767, 768.

46-8-150. Qualifications of locomotive engineers.

(a) No railroad company operating trains in this state shall employ or allow in charge of any of its locomotives in this state, as a locomotive engineer (except locomotive engines used in yard service), any person who has not had at least three years' actual experience as a fireman or an engineer on a railway locomotive, or who has not served an apprenticeship of four years in a regular railroad machine shop and had in addition thereto one year's actual experience as a locomotive fireman.

(b) Any railroad company which violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1908, p. 49, §§ 1, 2; Civil Code 1910, § 2696; Penal Code 1910, § 525; Code 1933, §§ 94-902, 94-9907.)

JUDICIAL DECISIONS

No federal preemption. — Neither the regulations existing in 1988 nor the underlying federal statute either expressly or impliedly indicate that Congress had the intent to preempt state minimum standards for engineers prior to 1991. *Mills v. Norfolk S. Ry. Co.*, 242 Ga. App. 324, 526 S.E.2d 585 (1999).

Violation of section as cause of collision. — Because the knowledge, training, and

experience of an engineer to deal with specific hazards, such as an activation failure with a vehicle in the crossing, comes from service, an engineer's experience of less than three years was an appropriate issue of causation for the jury to consider. *Mills v. Norfolk S. Ry. Co.*, 242 Ga. App. 324, 526 S.E.2d 585 (1999).

Cited in *Georgia R.R. & Banking Co. v. Cook*, 94 Ga. App. 650, 95 S.E.2d 703 (1956).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 277.
C.J.S. — 74 C.J.S., Railroads, §§ 767, 768.

ALR. — Validity of statute prescribing qualifications for railroad employees, 58 ALR 569.

46-8-151. Qualifications of railroad telegraph operators; maintenance of written record of certificate of competency.

(a) No railroad company shall employ in this state any telegraph operator to receive and transmit dispatches governing the movement of trains if such operator is less than 18 years of age, has not had at least one year's experience as a telegraph operator, and has not stood a thorough examination before the railroad superintendent or trainmaster and received a certificate of competency from such officer.

(b) A written record of the certificate shall be kept in the office of the officer issuing it and be subject to inspection at any time.

(c) Any railroad company violating this Code section shall be liable for a civil penalty of not less than \$50.00 and not more than \$500.00. Actions for the collection of penalties pursuant to this Code section shall be brought in the county where such violation occurs and shall be brought by the district attorney. All penalties collected pursuant to this Code section shall be paid into the general fund of the state treasury. (Ga. L. 1890-91, p. 182, §§ 1-3; Civil Code 1895, §§ 2237, 2238, 2239; Civil Code 1910, §§ 2690, 2691, 2692; Code 1933, §§ 94-901, 94-1106.)

Law reviews. — For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution

of venue questions, see 9 Ga. St. B.J. 254 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 77 Am. Jur. 2d, Venue, §§ 32, 34.

C.J.S. — 92A C.J.S., Venue, §§ 77, 78.

ALR. — Validity of statute prescribing

qualifications for railroad employees, 58 ALR 569.

Recovery of cumulative statutory penalties, 71 ALR2d 986.

46-8-152. Limitation of hours of service for railroad employees engaged in train operation.

(a) No railroad company shall require or permit its employees who are engaged in the business of operating its trains over its roads to make runs of more than 13 hours or to make runs aggregating more than 13 hours in any 24 hours, except when such train is detained by reason of casualty or other cause from reaching its destination on schedule time.

(b) No trainman, after having been on runs for as much as 13 hours out of a 24 hour period, shall be required to go again on duty until after ten hours' rest, except in the case stated in subsection (a) of this Code section. Any railroad company violating any of the provisions of this Code section shall be subject to a civil penalty of not less than \$50.00 nor more than \$500.00.

(c) Actions for the collection of penalties pursuant to this Code section shall be brought in the county in which is situated the principal office of the railroad company, provided that if such company has no principal office in this state, then such action may be brought in any county in which such company has a track and an agent. All penalties collected pursuant to this Code section shall be paid into the general fund of the state treasury. (Ga. L. 1890-91, p. 185, §§ 1-4; Ga. L. 1890-91, p. 186, §§ 1-3; Civil Code 1895, §§ 2240, 2241, 2242; Civil Code 1910, §§ 2693, 2694, 2695; Code 1933, §§ 18-106, 18-605.)

Cross references. — Effect of working beyond maximum hours of service on right of employee to recover damages for personal injury against employer, § 34-7-48.

Law reviews. — For note, "Position of

Labor in Georgia," see 1 Mercer L. Rev. 289 (1950). For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

RESEARCH REFERENCES

ALR. — Constitutionality of statute fixing venue of offense committed while upon public conveyances, or at stations or depots upon the route thereof, 11 ALR 1020.

Liability of employer for injury to em-

ployee as affected by expiration of statutory hours of labor before injury, 71 ALR 861.

Recovery of cumulative statutory penalties, 71 ALR2d 986.

PART 2

SIGNAL WHISTLES AND LIGHTS ON TRAINS

46-8-170. Equipping locomotives with signal bells, signal whistles, horns, or headlights.

(a) Each locomotive operated on the line of any railway in this state shall be equipped with a signal bell and a signal whistle or horn. In addition,

every railroad company shall equip each locomotive used on its main line after dark with a good and sufficient headlight which shall consume not less than 300 watts at the arc, and with a reflector not less than 23 inches in diameter, and shall keep the same in good condition.

(b) As used in this Code section, the term "main line" means all portions of the railway line not used solely as yards, spurs, and side tracks.

(c) This Code section shall not apply to tramroads, mill roads, and roads used principally for lumber or logging transportation in connection with mills.

(d) Any railroad company which violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1908, p. 50, §§ 1, 2, 4; Civil Code 1910, §§ 2697, 2698; Penal Code 1910, § 526; Ga. L. 1918, p. 212, § 1; Code 1933, §§ 94-505, 94-9901; Ga. L. 1950, p. 112, § 1.)

JUDICIAL DECISIONS

Constitutionality. — Former Civil Code 1910, §§ 2697 and 2698 (see O.C.G.A. § 46-8-170) was constitutional as it did not interfere with interstate commerce. *Atlantic Coast Line R.R. v. Georgia*, 234 U.S. 280, 34 S. Ct. 829, 58 L. Ed. 1312 (1914).

Term "locomotive" construed. — Term "locomotive" as used in former Code 1933, §§ 94-505, 94-507, 94-9901 and 94-9903 (see O.C.G.A. §§ 46-8-170 and 46-8-191) did not apply to gasoline motor bus operated by railroad company on its tracks. *Gainesville M.R.R. v. Allen*, 72 Ga. App. 736, 35 S.E.2d 12 (1945).

Term "railroad company" construed. — Term "railroad company" employed in Ga. L. 1908, p. 50, included natural persons as well as corporations. *Atlantic Coast Line R.R. v. State*, 135 Ga. 545, 69 S.E. 725, 32 L.R.A. (n.s.) 20 (1910), *aff'd*, 234 U.S. 280, 34 S. Ct. 829, 58 L. Ed. 1312 (1914).

Elements of violation. — Before it can be said that a railroad has violated former Code 1933, §§ 94-505 and 94-9901 (see O.C.G.A.

§ 46-8-170), it must be shown that it operated a locomotive over a main line, between sunset and sunrise, without the lights prescribed therein. *Cosper v. Atlantic Coast Line R.R.*, 85 Ga. App. 683, 69 S.E.2d 886 (1952).

Applicability to trains approaching crossings and persons using crossings. — Insofar as it limits speed of trains Ga. L. 1918, p. 212, § 1 (see O.C.G.A. § 46-8-170) applied only when trains are approaching crossings, and was designed to protect people from injury to person and property only when using the crossings. *Harrison v. Central of Ga. Ry.*, 44 Ga. App. 167, 160 S.E. 694 (1931).

Cited in *Mann v. Central of Ga. Ry.*, 43 Ga. App. 708, 160 S.E. 131 (1931); *Harrison v. Central of Ga. Ry.*, 44 Ga. App. 167, 160 S.E. 694 (1931); *Georgia R.R. & Banking Co. v. Farmer*, 45 Ga. App. 130, 164 S.E. 71 (1932); *Hatcock v. Georgia N. Ry.*, 90 Ga. App. 533, 83 S.E.2d 329 (1954); *Western & Atl. R.R. v. Hart*, 95 Ga. App. 810, 99 S.E.2d 302 (1957).

RESEARCH REFERENCES

ALR. — Validity and construction of railroad stop statute, 2 ALR 156.

Liability of railroad company for injury to live stock frightened by headlight, 29 ALR 1546.

Customary or statutory signal from train as measure of railroad's duty as to warning at highway crossing, 5 ALR2d 112.

46-8-171. Equipping track motor cars with headlights and red rear lights; promulgation by commission of rules and regulations to carry out Code section.

(a) Common carriers operating railroads and moving locomotives or cars over railroad lines in this state shall equip track motor cars used during the period from 30 minutes before sunset to 30 minutes after sunrise with an electric headlight of such construction and with such candlepower as to render plainly visible, at a distance not less than 300 feet in advance of such track motor car, any track obstruction, landmark, warning sign, or grade crossing which would be plainly visible in daylight to the operator of such track motor car at a distance of 300 feet.

(b) Common carriers referred to in subsection (a) of this Code section shall further equip track motor cars with a red rear light of such construction and with such candlepower as to be plainly visible at a distance of 300 feet.

(c) The commission is authorized and directed to promulgate rules and regulations necessary to carry out and effectuate this Code section. (Ga. L. 1952, p. 76, §§ 1-3; Ga. L. 1982, p. 3, § 46.)

JUDICIAL DECISIONS

Cited in *Johnson v. UPS*, 616 F.2d 161 (5th Cir. 1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 161. **C.J.S.** — 74 C.J.S., Railroads, §§ 807, 810 et seq.

46-8-172. Equipping steam locomotives with automatic door to firebox.

(a) All steam railroad companies operating steam locomotives on their railroads in this state shall provide and equip each steam locomotive so operated in this state with an automatic door to the firebox of such locomotive. Such automatic door shall be so constructed and so operated, either by steam, compressed air, or electricity, as deemed best and most efficient by the officers of the railroad. The device for operating such door shall be so constructed that it may be operated by the fireman of the locomotive by means of a push button or other appliance located on the floor of the engine deck or on the floor of the tender at a suitable distance from such floor to enable the fireman, while firing the locomotive by pressure with his feet to operate the door for the firing of the locomotive.

(b) This Code section shall not apply to locomotive engines weighing less than 125,000 pounds on the driver or having less than a 21 inch cylinder. This Code section also shall not apply to logging or tram roads,

mechanically fired engines, or locomotives engaged in interstate commerce.

(c) Every steam railroad company failing to provide and maintain in good condition and working order an automatic firebox door as required by this Code section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than \$100.00 nor more than \$500.00 for each day such locomotive is operated in this state without such automatic door. (Ga. L. 1924, p. 173, §§ 1, 2; Code 1933, §§ 66-409, 66-9911.)

JUDICIAL DECISIONS

Railroads engaged in interstate commerce exempt from this section. — So far as Ga. L. 1924, p. 173, §§ 1 and 2 (see O.C.G.A. § 46-8-172) applies to engines engaged in interstate commerce it is invalid. *Atlantic Coast Line R.R. v. Napier*, 2 F.2d 891 (N.D. Ga. 1924), aff'd, 272 U.S. 605, 47 S. Ct. 207, 71 L. Ed. 432 (1926).

OPINIONS OF THE ATTORNEY GENERAL

Protection of servant rather than protection against fire. — Former Code 1933, §§ 66-409 and 66-9911 (see O.C.G.A. § 46-8-172) was for protection of the servant rather than protection against fire. 1945-47 Op. Att'y Gen. p. 327.

PART 3

OPERATION OF TRAINS AT CROSSINGS

Cross references. — Manner of operation of motor vehicles at railroad grade crossings, § 40-6-140 et seq.

46-8-190. Erection of blowposts to warn of crossings; duty of locomotive engineers to blow whistle, keep and maintain lookout, and exercise due care upon reaching blowposts.

(a) Upon the line of each railway and at a point 400 yards from the center of its intersection at grade with any public road or street used by the public generally in crossing the tracks of the railway, and on each side of the crossing, there shall be erected by the railroad company operating the railway a blowpost to indicate the existence of the crossing.

(b) The engineer operating the locomotive of any railroad train moving over the tracks of the railroad shall be required, when he reaches the blowpost, as a signal of approach to the crossing, to blow through the whistle two long blasts, one short blast, and one long blast, said blasts to be loud and distinct. In addition thereto, after reaching the blowpost farthest removed from the crossing, and while approaching the crossing, the engineer shall keep and maintain a constant and vigilant lookout along the track ahead of said engine, and shall otherwise exercise due care in approaching the crossing, in order to avoid doing injury to any person or

property which may be on the crossing or upon the line of the railway at any point within 50 feet of the crossing.

(c) Any railroad company which fails to erect and maintain blowposts as required by subsection (a) of this Code section shall be guilty of a misdemeanor.

(d) Any locomotive engineer who violates subsection (b) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1918, p. 212, §§ 2-4; Code 1933, §§ 94-506, 94-9902, 94-9903; Ga. L. 1947, p. 479, § 1.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

NEGLIGENCE

1. IN GENERAL

2. LACK OF PROXIMATE CAUSE AND OTHER DEFENSES

PERSONS PROTECTED

CROSSINGS

PRACTICE AND PLEADING

1. IN GENERAL

2. INSTRUCTIONS

General Consideration

Editor's notes. — Some of the decisions cited below were decided under former Code 1882 §§ 708-710, former Code 1873, § 708 and former Code 1895, § 2222.

Constitutionality. — Former Code 1933, § 94-506 (see O.C.G.A. § 46-8-190) was not unconstitutionally vague. *Southern Ry. v. Shealey*, 382 F.2d 752 (5th Cir. 1967).

Code Sections 46-8-190 — 46-8-192 intended for protection at public crossings. — Ga. L. 1918, p. 212, §§ 2-5 (see O.C.G.A. §§ 46-8-190, 46-8-192) were intended for protection of persons and property at public crossings, and the provisions of these sections applied only where injury was done at public road crossings. *Western & A.R.R. v. Michael*, 175 Ga. 1, 165 S.E. 37 (1932).

The purpose of Ga. L. 1918, p. 212, §§ 2-5 (see O.C.G.A. §§ 46-8-190—46-8-192 with respect to giving signals in approaching a crossing was to give warning to persons upon the crossing or those who may be approaching the crossing or whose animals may be scared by the sudden and unwarned approach of the train. *Pollard v. Clifton*, 62 Ga. App. 573, 9 S.E.2d 782 (1940).

The purpose of Ga. L. 1918, p. 212, §§ 2-5 (see O.C.G.A. §§ 46-8-190 — 46-8-192), in-

sofar as they limit the speed of trains, was to protect people from injury to person and property only when using the crossings. *Harrison v. Central of Ga. Ry.*, 39 Ga. App. 366, 147 S.E. 177 (1929).

The object of the law requiring those in charge of railroad trains to sound a whistle upon approaching a crossing is to notify persons who might come within the realm of the danger of a train at the railroad crossing. *Southern Ry. v. Riley*, 60 Ga. App. 475, 4 S.E.2d 54 (1939).

Penal consequences for violation of section. — Violation of provisions of former Code 1933, §§ 94-506 (see O.C.G.A. § 46-8-190) made penal by former Code 1933, § 94-9903 (see O.C.G.A. § 46-8-191), and the violation of a statute enjoining a duty of diligence constituted negligence as a matter of law, and was not issuable. *Williams v. Southern Ry.*, 99 Ga. App. 503, 109 S.E.2d 343 (1959).

Strict construction. — Former Code 1883, §§ 708-710, being penal, should be strictly construed. *Morgan v. Central R.R.*, 77 Ga. 788 (1886) (decided under former Code 1883, §§ 708-710).

Applicability to trains approaching or passing blow-post points. — Former Code 1883, §§ 708-710 applied to trains approach-

General Consideration (Cont'd)

ing or passing beyond points where blow-posts should be located, and not to those working exclusively between such points. *Morgan v. Central R.R.*, 77 Ga. 788 (1886) (decided under former Code 1883, §§ 708-710).

Livestock killed near blow-post. — *Ga. L.* 1918, p. 212, §§ 2-4 (see O.C.G.A. § 46-8-190) applied where stock was killed between blow-post and crossing. *Port Royal & W.C. Ry. v. Phinizy*, 83 Ga. 192, 9 S.E. 609 (1889); *Bugg v. Cook*, 32 Ga. App. 116, 122 S.E. 714 (1924).

Collision not necessary. — If, by reason of a failure to observe the duty required by this section the locomotive comes within such close proximity to an animal that it takes fright, runs away, and injury results to the person in consequence of being thrown from the vehicle, the company was liable for such injury, although there be no actual contact between the locomotive and the vehicle or its occupant. *Bowen v. Gainesville & S.R.R.*, 95 Ga. 688, 22 S.E. 695 (1895); *Georgia S. & F. Ry. v. Shobe*, 142 Ga. 767, 83 S.E. 786 (1914).

Cited in *Southern Ry. v. Pair*, 32 Ga. App. 378, 123 S.E. 142 (1924); *Atlantic Coast Line R.R. v. Spearman*, 42 Ga. App. 536, 156 S.E. 824 (1931); *Western & A.R.R. v. Michael*, 44 Ga. App. 503, 162 S.E. 294 (1932); *Georgia R.R. & Banking Co. v. Farmer*, 45 Ga. App. 130, 164 S.E. 71 (1932); *Southern Ry. v. Abercrombie*, 45 Ga. App. 623, 165 S.E. 901 (1932); *Central of Ga. Ry. v. Leonard*, 49 Ga. App. 689, 176 S.E. 137 (1934); *Pollard v. Gorman*, 52 Ga. App. 127, 182 S.E. 678 (1935); *Bazemore v. Powell*, 54 Ga. App. 444, 188 S.E. 282 (1936); *Pollard v. Savage*, 55 Ga. App. 470, 190 S.E. 423 (1937); *Georgia N. Ry. v. Rollins*, 62 Ga. App. 138, 8 S.E.2d 114 (1940); *Southern Ry. v. Nix*, 62 Ga. App. 119, 8 S.E.2d 409 (1940); *Powell v. Jarrell*, 65 Ga. App. 453, 16 S.E.2d 198 (1941); *Powell v. Smith*, 70 Ga. App. 754, 29 S.E.2d 521 (1944); *Atlantic Coast Line R.R. v. Sellars*, 81 Ga. App. 381, 59 S.E.2d 24 (1950); *Atlantic Coast Line R.R. v. Green*, 84 Ga. App. 674, 67 S.E.2d 184 (1951); *Central of Ga. Ry. v. Tyson*, 86 Ga. App. 122, 70 S.E.2d 914 (1952); *Southern Ry. v. United States*, 197 F.2d 922 (5th Cir. 1952); *Shuler v. Southern Ry.*, 106 Ga. App. 523, 127 S.E.2d 471

(1962); *Heath v. Charleston & W.C. Ry.*, 218 Ga. 786, 130 S.E.2d 712 (1963); *Terry v. Central of Ga. Ry.*, 108 Ga. App. 204, 132 S.E.2d 573 (1963); *Savannah & A. Ry. v. Ward*, 110 Ga. App. 529, 139 S.E.2d 154 (1964); *Southern Ry. v. Grogan*, 113 Ga. App. 451, 148 S.E.2d 439 (1966); *Southern Ry. v. Gordons Transps., Inc.*, 117 Ga. App. 740, 161 S.E.2d 879 (1968); *Bennett v. Seaboard Coast Line R.R.*, 302 F. Supp. 271 (S.D. Ga. 1969); *Nelson v. Seaboard Coast Line R.R.*, 122 Ga. App. 521, 177 S.E.2d 799 (1970); *Gross v. Southern Ry.*, 446 F.2d 1057 (5th Cir. 1971); *Louisville & N.R.R. v. Bush*, 131 Ga. App. 405, 206 S.E.2d 58 (1974); *Seaboard Coast Line R.R. v. Davis*, 139 Ga. App. 138, 227 S.E.2d 915 (1976); *Johnson v. UPS*, 616 F.2d 161 (5th Cir. 1980); *Southern Ry. v. Georgia Kraft Co.*, 188 Ga. App. 623, 373 S.E.2d 774 (1988); *Crockett v. Norfolk S. Ry.*, 95 F. Supp. 2d 1353 (N.D. Ga. 2000), *aff'd*, 239 F.3d 370, (11th Cir. 2000).

Negligence**1. In General**

Failure to comply with section as negligence. — Failure to comply with the statutory requirements was negligence per se, if such failure was the proximate cause of the injury. *Augusta & S.R.R. v. McElmurry*, 24 Ga. 75 (1858) (decided under former law). *Western & A.R.R. v. Jones*, 65 Ga. 631 (1880); *Central R.R. & Banking Co. v. Smith*, 78 Ga. 694, 3 S.E. 397 (1887) (decided under former Code 1882, §§ 708-710). *Western & A.R.R. v. Strickland*, 114 Ga. 133, 39 S.E. 943 (1901) (decided under former law). *Georgia & A. Ry. v. Cook*, 114 Ga. 760, 40 S.E. 718 (1902) (decided under former law). *Southern Ry. v. Combs*, 124 Ga. 1004, 53 S.E. 508 (1906) (decided under former law). *Seaboard Air-Line Ry. v. Hollis*, 20 Ga. App. 555, 93 S.E. 264 (1917) (decided under former law). *Davis v. Whitcomb*, 30 Ga. App. 497, 118 S.E. 488 (1923).

Failure to blow train whistle. — Failure to blow a whistle on a train as required by *Ga. L.* 1947, p. 479, § 1 (see O.C.G.A. § 46-8-190) is negligence per se; such negligence is sufficient to impose liability on the railroad if it is the proximate cause of the collision. *Gross v. Southern Ry.*, 414 F.2d 292 (5th Cir. 1969).

Ga. L. 1947, p. 479, § 1 (see O.C.G.A. § 46-8-190) does not require ringing of a bell. *Atlantic Coast Line R.R. v. Studdard*, 99 Ga. App. 609, 109 S.E.2d 523 (1959).

No duty upon engineer to bring train to stop at crossing. — Ga. L. 1947, p. 479, § 1 (see O.C.G.A. § 46-8-190) imposes no absolute duty upon engineer to have engine under such control that the engineer can bring it to a stop, but only that the engineer shall exercise due care to avoid doing injury to any person or property which may be on such crossing, and it is for the jury to decide what amount of care under the circumstances is a compliance with those provisions. *Georgia R.R. & Banking Co. v. Cook*, 94 Ga. App. 650, 95 S.E.2d 703 (1956).

Duty of railroad to anticipate presence of people at crossings. — The law, in requiring the agents and employees of railway companies to perform specific acts of diligence in approaching public crossings, necessarily implies that it is the duty of companies to anticipate that persons may be present at such crossings. *Central of Ga. Ry. v. Johnston*, 45 Ga. App. 773, 165 S.E. 916 (1932).

Failure to perform required acts may amount to negligence independent of section. — Although a failure to observe statutory requirements as to duties required of those in charge of a train when approaching a crossing is not negligence per se as to one not at the crossing, a failure to perform any of the acts required by Ga. L. 1918, p. 212, §§ 2-4 (see O.C.G.A. § 46-8-190) may, independently of that section, under the circumstances of the particular case, amount to negligence. *Hines v. Rubnitz*, 26 Ga. App. 354, 106 S.E. 589 (1921).

Obstructing view may be separate negligent act. — The maintaining of cars on sidetracks so as to obstruct the view of persons entering the crossing may be considered by the jury as a separate act of negligence contributing to the injury although other acts of negligence might be alleged in regard to the speed of the train, failure to signal and to provide flagmen, etc. *Western & A.R.R. v. Davis*, 116 Ga. App. 831, 159 S.E.2d 134 (1967).

2. Lack of Proximate Cause and Other Defenses

Defenses available to railroad after negligence established. — When those in charge

of a railway train neglect to comply with the statutory precautions in approaching a highway, and a person on the crossing is struck and injured by the train, the only defenses open to the company are that the injury was done by the consent of the person injured, or that by the observance of ordinary care the person could have avoided the injury, or, in mitigation of damages, that the person's negligence contributed to it. *Alabama G.S. Ry. v. Gross*, 61 Ga. App. 609, 7 S.E.2d 38 (1940).

When those in charge of a railway train neglect to comply with the statutory precautions in approaching a highway, and a person on the crossing is struck and injured, the only defenses open to the company are that the injury was done by the consent of the person injured, or that by the observance of ordinary care the person could have avoided the injury, or, in mitigation of damages, that the person's negligence contributed to it. *Clements v. Central of Ga. Ry.*, 41 Ga. App. 310, 152 S.E. 849 (1930).

Proximate causation necessary between negligence and injury. — If the failure to comply with Ga. L. 1918, p. 212, §§ 2-4 (see O.C.G.A. § 46-8-190) is not the proximate cause of the injury, for example where no post is erected but the engineer nevertheless blew the whistle in accordance with the legal requirements, the presumption of negligence is conclusively rebutted. *Stanford v. Southern Ry.*, 36 Ga. App. 319, 136 S.E. 804 (1927).

Assuming that under the statute it may well be true that the engineer is given no sort of discretion as to when or under what circumstances it might or might not be obligatory to maintain a constant and vigilant lookout along the track ahead of the engine when approaching a crossing, but that it is the engineer's ever-present duty to obey the legal mandate relative thereto; it nevertheless follows that the engineer's failure to comply with such a duty would not support a cause of action for damages unless such failure on the engineer's part bore some causal relation to the injury. *Western & A.R.R. v. Leslie*, 48 Ga. App. 714, 173 S.E. 170 (1934).

No proximate cause where party aware of train's approach. — Before a railroad company can be absolved from negligence for failure of the operator of a train to give

Negligence (Cont'd)**2. Lack of Proximate Cause and Other Defenses (Cont'd)**

crossing alarm required by statute by blowing a whistle or ringing a bell on approaching a railroad crossing, it must appear that the person injured had knowledge of the approach of the train, or should by the exercise of ordinary care have known of the approach of the train in time to avoid the injury. *Atlanta & W.P.R.R. v. McCord*, 54 Ga. App. 811, 189 S.E. 403 (1936).

Failure to blow the whistle as required by Ga. L. 1947, p. 479, § 1 (see O.C.G.A. § 46-8-190) cannot be considered as the proximate cause of a collision with a person who is on or near the tracks when the person is aware of the train's approach. *McPhail v. Atlantic Coast Line R.R.*, 93 Ga. App. 599, 92 S.E.2d 558 (1956).

When an injured party was fully aware of the train's approach as a matter of fact, negligence in failing to give warning of its presence under Ga. L. 1947, p. 479, § 1 (see O.C.G.A. § 46-8-190) is no part of the proximate cause of the injury. *Southern Ry. v. Lambert*, 106 Ga. App. 691, 128 S.E.2d 87 (1962).

No proximate cause where front end of train has passed before collision. — After the front end of the train has passed and the impact between the cars and the automobile is not immediate, the failure to perform statutory duty of blowing the whistle and ringing the bell is not the proximate cause of the collision. *Pollard v. Clifton*, 62 Ga. App. 573, 9 S.E.2d 782 (1940).

Unobstructed view of tracks does not mean party negligent. — A person in going upon a railroad crossing is not guilty of negligence, as a matter of law, in not seeing an approaching train, where the train failed to give the crossing alarm required by law, although before going on the crossing the person had an unobstructed view of the approach of the train for at least a half mile. *Atlanta & W.P.R.R. v. McCord*, 54 Ga. App. 811, 189 S.E. 403 (1936).

When recovery may be allowed despite lack of care by traveler. — Though a traveler may not observe that amount of care and diligence which would be exercised under like circumstances by an ordinarily prudent person, the traveler is not necessarily pre-

cluded from recovering for injuries to the traveler's person received on the crossing if, after it is apparent that the engineer of the company is disobeying the provisions of the traveler's, the traveler then exercises ordinary care and diligence in endeavoring to escape the consequences of the company's negligence. *Comer v. Barfield*, 102 Ga. 485, 31 S.E. 89 (1897); *Macon, D. & S.R.R. v. McLendon*, 119 Ga. 297, 46 S.E. 106 (1903); *Louisville & N.R.R. v. Hames*, 135 Ga. 67, 68 S.E. 805 (1910); *Wrightsville & T.R.R. v. Floyd*, 17 Ga. App. 461, 87 S.E. 688 (1916).

Party using crossing may assume railroad complying with law. — A party using a public crossing has a right to assume that the railroad's employees will obey the law requiring them to give warning before moving train toward crossing and will use reasonable care in avoiding injuring to that party. *Southern Ry. v. Florence*, 81 Ga. App. 1, 57 S.E.2d 856 (1950).

Automobile approaching slowly does not excuse negligence by engineer. — Mere fact that a person approaching a railroad crossing in an automobile is going at such a slow rate of speed that the person could easily stop the automobile within a few feet would not authorize or justify the engineer approaching the crossing to assume that the automobile would stop before it reached the crossing, where it does not appear that the engineer knew of the presence of the automobile. *Atlanta & W.P.R.R. v. McCord*, 54 Ga. App. 811, 189 S.E. 403 (1936).

Persons Protected

Section applies to protect person standing on track. — The protection of life and property on the highway where it was crossed by a railroad track is within the purpose of this section; and whether a person on the crossing is in actual motion or is temporarily standing does not make two such distinct situations that the section applied wholly for the protection of persons in the one and not at all for those in the other. *Central of Ga. Ry. v. Motz*, 130 Ga. 414, 61 S.E. 1 (1908).

Section applies to protect railroad employees. — The fact that the injured party was also an employee of the railroad did not make the employee any less entitled to the protection of this section and § 46-8-191 than any one else. He is, so far as the duty of

the other employees operating the cars across the crossing was concerned, a member of the public entitled to the fullest protection afforded by the law and their consequent duty to keep a constant and vigilant lookout. *Atlantic Coast Line R.R. v. Strickland*, 87 Ga. App. 596, 74 S.E.2d 897 (1953).

No duty owed to driver stopped far away or to driver driving too fast. — When the engine of a train which is barely moving has already gone over the crossing and is six lengths away, the failure of the engineer to ring the bell or blow the air whistle in approaching said crossing does not violate a duty to the driver of an automobile who is seated in a car stopped at a filling station 200 yards distant or to a driver who knows of such crossing and that it may be occupied by a train, and who is driving at a rate of speed which prevents the driver from stopping after the driver discovers the presence of the freight cars on the crossing. *Pollard v. Clifton*, 62 Ga. App. 573, 9 S.E.2d 782 (1940).

Duty of care to trespassers. — Though the person upon the line of the railway, not on the crossing, at a point within 50 feet of the crossing, if there without license or permission, would be a trespasser, nevertheless the duty is on the engineer to maintain a lookout and exercise due care not to injure the person. *Atlantic Coast Line R.R. v. Fulford*, 159 Ga. 812, 127 S.E. 274 (1925); *Simmons v. Atlanta & W.P.R.R.*, 46 Ga. App. 93, 166 S.E. 666 (1932).

Mere failure to give signals not negligence per se to trespasser. — Failure of an engineer to give the required signals would be negligence as to any person on a public road crossing over a railroad, and as to any person within 50 feet of the crossing; but would not be negligence as to a trespasser upon the railroad track who was more than 50 feet from the crossing. Mere failure to comply with Ga. L. 1918, p. 212, UU 2-4 (see O.C.G.A. § 46-8-190) and nothing more would constitute only ordinary or simple negligence. *Western & A.R.R. v. Michael*, 175 Ga. 1, 165 S.E. 37 (1932).

Crossings

Applicability of section to public road crossings only. — Crossings of public roads only and not those of private ways are em-

braced in former Code 1873, § 708. *Georgia R.R. v. Cox*, 61 Ga. 455 (1878) (decided under former Code 1873, § 708).

The provisions of former Code 1882, § 708 have no application except to crossings where a public road established pursuant to law crosses the track of a railroad, and consequently the statutory duties are not incumbent upon an engineer when approaching the intersection with a railroad of a road which, though to a greater or less extent used by the public, has never been established as a public road in the manner pointed out by law. *Comer v. Shaw*, 98 Ga. 543, 25 S.E. 733 (1896) (decided under former Code 1882, § 708).

Meaning of term "public road". — The term "a public road" or "highway" is not confined to one which had been laid out and established by the county authorities by regular proceedings, but includes highways in any of four ways: (1) by legislative action; (2) by formal proceedings by the county authorities establishing it; (3) by dedication; and (4) by prescription. *Atlanta & W.P.R.R. v. Wise*, 58 Ga. App. 176, 198 S.E. 126 (1938); *Georgia S. & Fla. Ry. v. Blanchard*, 121 Ga. App. 82, 173 S.E.2d 103 (1970).

What is a road crossing. — A road crossing, was the crossing by a railroad of a public highway, not only used but maintained as such by the proper authorities having the same in charge. *Atlantic Coast Line R.R. v. Bunn*, 2 Ga. App. 305, 58 S.E. 538 (1907).

Applicability to grade crossings only. — Former Code 1882, § 708 was applicable to grade crossings only and not to public roads passing above or beneath the track of a railroad. *McElroy v. Georgia C. & N. Ry.*, 98 Ga. 257, 25 S.E. 439 (1896) (decided under former Code 1882, § 708).

No application to overhead trestle or bridge. — This section is not applicable to a crossing where the railroad-tracks cross a public highway by means of a trestle over the public road. *Barton v. Southern Ry.*, 132 Ga. 841, 64 S.E. 1079, 22 L.R.A. (n.s.) 915, 16 Ann. Cas. 1232 (1909); *Central of Ga. Ry. v. Tapley*, 145 Ga. 792, 89 S.E. 841 (1916).

Code section not applicable to footway crossing track. — Former Code 1895, § 2222 did not apply to footway crossing track in town although a harmless reference thereto in a charge was not a cause for reversal. *Central of Ga. Ry. v. Bond*, 114 Ga.

Crossings (Cont'd)

913, 41 S.E. 70 (1902) (decided under former Code 1895, § 2222).

Code section not applicable to farm road.

— Where a crossing had been in existence at least 35 years, was originally established and used to afford ingress and egress to those farming the land in the bottoms to the west of the railroad, was a “farm road” or a “field road,” and it does not appear that the road as originally used, which called the crossing into existence, was now being maintained, or that such road ever acquired the character of a public road, the road was not a public crossing. *Atlanta & W.P.R.R. v. Wise*, 58 Ga. App. 200, 198 S.E. 126 (1938).

Code section not applicable to municipal crossings. — Ga. L. 1947, p. 479, § 1 (see O.C.G.A. § 46-8-190) does not apply to crossings within municipalities. *Georgia R.R. & Banking Co. v. Cook*, 94 Ga. App. 650, 95 S.E.2d 703 (1956).

The requirement as to blowing the whistle upon approaching a crossing had no application to a crossing in an incorporated city, town or village. *Luke v. Powell*, 63 Ga. App. 795, 12 S.E.2d 196 (1940).

Whistle may be needed in exercise of ordinary care. — While the Georgia blow-post law does not apply in municipalities, so that a failure to blow the whistle for a crossing therein is not a violation of the statute and thus negligence per se, nevertheless, such use of the whistle may be required in the exercise of ordinary care. *Atlantic Coast Line R.R. v. Key*, 196 F.2d 64 (5th Cir. 1952).

Failure to blow the whistle within a municipality may in certain circumstances constitute negligence as a matter of fact if it is the only way in which an adequate warning may be given. *Georgia R.R. & Banking Co. v. Cook*, 94 Ga. App. 650, 95 S.E.2d 703 (1956).

Need to prove public road status. — In any case in which the inquiry is material the method in which a public road was established — whether by legislative enactment, by order of the county authorities, by prescription, or by dedication — must be shown. *Georgia S. & Fla. Ry. v. Blanchard*, 121 Ga. App. 82, 173 S.E.2d 103 (1970).

Definite proof of public road status may be waived. — Where a witness, without objection, testifies that a certain road is a

public road, and no effort is made to test the sources of the witness's information or question the witness's statement that the road in question is in fact a public road, it must be assumed that more specific and definite proof of the fact that the road is lawfully a public road was waived. *Georgia S. & Fla. Ry. v. Blanchard*, 121 Ga. App. 82, 173 S.E.2d 103 (1970).

Practice and Pleading**1. In General**

Question of comparative negligence is exclusively jury question. — Question of comparative negligence on the part of the parties is exclusively a jury question and not a question that may be determined by the court as a matter of law. *Southern Ry. v. Haynes*, 293 F.2d 291 (5th Cir. 1961).

Sufficiency of complaint. — In action for injuries sustained in collision between plaintiff's automobile and defendant railway company's backing freight train at street grade crossings, allegations of complaint as to engineer's failure to ring the bell or keep a lookout made a jury question as to the proximate cause of the plaintiff's injury and damage, and were not subject to demurrer (now motion to dismiss) as stating no cause of action. *Southern Ry. v. Florence*, 81 Ga. App. 1, 57 S.E.2d 856 (1950).

Complaint which alleges that railroad company was negligent in failing to signal for crossing by the blowing of a train whistle, and in not flagging the crossing or having such other warning at the crossing as the exercise of ordinary care would require, is sufficient to state a cause of action as against a general demurrer (now motion to dismiss) for the death of plaintiff's husband in a collision with a train. *Jones v. McCranie*, 92 Ga. App. 505, 88 S.E.2d 849 (1955).

2. Instructions

Judge not to specify what acts constitute negligence. — Trial court errs in charging the jury that, if the bell on the train was not rung as the train approached the crossing, the railroad would be guilty of negligence per se even though the engineer gave the signal by whistle as required by Ga. L. 1947, p. 479, § 1 (see O.C.G.A. § 46-8-190), since a judge is prohibited from telling a jury what

acts do or do not constitute negligence, unless the act has been declared by law to be negligence. *Atlantic Coast Line R.R. v. Studdard*, 99 Ga. App. 609, 109 S.E.2d 523 (1959).

Jury may be charged that violation of statute is negligence. — It was error to leave to the jury the question of whether or not a violation of a part of Ga. L. 1947, p. 479, § 1 (see O.C.G.A. § 46-8-190) would constitute negligence by instructing that the plaintiff could recover under this allegation of negligence only if the jury found as a fact that the omission was negligence, when that provision requires a certain standard of care and the plaintiff requested a charge to the effect that failure to do the act required by the statute would constitute negligence per se which, if existing, and if the proximate cause of the injury, would entitle plaintiff to recover. *Williams v. Southern Ry.*, 99 Ga. App. 503, 109 S.E.2d 343 (1959).

Instruction where injury within corporate limits. — In view of Ga. L. 1918, p. 212, §§ 2-4 (see O.C.G.A. § 46-8-190) the court did not err in refusing to charge that, where the injury was within the corporate limits, if the railroad company either blew its whistle or tolled its bell there was sufficient compliance with those provisions but if the whistle were blown it would not be necessary to toll the bell, and vice versa. *Elberton & E.R.R. v. Thornton*, 32 Ga. App. 259, 122 S.E. 795 (1924).

It is harmless error to charge Ga. L. 1918, p. 212, §§ 2-4 (see O.C.G.A. § 46-8-190) where action is for injury within the corporate limits of city, and those provisions contains matter inapplicable to such actions. *Western & A.R.R. v. Mathis*, 32 Ga. App. 308, 122 S.E. 818 (1924).

Error to charge that engineer must exercise the engineer's faculties effectively. — Charge that engineer must exercise the en-

gineer's faculties of sight and hearing so that they will be effective is erroneous; Ga. L. 1918, p. 212, §§ 2-4 (see O.C.G.A. § 46-8-190) makes no such requirement. *Elberton & E.R.R. v. Thornton*, 32 Ga. App. 259, 122 S.E. 795 (1924).

Error to charge on failure to control engine. — It is not necessary for the engineer to check and keep checking the engine so as to stop in time if any person were crossing the track, hence, it is error for the court to charge that failure to have the engine so under control, amounted to negligence as a matter of law. *Louisville & N.R.R. v. Faust*, 30 Ga. App. 310, 117 S.E. 761 (1923).

Use of words "to instruct" not harmful. — A charge to the jury that the law requires a railroad company to erect a blow post "to instruct," rather than the statutory "to indicate," the direction of such crossing was a mere inaccuracy and not a substantial misstatement of the meaning those provisions. *Western & A.R.R. v. Bennett*, 47 Ga. App. 629, 171 S.E. 187 (1933).

No error in incorrect reference to section number. — The fact that the trial court in its charge referred to Code 1933, § 94-504 (now repealed) as dealing with the "blow post law" when it should have referred to this section could not have confused the jury as the court charged the language of these sections. *Western & Atl. R.R. v. Hart*, 95 Ga. App. 810, 99 S.E.2d 302 (1957).

No error in refusing to charge section where section complied with. — Where it is proved that the defendant blew the whistle of its locomotive, it is not error for the court to fail to charge the portion of Ga. L. 1918, p. 212, §§ 2-4 (see O.C.G.A. § 46-8-190), relative to the manner of approach within the corporate limits of a town. *Hines v. Owens*, 27 Ga. App. 373, 108 S.E. 478 (1921).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, §§ 258, 259, 261, 263, 271.

C.J.S. — 74 C.J.S., Railroads, §§ 764, 816 et seq., 819, 820.

ALR. — Expense of flagmen, gates, and automatic signals as items of compensation to railroad company across whose tracks a

highway is laid, 4 ALR 137.

Negligence in leaving live locomotive unattended, 24 ALR 124.

Liability of railroad company for injury to livestock frightened by headlight, 29 ALR 1546.

Running past stop signal as wanton or

willful misconduct rendering railroad company liable for injury to trespasser, 41 ALR 1354.

Liability for accident at point where highway leads to, but does not cross, railroad tracks, 47 ALR 863.

Infrequent use of crossing by railroad company as affecting its duty or liability to traveler at crossing, 52 ALR 751.

Duty of driver whose view at railroad crossing is obstructed to leave vehicle in order to get an unobstructed view before crossing, 56 ALR 647; 91 ALR 1055.

Failure or delay in sounding crossing signals as affecting liability of railroad company to persons not crossing nor about to cross track, 66 ALR 811.

Applicability to car or engine driven on rails by motive power other than steam, of statute relating to crossing signals or other precautions at approach to crossing, 73 ALR 105.

Responsibility for accident at railroad crossing as affected by absence, improper location, or insufficiency of signs warning approaching travelers of presence of crossing, 93 ALR 218.

Liability of railroad company for injury or damage due to road vehicles striking signal or warning device installed at crossing, 99 ALR 287.

Conduct of operator of automobile at railroad crossing as gross negligence, recklessness, etc., within guest statute, 143 ALR 1144.

Speed of train, locomotive, or railway car at highway crossing, as negligence, 154 ALR 212.

Contributory negligence of one attempting to cross in front of an observed approaching train, as affected by increase of its speed, 154 ALR 512.

What amounts to negligence of gate tender at railroad crossing, 160 ALR 731.

Duty of railroad toward persons using private crossing or commonly used footpath over or along railroad tracks, 167 ALR 1253.

Railroad lookout statutes as applicable to switching operations, 1 ALR2d 621.

Duty of railroad company to maintain flagman at crossing, 24 ALR2d 1161.

Intoxication of person injured or killed as affecting applicability of last clear chance doctrine, 26 ALR2d 308.

Railroad's duty to children walking longitudinally along railroad tracks or right of way, 31 ALR2d 789.

Railroad's liability for crossing collision as affected by fact that train or engine was backing or engine was pushing train, 85 ALR2d 267.

46-8-191. Duty of railroad companies as to erection of blowposts within city limits; exercise of due care by locomotive engineers within city limits; duty of companies and engineers to observe speed-limit ordinances.

(a) Within the corporate limits of cities, a railroad company shall not be required either to erect the blowpost provided for in Code Section 46-8-190 or to blow the whistle of its locomotives in approaching a crossing in said corporate limits. However, in lieu thereof, the engineer of each locomotive shall be required to signal the approach of his train to such crossing in said corporate limits by constantly tolling the bell of the locomotive; and on failure to do so, the engineer shall be guilty of a misdemeanor.

(b) Nothing in this Code section shall be held to relieve the engineer or the railroad company of his or its duty of keeping and maintaining a constant and vigilant lookout along the track ahead of the engine while moving within the corporate limits of a city. In addition, nothing in this Code section shall be held to excuse such railroad company or such engineer from exercising due care in so controlling the movements of such trains as to avoid doing injury to persons or property which may be on such crossing within said city or within 50 feet of the crossing on the line of such

railway, or from observing any ordinance of such city regulating the speed at which railroad trains may be run therein. (Ga. L. 1918, p. 212, § 4; Code 1933, §§ 94-507, 94-9903.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

NEGLIGENCE

1. IN GENERAL
2. OTHER DUTIES
3. DEFENSES

PERSONS PROTECTED

PLEADING AND PRACTICE

General Consideration

Code Sections 46-8-190 — 46-8-192 intended for protection at public crossings. — Ga. L. 1918, p. 212, §§ 2-5 (see O.C.G.A. §§ 46-8-190 — 46-8-192) were intended for protection of persons and property at public crossings, and the provisions of these sections apply only where injury is done at public road crossings. *Western & A.R.R. v. Michael*, 175 Ga. 1, 165 S.E. 37 (1932).

The purpose of Ga. L. 1918, p. 212, §§ 2-5 (see O.C.G.A. §§ 46-8-190 — 46-8-192) with respect to giving signals in approaching a crossing was to give warning to persons upon the crossing or those who may be approaching the crossing or whose animals may be scared by the sudden and unwarned approach of the train. *Pollard v. Clifton*, 62 Ga. App. 573, 9 S.E.2d 782 (1940).

The purpose of this requirement is to notify persons intending to pass over the crossing of the approach of the train. *Chandler v. Pollard*, 64 Ga. App. 122, 12 S.E.2d 190 (1940).

Gasoline motor bus operated on tracks not "locomotive". — Term "locomotive" as used in former Code 1933, §§ 94-505 and 94-507 (see O.C.G.A. §§ 46-8-170 and 46-8-191) did not apply to gasoline motor bus operated by railroad on its tracks. *Gainesville M.R.R. v. Allen*, 72 Ga. App. 736, 35 S.E.2d 12 (1945).

Applicability of section to backing train. — Former Code 1933, § 94-507 (see O.C.G.A. § 46-8-191) did not mean that the engineer of a backing train was not required to keep a lookout. The word "ahead" must be construed as relating to the direction in

which the train is moving, rather than to the direction in which the pilot on the engine was pointing. *Atlanta, B. & C.R.R. v. Davis*, 53 Ga. App. 814, 187 S.E. 148 (1936).

Cited in *Western & A.R.R. v. Michael*, 44 Ga. App. 503, 162 S.E. 294 (1932); *Georgia R.R. & Banking Co. v. Farmer*, 45 Ga. App. 130, 164 S.E. 71 (1932); *Southern Ry. v. Abercrombie*, 45 Ga. App. 623, 165 S.E. 901 (1932); *Pollard v. Gorman*, 52 Ga. App. 127, 182 S.E. 678 (1935); *Bazemore v. Powell*, 54 Ga. App. 444, 188 S.E. 282 (1936); *Southern Ry. v. Maddox*, 63 Ga. App. 508, 11 S.E.2d 501 (1940); *Powell v. Jarrell*, 65 Ga. App. 453, 16 S.E.2d 198 (1941); *Southern Ry. v. Harris*, 123 F.2d 7 (5th Cir. 1941); *Callaway v. Cox*, 74 Ga. App. 555, 40 S.E.2d 578 (1946); *Cosper v. Atlantic Coast Line R.R.*, 85 Ga. App. 683, 69 S.E.2d 886 (1952); *Hatcock v. Georgia N. Ry.*, 90 Ga. App. 533, 83 S.E.2d 329 (1954); *Atlantic Coast Line R.R. v. Grimes*, 99 Ga. App. 774, 109 S.E.2d 890 (1959); *Shuler v. Southern Ry.*, 106 Ga. App. 523, 127 S.E.2d 471 (1962); *Southern Ry. v. Grogan*, 113 Ga. App. 451, 148 S.E.2d 439 (1966); *Southern Ry. v. Gordons Transps., Inc.*, 117 Ga. App. 740, 161 S.E.2d 879 (1968); *Brown v. Seaboard Coast Line R.R.*, 405 F.2d 601 (5th Cir. 1968); *Nelson v. Seaboard Coast Line R.R.*, 122 Ga. App. 521, 177 S.E.2d 799 (1970); *Johnson v. UPS*, 616 F.2d 161 (5th Cir. 1980).

Negligence

1. In General

Failure to ring bell is negligence per se. — Allegations of negligence on part of a railway company that through its engineer it failed

Negligence (Cont'd)**1. In General (Cont'd)**

to keep a proper lookout ahead of the train and failed to ring the bell, sound the whistle or horn, or otherwise give motorists any warning of the approach of the train was negligence per se. *Southern Ry. v. Grant*, 93 Ga. App. 185, 91 S.E.2d 99 (1956).

Where the engineer in charge of the train did not toll the bell of the locomotive as the train approached a crossing within the corporate limits of a municipality, in violation of the requirements of former Code 1933, § 94-507 (see O.C.G.A. § 46-8-191), this failure, where there was a causal connection between such failure and the collision at the crossing, was actionable negligence on the part of the engineer. *Luke v. Powell*, 63 Ga. App. 795, 12 S.E.2d 196 (1940).

Blowing whistle does not excuse failure to ring bell. — Under former Code 1933, § 94-507 (see O.C.G.A. § 46-8-101), upon approaching a crossing located within the corporate limits of a city, town, or village, the engineer of a train was required to constantly toll the bell of the locomotive, and was not relieved from compliance with this requirement by blowing the whistle of the engine, and where there was a causal connection between the failure of the engineer to so ring the bell and an injury to a traveler upon the crossing, such failure constituted actionable negligence against the railroad company. *Chandler v. Pollard*, 64 Ga. App. 122, 12 S.E.2d 190 (1940).

Failure to ring bell as negligence. — Failure to ring bell under certain circumstances may constitute negligence in fact but not negligence per se. *Georgia, A., S. & C. Ry. v. Rutherford*, 104 Ga. App. 41, 121 S.E.2d 159 (1961).

Timing of whistle contested. — Material question of fact concerning timing of whistle existed to preclude summary judgment against defendant railroad for failure to ring its bell. *Biggers ex rel. Key v. Southern Ry.*, 820 F. Supp. 1409 (N.D. Ga. 1993). But see *CSX Transp., Inc. v. Trism Specialized Carriers, Inc.*, 9 F. Supp. 2d 1374 (N.D. Ga. 1998), *aff'd*, 182 F.3d 788 (11th Cir. 1999).

Train exceeding speed limit as negligence. — Where train is run at crossing at rate of speed in excess of that limited by ordinance it is negligence per se, and the railroad

company is liable if such speed is the proximate cause of injury. *Central of Ga. Ry. v. Barnes*, 46 Ga. App. 158, 167 S.E. 217 (1932).

2. Other Duties

Compliance with subsection (a) does not relieve engineer from other duties. — Subsection (b) of former Code 1933, § 94-507 (see O.C.G.A. § 46-8-191) points out that the duty placed upon the engineer by subsection (a) did not relieve the engineer or railroad company from certain other duties therein specified. *Montgomery v. Southern Ry.*, 78 Ga. App. 370, 51 S.E.2d 66 (1948).

Exercise of ordinary care by employees controlling train movements. — Independently of the provisions of Ga. L. 1918, p. 212 there rests upon the railroad company a duty to exercise ordinary care, and a failure of the servants of a railroad company operating its train to give any signal by bell, whistle, or otherwise, or to check the speed of the train on approaching a public crossing, might, in the opinion of the jury, constitute actual negligence in the light of the surrounding facts and circumstances. *Thompson v. Powell*, 60 Ga. App. 796, 5 S.E.2d 260 (1939).

Railroad company and its employees engaged in operation of trains must exercise ordinary care in so controlling the movements of such trains as to avoid doing injury to persons or property which may be on a crossing within the corporate limits of cities, towns, or villages along its line. *Atlantic Coast Line R.R. v. Grimes*, 99 Ga. App. 774, 109 S.E.2d 890 (1959).

Ordinary care may require other duties. — The requirement in former Code 1933, § 94-507 (see O.C.G.A. § 46-8-191) of certain duties of a railway company within the limits of a municipality did not relieve it from doing what ordinary care otherwise required to be done. *Pollard v. Savage*, 55 Ga. App. 470, 190 S.E. 423 (1937); *Thompson v. Powell*, 60 Ga. App. 796, 5 S.E.2d 260 (1939).

Duty of railroad to anticipate presence of people at public crossings. — The law, in requiring the agents and employees of railway companies to perform specific acts of diligence in approaching public crossings, necessarily implies that it is the duty of the companies to anticipate that persons may be

present at such crossings. *Central of Ga. Ry. v. Johnston*, 45 Ga. App. 773, 165 S.E. 916 (1932).

Duty of railroad to anticipate presence of people at private crossings. — Where a number of persons habitually, with the knowledge and without the disapproval of a railroad company, use a private passageway for the purpose of crossing the tracks of the company at a given point, the employees of the company in charge of one of its trains, who are aware of this custom, are bound on a given occasion to anticipate that persons may be upon the track at this point; and they are under a duty to take such precautions to prevent injury to such persons as would meet requirements of ordinary care and diligence. *Western & A.R.R. v. Michael*, 44 Ga. App. 503, 162 S.E. 294 (1931).

3. Defenses

No liability where party aware of train's approach. — Before a railroad company can be absolved from negligence for failure of the operator of a train to give crossing alarm required by statute by blowing a whistle or ringing a bell on approaching a railroad crossing, it must appear that the person injured had knowledge of the approach of the train, or should, by the exercise of ordinary care, have known of the approach of the train in time to avoid injury. *Atlanta & W.P.R.R. v. McCord*, 54 Ga. App. 811, 189 S.E. 403 (1936).

The failure of an engineer to give signals required by former Code 1933, § 94-507 (see O.C.G.A. § 46-8-191) will not impose liability on the railroad company to a person on or near the railroad track who was either aware of the approach of the train or who, through the exercise of ordinary care, should have discovered the approach of the train. *Iler v. Seaboard Air Line R.R.*, 214 F.2d 385 (5th Cir. 1954).

No liability where front end of train has passed before collision. — After the front end of the train has passed and the impact between the cars and the automobile is not immediate, the failure to perform the statutory duty of blowing the whistle and ringing the bell is not the proximate cause of the collision. *Pollard v. Clifton*, 62 Ga. App. 573, 9 S.E.2d 782 (1940).

Unobstructed view of tracks does not mean party is negligent. — A person in

going upon a railroad crossing is not guilty of negligence, as a matter of law, in not seeing an approaching train, where the train failed to give the crossing alarm required by law, although before going on the crossing the person had an unobstructed view of the approach of the train for at least a half mile. *Atlanta & W.P.R.R. v. McCord*, 54 Ga. App. 811, 189 S.E. 403 (1936).

Party using crossing may assume railroad complying with law. — A party using a public crossing has a right to assume that the railroad's employees will obey the law requiring them to give warning before moving train toward crossing and will use reasonable care in avoiding injuring to that party. *Southern Ry. v. Florence*, 81 Ga. App. 1, 57 S.E.2d 856 (1950).

The mere fact that motorist saw an engine of the railway company with cars attached thereto and with steam up, standing on the tracks near the crossing, affords no justification for holding that as a matter of law, the motorist was so negligent in going upon the crossing as to bar a recovery from the company for personal injuries and property damage sustained in collision between the automobile and backing freight train where there is no other fact to show that the motorist had any cause to believe that the company's servants would move the train toward the crossing without first giving a warning to the public using the crossing as required by law. *Southern Ry. v. Florence*, 81 Ga. App. 1, 57 S.E.2d 856 (1950).

Fact that automobile is approaching slowly does not excuse negligence by engineer. — Mere fact that a person approaching a railroad crossing in an automobile is going at such a slow rate of speed that the person could easily stop the automobile within a few feet would not authorize or justify engineer approaching the crossing to assume that the automobile would stop before it reached the crossing, where it does not appear that the engineer knew of the presence of the automobile. *Atlanta & W.P.R.R. v. McCord*, 54 Ga. App. 811, 189 S.E. 403 (1936).

Persons Protected

Section applies to protect railroad employees. — The fact that the injured party is also an employee of the railroad does not make the employee any less entitled to the protection of these sections than anyone else. The

Persons Protected (Cont'd)

employee is, so far as the duty of the other employees operating the cars across the crossing is concerned, a member of the public entitled to the fullest protection afforded by law and their consequent duty to keep a constant and vigilant lookout. *Atlantic Coast Line R.R. v. Strickland*, 87 Ga. App. 596, 74 S.E.2d 897 (1953).

No duty owed to driver stopped far away or to driver driving too fast. — When the engine of a train which is barely moving has already gone over the crossing and is six lengths away, the failure of the engineer to ring the bell or blow the air whistle in approaching said crossing does not violate a duty to the driver of an automobile who is seated in a car stopped at a filling station 200 yards distant or to a driver who knows of such crossing and that it may be occupied by a train, and who is driving at a rate of speed which prevents the driver from stopping after the driver discovers the presence of the freight cars on the crossing. *Pollard v. Clifton*, 62 Ga. App. 573, 9 S.E.2d 782 (1940).

Duty of care to trespassers. — Under Ga. L. 1918, p. 212, § 4 (see O.C.G.A. § 46-8-1912), though a person upon the line of the railway, not on the crossing, at a point within 50 feet of the crossing, if there without license or permission, would be a trespasser, nevertheless the engineer has a duty to maintain a lookout and exercise due care not to injure the person. *Simmons v. Atlanta & W.P.R.R.*, 46 Ga. App. 93, 166 S.E. 666 (1932).

Mere failure to give signals not negligence per se to trespasser. — Failure of an engineer to give the required signals would be negligence as to any person on a public road crossing over a railroad, and as to any person within 50 feet of the crossing, but would not be negligence as to a trespasser upon the railroad track who was more than 50 feet from the crossing. Mere failure to comply with Ga. L. 1918, p. 212, § 4 (see O.C.G.A. § 46-8-191) and nothing more would constitute only ordinary or simple negligence. *Western & A.R.R. v. Michael*, 175 Ga. 1, 165 S.E. 37 (1932).

Pleading and Practice

Sufficiency of complaint. — In action for injuries sustained in collision between plain-

tiff's automobile and defendant railway company's backing freight train at street grade crossings, allegations of complaint as to engineer's failure to ring the bell or keep a lookout made a jury question as to the proximate cause of the plaintiff's injury and damage, and were not subject to demurrer (now motion to dismiss) as stating no cause of action. *Southern Ry. v. Florence*, 81 Ga. App. 1, 57 S.E.2d 856 (1950).

Question of duties constituting ordinary care is for jury. — In an action against a railroad company for injuries received by a person lawfully upon a railroad crossing, the question of what such person must or must not do in order to free oneself of guilt of lack of ordinary care constituting the proximate cause of the person's injury is a question for the jury. *Atlantic Coast Line R.R. v. Grimes*, 99 Ga. App. 774, 109 S.E.2d 890 (1959).

Statement of correct law is charge as to proper control. — Charge that one who operates a locomotive engine or drives a motor vehicle at such speed that one cannot bring the same to a stop within the distance dictated by the voice of ordinary care does not have immediate or proper control of the conveyance, whatever be its nature, states the correct principle of law as to what is proper control. *Atlantic Coast Line R.R. v. Grimes*, 99 Ga. App. 774, 109 S.E.2d 890 (1959).

Use of entire contents of section proper even where part inapplicable. — Where court's charge quoted the entire contents of former Code 1933, § 94-507 see O.C.G.A. § 46-8-191) with reference to a railroad company's duties as to operation of its trains in incorporated municipalities, fact that a part of it was inapplicable to the issues was not ground for reversal unless calculated to mislead or erroneously affect the jury. *Atlantic Coast Line R.R. v. Grimes*, 99 Ga. App. 774, 109 S.E.2d 890 (1959).

Charge not to state that railroad should blow whistle. — Charge which instructs the jury that they should find the defendant railroad guilty of negligence if they determined that its employees failed to blow the train whistle or horn as it approached the crossing where the collision occurred was erroneous, because since the collision occurred within the corporate limits of a town the defendant was not required by statute to blow the whistle or horn as it approached a

public crossing. *Western & A.R.R. v. Mansfield*, 98 Ga. App. 421, 105 S.E.2d 804 (1958).

Where a charge in effect states that the failure of the engineer to blow the train whistle was negligence per se and submitted to the jury the sole question as to whether such failure was the proximate cause of the collision, the charge is error. The engineer was not required by law to blow the train whistle upon approaching the crossing which lay within the corporate limits of the town. The court should have submitted to the jury for their determination the question whether the failure of the engineer to blow the train whistle under the circumstances was common law negligence. *Southern Ry. v. Thompson*, 96 Ga. App. 305, 99 S.E.2d 845 (1957).

Error to charge jury that section applies to gasoline motor bus. — To violate former Code 1933, § 94-507 (see O.C.G.A. § 46-8-191) is a penal offense, and penal statutes must be strictly construed; thus, the words in former Code 1933, § 94-505 (see O.C.G.A. § 46-8-170), "shall be equipped with a signal bell and a signal whistle," clearly evidence that the legislative intent was to apply the provisions of this section as to "constantly tolling the bell of the locomotive" only to locomotives. Consequently, a trial judge committed reversible error in instructing a jury that this requirement of the statute applied to a gasoline motor bus. *Gainesville M.R.R. v. Allen*, 72 Ga. App. 736, 35 S.E.2d 12 (1945).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, §§ 258, 259, 261, 263, 271.

C.J.S. — 74 C.J.S., Railroads, §§ 764, 816 et seq., 819, 820.

ALR. — Validity and construction of railroad stop statute, 2 ALR 156.

Reasonableness of regulation of speed of railroad train, 20 ALR 1222.

Infrequent use of crossing by railroad company as affecting its duty or liability to traveler at crossing, 52 ALR 751.

Responsibility for accident at railroad crossing as affected by absence, improper location, or insufficiency of signs warning approaching travelers of presence of crossing, 93 ALR 218.

What amounts to negligence of gate tender at railroad crossing, 160 ALR 731.

Railroad lookout statutes as applicable to switching operations, 1 ALR2d 621.

Customary or statutory signal from train as measure of railroad's duty as to warning at highway crossing, 5 ALR2d 112.

Duty of railroad company to maintain flagman at crossing, 24 ALR2d 1161.

Intoxication of person injured or killed as affecting applicability of last clear chance doctrine, 26 ALR2d 308.

Railroad's liability for crossing collision as affected by fact that train or engine was backing or engine was pushing train, 85 ALR2d 267.

46-8-192. Effect of title on duties or liabilities of railroad companies under other laws.

The enumeration of certain specific duties in this title shall in no way be so construed as to relieve any railroad company from any other duties or liabilities which may be imposed upon it by any other law. (Ga. L. 1918, p. 212, § 5; Code 1933, § 94-508.)

JUDICIAL DECISIONS

Code Sections 48-8-190 — 48-8-192 intended for protection at public crossings. — Ga. L. 1918, p. 212, §§ 2-5 (see O.C.G.A. §§ 46-8-190 — 46-8-192) were intended for

protection of persons and property at public crossings, and the provisions of these sections apply only where injury was done at public road crossings. *Western & A.R.R. v.*

Michael, 175 Ga. 1, 165 S.E. 37 (1932).

The purpose of Ga. L. 1918, p. 212, §§ 2-5 (see O.C.G.A. §§ 46-8-190 — 46-8-192) with respect to giving signals in approaching a crossing was is to give warning to persons upon the crossing or those who may be approaching the crossing or whose animals may be scared by the sudden and unwarned approach of a train. Pollard v. Clifton, 62 Ga. App. 573, 9 S.E.2d 782 (1940).

No liability where front end of train has passed before collision. — After the front end of the train has passed and the impact between the cars and the automobile is not immediate, the failure to perform statutory duty of blowing the whistle and ringing the bell is not the proximate cause of the collision. Pollard v. Clifton, 62 Ga. App. 573, 9 S.E.2d 782 (1940).

No duty owed to driver stopped far away or to driver driving too fast. — When the

engine of a train which is barely moving has already gone over the crossing and is six lengths away, the failure of the engineer to ring the bell or blow the air whistle in approaching said crossing does not violate a duty to the driver of the automobile who is seated in a car stopped at a filling station 200 yards distant or to a driver who knows of such crossing and that it may be occupied by a train, and who is driving at a rate of speed which prevents the driver from stopping after he discovers the presence of the freight cars on the crossing. Pollard v. Clifton, 62 Ga. App. 573, 9 S.E.2d 782 (1940).

Cited in Georgia R.R. & Banking Co. v. Farmer, 45 Ga. App. 130, 164 S.E. 71 (1932); **Bazemore v. Powell**, 54 Ga. App. 444, 188 S.E. 282 (1936); **Pollard v. Savage**, 55 Ga. App. 470, 190 S.E. 423 (1937); **Powell v. Jarrell**, 65 Ga. App. 453, 16 S.E.2d 198 (1941).

RESEARCH REFERENCES

ALR. — Duty to have forward light on car or train preceding engine or on engine running backwards, 15 ALR 1527.

Duty to check speed of train upon discovering live stock on or near tracks, 23 ALR 148.

Duty of railroad to keep trespassing children from getting on cars, 43 ALR 38.

Speed of train, locomotive, or railway car at highway crossing, as negligence, 154 ALR 212.

What amounts to negligence of gate tender at railroad crossing, 160 ALR 731.

Duty of railroad toward persons using private crossing or commonly used footpath over or along railroad tracks, 167 ALR 1253.

Railroad company's liability for injury or death of pedestrian due to condition of surface of crossing, 64 ALR2d 1199.

46-8-193. Duty of enginemen and conductors to stop trains at railroad crossings.

(a) Whenever the tracks of separate and independent railroads cross each other in this state, or whenever any railroad has the tracks of two separate and independent divisions crossing each other in this state, all enginemen and conductors in charge of trains moving on those tracks shall cause the trains which they respectively drive and conduct to come to a full stop within 50 feet of the place of crossing and then to move the trains forward slowly until over the crossing, provided that whenever either or any of the railroads whose tracks cross in the manner contemplated in this Code section place at such crossing either flagmen or modern interlocking signal devices, it shall not be necessary for trains to stop at such crossings if the signals indicate that the tracks for such trains are clear; but all trains

approaching crossings so guarded shall be under such control that they may be stopped if the signals so indicate.

(b) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1931, p. 229, §§ 1, 2; Code 1933, §§ 94-510, 94-9905.)

JUDICIAL DECISIONS

Editor's notes. — Some of the decisions cited below were decided under former Code 1895, § 2234 and former Penal Code 1910, § 517.

Section applies where one railroad cuts through another's track. — If one railroad should cut another's track and install another track crossing it, it will be necessary for the crossing railroad to bring all of its trains using its said main line track to a full stop within 50 feet of the place of crossing. *Atlantic Coast Line R.R. v. Southern Ry.*, 214 Ga. 178, 104 S.E.2d 77 (1958).

Section not applicable to street railway. — Former Civil Code 1895, § 2234 (see O.C.G.A. § 46-8-193) did not apply to an intersection by a street railroad track of a commercial railroad track. *Georgia Ry. & Elec. Co. v. Joiner*, 120 Ga. 905, 48 S.E. 336 (1904); *Georgia Ry. & Elec. Co. v. Carroll*, 143 Ga. 93, 84 S.E. 434 (1915) (decided under former Civil Code 1895 § 2234).

Violation as negligence at highway crossing. — The purpose of former Penal Code 1910, § 517 was to prevent collisions of trains and cannot be invoked by a private individual in an action for injuries sustained at a railway and highway crossing for the purpose of showing negligence because the engine failed to stop before crossing the track of a nearby intersecting railroad. *Central of Ga. Ry. v. Griffin*, 35 Ga. App. 161, 132 S.E. 255 (1926) (decided under former Penal Code 1910, § 517).

Diligence required of first passing train.

— While this section declares that whenever the tracks of different railroads cross each other, the trains of the road first constructed and put in operation have the privilege of crossing first, nevertheless, in making the prescribed stop within 50 feet of the crossing and in approaching it as provided, those in charge of the train which had the right of passing first must use extraordinary care and diligence to protect the safety and welfare of its passengers. *Atlantic Coast Line R.R. v. Adeeb*, 15 Ga. App. 842, 84 S.E. 316 (1915).

Recovery of exemplary damages.

— Where proof shows failure to observe the statutory requirements as to a giving of a signal of taking of an precaution, exemplary damages are not recoverable. There must be proof of willfulness, wantonness, malice, or oppression. *Southern Ry. v. Davis*, 132 Ga. 812, 65 S.E. 131 (1909) (decided under former Civil Code 1895, § 2234).

There must be proof of willfulness, wantonness, malice, or oppression to recover exemplary damages. *Southern Ry. v. Davis*, 132 Ga. 812, 65 S.E. 131 (1909).

Cited in *Little v. Southern Ry.*, 120 Ga. 347, 47 S.E. 953 (1904); *Central of Ga. Ry. v. Griffin*, 35 Ga. App. 161, 132 S.E. 255 (1926); *George A. Fuller Constr. Co. v. Elliott*, 92 Ga. App. 309, 88 S.E.2d 413 (1955).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 273.

C.J.S. — 74 C.J.S., Railroads, §§ 766, 821 et seq.

ALR. — Validity and construction of railroad stop statute, 2 ALR 156.

What conduct on part of railroad, in connection with crossing accident, amounts to wantonness, willfulness, or the like, precluding defense of contributory negligence, 151 ALR 9.

46-8-194. Erection and maintenance of crossbuck signs at highway grade crossings; conformance of signs to Department of Transportation standards.

By July 31, 1976, each railroad company shall erect and continue to maintain a reflectorized railroad crossbuck sign at each grade crossing where a railroad crossbuck sign is required by Georgia law to be erected. Such reflectorized railroad crossbuck signs shall conform to standards established by the Georgia Department of Transportation. (Ga. L. 1973, p. 97, § 1.)

Cross references. — For further provisions regarding installation of protective devices at grade crossings, § 32-6-200, 32-6-202.

JUDICIAL DECISIONS

Cited in Johnson v. UPS, 616 F.2d 161 (5th Cir. 1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 271. **C.J.S.** — 74 C.J.S., Railroads, § 821 et seq.

46-8-195. Bringing of actions to compel railroad companies to post crossbuck signs.

The Georgia Department of Transportation or, with respect to roads under its jurisdiction, the governing authority of a county or an incorporated municipality may bring an action in the appropriate superior court to compel a railroad company from posting reflectorized railroad crossbuck signs, as such duty is imposed by Code Section 46-8-194. (Ga. L. 1973, p. 97, § 2.)

Cross references. — For further provisions regarding installation of protective devices at grade crossings, see §§ 32-6-200, 32-6-202.

46-8-196. Use of standard signs for highway crossings and for advertising or other purposes; mutilation, destruction, and defacement of standard signs; removal of unauthorized signs by county authorities.

(a) It shall be the duty of the Public Service Commission to designate a standard sign or signs and to require the use of same by railroad companies to indicate crossings of public highways across railroads. It shall be unlawful for any person to use a sign similar thereto for advertising or for any other purpose; and it shall be unlawful to mutilate, destroy, or deface any crossing sign. The county authorities in charge of the roads of any county where a

sign is erected contrary to this law shall have the duty of removing and destroying that sign.

(b) Any person who violates this Code section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not exceeding \$50.00 or by imprisonment for a period not to exceed 12 months, or both. (Ga. L. 1918, p. 268, § 1; Code 1933, §§ 94-511, 94-9906; Ga. L. 1982, p. 3, § 46.)

Cross references. — Promulgation by Department of Transportation of uniform regulations governing signs and signals, on pub-

lic roads, and as to erection, placement, or maintenance of unauthorized signs and signals, §§ 32-6-50, 32-6-51.

JUDICIAL DECISIONS

Absence of crossbuck sign not proximate cause where motorist hits side of train. — The absence of a railroad crossbuck sign at a railroad crossing bore no causal relationship and was not a proximate cause of the accident where the motorist ran into the side of the moving train, which had been in the crossing for several minutes and was in plain view and within the range of the driver's headlights. *Gross v. Southern Ry.*, 446 F.2d 1057 (5th Cir. 1971).

Cited in *Atlantic Coast Line R.R. v. Kammerer*, 239 F.2d 115 (5th Cir. 1956); *Padgett v. Central of Ga. Ry.*, 95 Ga. App. 96, 96 S.E.2d 658 (1957); *Wood v. Atlantic Coast Line R.R.*, 192 F. Supp. 351 (M.D. Ga. 1960); *Seaboard Coast Line R.R. v. Sheffield*, 127 Ga. App. 580, 194 S.E.2d 484 (1972); *Johnson v. UPS*, 616 F.2d 161 (5th Cir. 1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 271.

C.J.S. — 74 C.J.S., Railroads, § 821 et seq.

46-8-197. Legal responsibility of member of train crew, yard crew, or engine crew for occupying or blocking street, road, or highway grade crossing pursuant to employer's order.

No member of a train crew, yard crew, or engine crew of a railroad common carrier shall be held personally responsible under, or found guilty of violating, any state laws or municipal ordinances regulating or intended to regulate the occupying or blocking of any street, road, or highway grade crossing by engines or passenger or freight cars, upon reasonable proof by the crew member that the occupying or blocking of the grade crossing was necessary to comply with the orders or instructions, either written or oral, of his employer or of the officers or supervisory officials of the company owning the railroad over which the engine or cars are operated; provided, however, that this Code section shall not relieve the employer or railroad company from any responsibility placed upon such employee or railroad company by any such state laws or municipal ordinances. (Ga. L. 1965, p. 645, § 1.)

JUDICIAL DECISIONS

Editor's notes. — The decision cited below was decided under former law.

Pedestrian not trespasser where railroad has blocked crossing. — Where a railroad company blocks with its cars a crossing on a public highway for a needless or unreasonable length of time, a pedestrian, after waiting a reasonable time for such cars to be removed, may turn aside to avoid the obstruction and pass over property of the company without being a trespasser in so doing, and in such a case the questions as to the

reasonableness of the time of blocking and waiting, whether the company owed to the pedestrian the duty, under the facts and circumstances, of anticipating the pedestrian's presence, and the diligence due and exercised by the company for the pedestrian's safety, are jury questions. *Yarbrough v. Georgia R.R. & Banking Co.*, 48 Ga. App. 314, 172 S.E. 808 (1934) (decided under former law).

Cited in *Britt v. City of Gainesville*, 118 Ga. App. 40, 162 S.E.2d 740 (1968).

RESEARCH REFERENCES

ALR. — Negligence in leaving cars where they obstruct view at crossing, 47 ALR 287.

Liability of railroad to adult pedestrian attempting to pass over, under, or between

cars obstructing crossing, 27 ALR2d 369.

Contributory negligence of child injured while climbing over or through railroad train blocking crossing, 11 ALR3d 1168.

46-8-198. Erection and placement of signboards to warn of drawbridges, grade crossings, and stations at which there is a switch.

(a) Every company operating a railroad in this state shall be required to erect and maintain a signboard at least four feet six inches in height to warn approaching rail traffic of the existence of drawbridges, grade crossings, and stations at which there is a switch. Such a sign must be constructed at a point on the right of way not less than one-half mile nor more than one mile on each side of every station at which there is a switch; not less than one-half mile nor more than one mile on each side of every drawbridge; and not less than one-half mile nor more than one mile on each side of every railroad grade crossing. The signboards must be placed where they can be plainly seen by persons operating locomotives and must be placed on the right-hand side of the track approaching such station, drawbridge, or railroad grade crossing.

(b) Any railroad company which violates this Code section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of \$100.00 for each offense. (Ga. L. 1913, p. 114, §§ 1, 2; Code 1933, §§ 94-509, 94-9904.)

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 271.

C.J.S. — 74 C.J.S., Railroads, § 821 et seq.

ALR. — Responsibility for accident at

railroad crossing as affected by absence, improper location, or insufficiency of signs warning approaching travelers of presence of crossing, 93 ALR 218.

PART 4

INJURY TO LIVESTOCK AND OTHER PROPERTY

Cross references. — Impoundment and sale of livestock running at large or straying, Ch. 3, T. 4.

46-8-210. Reports by engineers of livestock and other property injured, killed, or destroyed; maintenance of record books.

Every railroad company shall require of every engineer employed by it to render daily to a proper officer an account of any livestock or other property injured, killed, or destroyed, which reports shall be recorded in a book which shall be kept open for inspection by all persons. For the failure to keep such a record and to require such reports by engineers, the company shall be liable for 10 percent extra damages to any person whose livestock or other property is injured by the company. (Ga. L. 1847, p. 250, § 4; Code 1863, § 2981; Code 1868, p. 2982; Code 1873, § 3037; Code 1882, § 3037; Civil Code 1895, § 2247; Civil Code 1910, § 2703; Code 1933, § 94-704.)

JUDICIAL DECISIONS

Cited in Biggers ex rel. Key v. Southern Ry., 820 F. Supp. 1409 (N.D. Ga. 1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 474.

46-8-211. Report by track and section foremen as to livestock killed.

All track or section foremen shall report, in such manner and at such times as may be required by federal law, the different marks and brands of all livestock killed upon their respective sections, specifying in their report on what part of their sections such livestock were or may have been killed, by means of referring to a designated place on the section. Such reports shall be filed with the station agent nearest the point at which the livestock were killed, on their respective sections, if any, and if not, then with the agent nearest the point at which the livestock were killed. (Ga. L. 1863-64, p. 65, § 1; Code 1868, § 2983; Code 1873, § 3038; Code 1882, § 3038; Civil Code 1895, § 2248; Ga. L. 1901, p. 37, § 1; Civil Code 1910, § 2704; Code 1933, § 94-705; Ga. L. 1982, p. 3, § 46.)

JUDICIAL DECISIONS

Term “marks” construed. — Word “marks” in former Civil Code 1895, § 2248 (see O.C.G.A. § 46-8-211) referred only to artificial marks and brands placed upon stock. *Churchill v. Georgia R.R. & Banking Co.*, 108 Ga. 265, 33 S.E. 972 (1899).

Testimony of auditor not evidence of report. — It not appearing that the report of

the killing of the cow of the plaintiff was made by an agent of the defendant company with authority to bind the company, the justice of the peace did not commit error in refusing to allow the auditor of the company to testify that a report was made of the killing. *Young v. Darien & W.R.R.*, 1 Ga. App. 317, 57 S.E. 921 (1907).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 474.

or death of trespassing animal on bridge or trestle, 163 ALR 1233.

ALR. — Liability of railroad for injury to

46-8-212. Owner’s right of recovery against railroad company causing injury to livestock; right of railroad company to put injured livestock to death.

(a) When any livestock are so injured by the train of any railroad company as to become valueless for ordinary uses, the owner of the livestock may procure the attendance of two disinterested persons to examine the livestock. If these two persons determine the injury to be of such character as to render the livestock valueless for the purpose for which the owner kept the livestock, then the owner may put the livestock to death or cause the same to be done without impairing in any way his right to recover damages from the company inflicting the injury upon his livestock.

(b) Nothing in subsection (a) of this Code section shall be construed to prevent the railroad company which has inflicted serious injury of the character specified in subsection (a) of this Code section from putting such livestock to death. (Ga. L. 1882-83, p. 146, §§ 1, 2; Civil Code 1895, §§ 2261, 2262; Civil Code 1910, §§ 2709, 2710; Code 1933, §§ 94-709, 94-710.)

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 290.

ALR. — Liability of railroad for injury to or death of trespassing animal on bridge or trestle, 163 ALR 1233.

C.J.S. — 74 C.J.S., Railroads, § 966.

ARTICLE 7

SPECIAL OFFICERS FOR PROTECTION OF RAILROAD PROPERTY

Cross references. — Employment and training of peace officers generally, Ch. 8, T. 35.

46-8-230. Appointment of officers by Governor; power of arrest; source of compensation.

Upon the application of the president or resident executive officer of any railroad corporation operating and doing business in this state as a common carrier, the Governor may appoint one or more persons as special officers for the protection of the property and interest of such corporation, with powers to make arrests, provided that such special officers must be paid by the corporation applying for such appointment; provided, further, that such special officers shall not receive any compensation from the state or any county thereof. (Ga. L. 1935, p. 465, § 1.)

JUDICIAL DECISIONS

Cited in Atlantic Coast Line R.R. v. Wegner, 90 Ga. App. 267, 83 S.E.2d 58 (1954).

RESEARCH REFERENCES

C.J.S. — 13 C.J.S., Carriers, § 514. 74
C.J.S., Railroads, § 43 et seq.

46-8-231. Powers, duties, and responsibilities of officers generally.

All special officers appointed and commissioned as provided for in this article shall have throughout the state all the powers, duties, and responsibilities of sheriffs or other law enforcement officers of the state while engaged in the performance of their duties as such railroad officers, except the serving of civil processes. (Ga. L. 1935, p. 465, § 2; Ga. L. 1953, Jan.-Feb. Sess., p. 390.)

46-8-232. Qualifications of officers; posting of bond; duration of appointment and commission; filing notice of termination by corporation; revocation of appointment and commission.

(a) Every special officer appointed and commissioned under this article shall be a resident of the United States and of good character. Every such officer shall be required to post a good and sufficient bond payable to the State of Georgia in the sum of \$1,000.00, conditioned on the faithful performance of his duties.

(b) All appointments and commissions issued under this article shall continue so long as the special officer is employed in such capacity by the railroad corporation. The authority of any person appointed under this article shall immediately cease whenever such person ceases to be an agent, servant, or employee of the corporation applying for the appointment or no longer serves as a special officer of such corporation.

(c) Whenever any railroad corporation no longer requires the services of any special officer so appointed, it shall file written notice to that effect in the offices of the Governor and the Secretary of State.

(d) The appointment and commission may be revoked at any time by the Governor, with or without written notice by the president or resident executive officer of the common carrier applying for the appointment and commission. (Ga. L. 1935, p. 465, § 3; Ga. L. 1953, Jan.-Feb. Sess., p. 390, § 3; Ga. L. 1982, p. 1183, § 1; Ga. L. 1986, p. 308, § 1; Ga. L. 1990, p. 856, § 3.)

RESEARCH REFERENCES

ALR. — Validity of statute or ordinance which requires liability or indemnity insurance or bond as condition of license for conducting business or profession, 120 ALR 950.

46-8-233. Return of processes to county of origin.

All criminal processes served by a special officer shall be returned by him to the county from which the same originated. (Ga. L. 1935, p. 465, § 4.)

ARTICLE 8

LIENS AGAINST COMPANIES GENERALLY

46-8-250. Lien for wages of railroad company employees, generally.

The amounts due employees of any railroad company for wages earned by services rendered to the railroad company shall constitute a lien upon the railroad and other property of the railroad company and shall be superior to the lien of any mortgage or other contract lien executed or created by the railroad company, provided that no employee shall be entitled to a lien under this Code section to an amount exceeding \$500.00. (Ga. L. 1893, p. 91, § 1; Civil Code 1895, § 2329; Civil Code 1910, § 2793; Code 1933, § 94-801.)

JUDICIAL DECISIONS

Lien not acquired by adjoining carrier. — The amount claimed by connecting railroad company for the switching of cars for the defendant railroad company is not wages for services rendered by an employee for the railroad company. *Valdosta, M. & W.R.R. v. Atlantic Coast Line R.R.*, 148 Ga. 842, 98 S.E. 465 (1919).

Nor by railroad operating joint depot. — Railroad does not acquire a lien for services of its agents and employees, rendered in the

maintenance and operation of a joint depot, or for labor of its employees in repairing cars belonging to another railroad. *Baltimore Trust Co. v. Seaboard Air-Line Ry.*, 149 Ga. 260, 99 S.E. 867, cert. denied, 250 U.S. 673, 40 S. Ct. 16, 63 L. Ed. 1200 (1919).

Lien given by former Civil Code 1910, § 2793 (see O.C.G.A. § 46-8-250) to property of employers only. *Poss Bros. Lumber Co. v. Haynie*, 37 Ga. App. 60, 139 S.E. 127 (1927).

Priority of liens. — Liens under former Civil Code 1910, §§ 2793 and 2795 (see O.C.G.A. §§ 46-8-250 and 46-8-252) were subject to a debt owed to the United States, though having priority over the mortgage and other debts of the railroad company. *Piedmont Corp. v. Gainesville & N.W.R.R.*, 30 F.2d 525 (N.D. Ga. 1929).

Cited in *Birmingham Trust & Sav. Co. v. Atlanta, B. & Atl. Ry.*, 287 F. 561 (N.D. Ga. 1923); *Birmingham Trust & Sav. Co. v. Atlanta, B. & Atl. Ry.*, 300 F. 173 (N.D. Ga. 1924).

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Relationship, § 66.

C.J.S. — 74 C.J.S., Railroads, § 531.

46-8-251. Manner of payment after placement of company in receivership; manner of payment and rights of employees after seizure of railroad pursuant to conveyance to secure debt.

(a) Whenever any railroad is seized by any order or process from any court appointing a receiver for the railroad company, it shall be the duty of the judge presiding in the court to order payments on account of the liabilities specified in Code Section 46-8-250 to be made out of any funds of the company available for that purpose as soon as the amount of the liabilities is liquidated, or, if the same are disputed, then as soon as they can be judicially ascertained, and without awaiting the final judgment in the cause.

(b) Whenever any railroad is seized by any trustee or other person by authority of any provision in any trust deed or other conveyance to secure debt, it shall be the duty of the person so seizing the railroad to pay the liabilities specified in Code Section 46-8-250 out of the first moneys coming into his hands, as soon as the amount of the liabilities can be ascertained or, if disputed, can be determined judicially or otherwise. In all such cases, the persons having such claims of liability shall have the same right to proceed against the property of the railroad and to collect and secure the amount due on account of the liabilities as if the railroad had not been seized by a trustee or other person under a trust deed or other conveyance for the security of debt. (Ga. L. 1893, p. 91, § 2; Civil Code 1895, § 2330; Civil Code 1910, § 2794; Code 1933, § 94-802.)

JUDICIAL DECISIONS

Priority of liens. — Liens under former Civil Code 1910, §§ 2793 and 2795 (see O.C.G.A. §§ 46-8-250, and 46-8-252) were subject to a debt owed to the United States,

though having priority over the mortgage and other debts of the railroad company. *Piedmont Corp. v. Gainesville & N.W.R.R.*, 30 F.2d 525 (N.D. Ga. 1929).

RESEARCH REFERENCES

C.J.S. — 75 C.J.S., Receivers, §§ 384, 595.

ALR. — Statute creating presumption of negligence against railroad company as applicable to receiver operating road, 1 ALR 1180.

Priority of claims for damages from operation of railroad during receivership, 3 ALR 1470.

Operation of railroad by receiver at expense of prior lienors, 50 ALR 146.

Validity, construction, and effect of state laws requiring payment of wages on resignation of employee immediately or within specified period, 11 ALR5th 715.

Validity, construction, and effect of state laws requiring payment of wages on discharge of employee immediately or within specified period, 18 ALR5th 577.

46-8-252. Lien for furnishing materials, supplies, and articles necessary for railroad operation and for damages for killing of livestock generally.

All persons furnishing material, supplies, or other articles necessary to the operation of any railroad company operated in this state and all persons having claims against such company for livestock killed by its engines or cars shall have a lien upon the property of the company for the amounts due for such supplies, material, or other necessary articles furnished within six months preceding the institution of proceedings to enforce the same, or for the amounts due to them for damages for the killing of such livestock. Such lien shall be superior to any mortgage or other contract lien created by the railroad company. (Ga. L. 1894, p. 68, § 1; Civil Code 1895, § 2331; Civil Code 1910, § 2795; Code 1933, § 94-803.)

JUDICIAL DECISIONS

Section applies to supplying of cars. — The supplying of cars as necessary to the operation of a railroad was the “furnishing of material, supplies, or other articles,” within the meaning of former Civil Code 1910, § 2795 (see O.C.G.A. § 46-8-252). *Valdosta, M. & W.R.R. v. Atlantic Coast Line R.R.*, 148 Ga. 842, 98 S.E. 465 (1919).

Section applies to lien arising from maintenance of joint depot. — Under former Civil Code 1910, § 2795 (see O.C.G.A. § 46-8-252), a railway acquired a lien for use and hire of its cars and equipment, for coal, for material used in repairing cars, for rental of watertank, for tariffs, and for any material used in maintaining and operating a joint depot; the lien, however, extending only to such portions of such material of any of the foregoing classes as were furnished within six months immediately preceding the filing of the intervention. *Baltimore Trust Co. v. Seaboard Air-Line Ry.*, 149 Ga. 260, 99 S.E.

867, cert. denied, 250 U.S. 673, 40 S. Ct. 16, 63 L. Ed. 1200 (1919).

Premiums on insurance policies not a lien. — Premiums on policies of fire insurance, issued under the circumstances of this case, were not a lien upon the property of the company under former Civil Code 1910, § 2795 (see O.C.G.A. § 46-8-252). *Jones v. Peebles*, 145 Ga. 335, 89 S.E. 195 (1916).

Priority of liens. — Liens under former Civil Code 1910, § 2793 and 2795 (see O.C.G.A. § 46-8-250 and 46-8-252) were subject to a debt owed to the United States, though having priority over the mortgage and other debts of the railroad company. *Piedmont Corp. v. Gainesville & N.W.R.R.*, 30 F.2d 525 (N.D. Ga. 1929).

Necessity of enforcing lien. — A lien under former Civil Code 1910, § 2795 (see O.C.G.A. § 46-8-252) for coal furnished to a railroad perished, where no action was taken to enforce it, though bills accrued within six

months before receivership. *Birmingham Trust & Sav. Co. v. Atlanta, B. & Atl. Ry.*, 300 F. 173 (N.D. Ga. 1924).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Receivers, §§ 103, 238, 239, 240, 255.

C.J.S. — 74 C.J.S., Railroads, §§ 523, 527, 530 et seq., 537 et seq.

46-8-253. Manner of payment after placement of company into receivership by judicial proceeding; manner and order of payment and rights of claimants after seizure of railroad.

(a) Whenever any railroad company in operation in this state is put into the hands of a receiver by any court in this state, it shall be the duty of the presiding judge to order the payments on account of the liabilities specified in Code Section 46-8-252 out of the income of the property available for that purpose, as soon as the amounts of the liabilities have been liquidated or, if disputed, have been judicially ascertained, without awaiting the final judgment in the cause.

(b) Whenever any railroad is seized by a trustee or other person otherwise than through the instrumentality of a court of justice, it shall be the duty of such person so seizing the railroad to pay the liabilities specified in Code Section 46-8-252 out of the first moneys arising from the operations of the road next after the payments due for wages of employees and other claims superior to the claims specified in Code Section 46-8-252. No such seizure by a trustee or other person, other than through a court of justice, shall have the effect of preventing proceedings against the railroad property, on the part of persons having any claims specified in Code Section 46-8-252, to collect and secure the same by due process of law. (Ga. L. 1894, p. 68, § 2; Civil Code 1895, § 2332; Civil Code 1910, § 2796; Code 1933, § 94-804.)

JUDICIAL DECISIONS

Priority of liens. — Liens under former Civil Code 1910, §§ 2793 and 2795 (see O.C.G.A. §§ 46-8-50 and 46-8-252) were subject to a debt owed to the United States,

though having priority over the mortgage and other debts of the railroad company. *Piedmont Corp. v. Gainesville & N.W.R.R.*, 30 F.2d 525 (N.D. Ga. 1929).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Receivers, §§ 237, 239, 240, 246, 250.

C.J.S. — 75 C.J.S., Receivers, §§ 300, 301, 384, 595.

46-8-254. Duties of receivers of railroads as to payment of liens; duties of successors to receivers.

(a) In all cases where the business of any corporation operating a railroad in this state is, by order or decree of any court, placed into the hands of a receiver for the benefit of the creditors or stockholders of the corporation, it shall be the duty of the receiver to apply the income of the railroad to the payment of the incidental expenses necessary to the carrying on of the business of the railroad. Such expenses shall include wages of employees; the cost of wood, cross-ties, and other material furnished which may be necessary for conducting the business and keeping the property in repair; the damages which may arise from the loss of or injury to goods, wares, and merchandise received by the road for transportation and for which the road is liable as a common carrier by the laws of this state; and the damages which may arise from injuries to persons and property caused by the running of the trains on the road. A lien is created on the gross income of the road while in the hands of the receiver in favor of such creditors or claimants, superior to all other liens under the laws of this state.

(b) If the receiver is removed or if a vacancy occurs in the office and a successor is appointed, it shall be his duty to pay the liens provided for in this Code section according to their date out of any funds in his hands as such receiver, whether the liability accrued before or after his appointment. (Ga. L. 1876, p. 122, §§ 1, 2; Code 1882, § 278a; Civil Code 1895, § 2333; Civil Code 1910, § 2797; Code 1933, § 94-805.)

Cross references. — Liability of receiver, trustee, etc., of railroad company for injury

to employee of company caused by negligence of other employee, § 34-7-45.

JUDICIAL DECISIONS

Constitutionality of liens. — The lien created by the provisions of former Civil Code 1910, § 2797 (see O.C.G.A. § 46-8-254), in favor of certain classes of creditors designated therein, did not unreasonably interfere with interstate commerce, and was not offensive to U.S. Const., Art. I, Sec. 8, Cl. 3. *Standard Steel Works Co. v. Williams*, 158 Ga. 434, 124 S.E. 21 (1924).

Section applies when receiver appointed where mortgage foreclosed. — Former Civil Code 1910, § 2797 (see O.C.G.A. § 46-8-254) was applicable to the case of the appointment of a receiver for a railroad company under mortgage foreclosure proceedings. *Standard Steel Works Co. v. Williams*, 155 Ga. 177, 116 S.E. 636 (1923).

Interest on receivers' certificates not incidental expenses. — The interest on the underlying bonds and the receivers' certificates partook of the nature of the debts out of which they issued, and did not fall under the head of incidental expenses for the payment of which provision was made in former Civil Code 1910, § 2797 (see O.C.G.A. § 46-8-254). *Standard Steel Works Co. v. Williams*, 155 Ga. 177, 116 S.E. 636 (1923).

Cited in *Birmingham Trust & Sav. Co. v. Atlanta, B. & Atl. Ry.*, 287 F. 561 (N.D. Ga. 1923).

RESEARCH REFERENCES

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| <p>Am. Jur. 2d. — 65 Am. Jur. 2d, Receivers, §§ 177, 180, 243.</p> <p>C.J.S. — 74 C.J.S., Railroads, § 734 et seq. 75 C.J.S., Receivers, §§ 148, 152, 186, 188.</p> <p>ALR. — Operation of railroad by receiver</p> | <p>at expense of prior lienors, 50 ALR 146.</p> <p>Priority over preexisting lien or encumbrance of claims for damages arising from operation of railroad before appointment of receiver, 90 ALR 664.</p> |
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ARTICLE 9

LEASES AND CONDITIONAL SALES OF ROLLING STOCK

46-8-270. Contracts for conditional sales of rolling stock and other equipment.

Any person may make a contract in writing with any company owning or operating a railroad in this state to furnish the company with rolling stock or other equipment, deliverable either immediately or subsequently at stipulated periods. The contract may provide that the purchase money for the property, in whole or in part, is to be paid after delivery. The contract may also include an agreement that title to the property shall not pass to or vest in the vendee until the purchase money for the same has been fully paid, notwithstanding the delivery of such property to and the possession of the same by the vendee, but that, until the purchase money has been fully paid, the title to the property shall remain in the vendor and his assigns. (Ga. L. 1889, p. 188, § 1; Civil Code 1895, § 2326; Civil Code 1910, § 2790; Code 1933, § 94-401.)

RESEARCH REFERENCES

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| <p>Am. Jur. 2d. — 68A Am. Jur. 2d, Secured Transactions, §§ 82, 86.</p> <p>C.J.S. — 14 C.J.S., Chattel Mortgages, § 7.</p> | <p>79 C.J.S. Supp., Secured Transactions, §§ 9, 10, 20 et seq., 27, 31, 33.</p> |
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46-8-271. Contracts for lease of rolling stock and other equipment; agreements as to conditional sale upon termination of lease.

The manufacturer, owner, or assigns of any railroad equipment or rolling stock may make a written contract for the lease of such equipment or rolling stock to any company owning or operating a railroad in this state. In such contract, it shall be lawful to agree to a conditional sale of the property to the lessee on the termination of the lease and to stipulate that the rental received for said property may, as paid or when fully paid, be applied to and treated as purchase money. Any such agreement for a conditional sale may contain such terms as to the time of passage of title as are authorized by Code Section 46-8-270. (Ga. L. 1889, p. 188, § 2; Civil Code 1895, § 2327; Civil Code 1910, § 2791; Code 1933, § 94-402.)

JUDICIAL DECISIONS

Applicability to both chartered or nonchartered railroads. — Former Civil Code 1910, §§ 2791 and 2792 (see O.C.G.A. §§ 46-8-271 and 46-8-272) applied to all railroads whether chartered or not, in the op-

eration of which cars and locomotives were essential. *Real Estate Bank & Trust Co. v. Baldwin Locomotive Works*, 148 Ga. 821, 98 S.E. 486 (1919).

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bailments, §§ 16, 19. 68A Am. Jur. 2d, Secured Transactions, § 97 et seq.

C.J.S. — 8 C.J.S., Bailments, §§ 2, 9-12. 79 C.J.S. Supp., Secured Transactions, § 20.

46-8-272. Validity of conditional sales or lease contracts; execution, attestation, and recordation of contracts; marking of locomotive engines and railroad cars so as to indicate ownership.

(a) Every contract authorized by Code Sections 46-8-270 and 46-8-271 shall be good, valid, and effectual to retain the title to the property in the vendor or lessor, or in his assigns, as against the vendee or lessee and as against all persons claiming under the lessee.

(b) Such contracts, if made within this state, shall be executed in the presence of, and attested by or proved before, a notary public, a judge of any court in this state, or a clerk of the superior court. If such a contract is made outside this state, it shall be executed in the presence of, and attested by or proved before, a commissioner of deeds for the State of Georgia, a notary public having authority to act as such in the state or other jurisdiction within the United States where the contract is made, a consul or vice-consul of the United States (the certificates of the foregoing officers, under their seals, being evidence of the fact), or a judge of a court of record in the state where executed. Within six months after the date of its execution, any such contract made outside this state shall be executed in the office of the clerk of the superior court of the county where the principal office in this state of the railroad company is situated.

(c) Each locomotive engine and each car so sold or leased or contracted to be sold or leased shall have the name of the vendor or lessor, or the assignee of such vendor or lessor, plainly placed or marked on the same; or it shall be otherwise marked so as to indicate plainly the ownership thereof. (Ga. L. 1889, p. 188, § 3; Civil Code 1895, § 2328; Civil Code 1910, § 2792; Ga. L. 1917, p. 55, § 1; Code 1933, § 94-403.)

JUDICIAL DECISIONS

Cited in *Real Estate Bank & Trust Co. v. Baldwin Locomotive Works*, 145 Ga. 831, 90 S.E. 49 (1916).

RESEARCH REFERENCES

Am. Jur. 2d. — 68A Am. Jur. 2d, Secured Transactions, §§ 336, 338, 363, 414. **C.J.S.** — 74 C.J.S., Railroads, § 521.

ARTICLE 10

LIABILITY OF COMPANIES FOR DAMAGES
GENERALLY

Cross references. — Liability of railroad employers for injuries to employees, § 34-7-40 et seq. Measure of damages for wrongs and injuries by railroad companies generally, § 46-1-2.

46-8-290. Liability of railroad companies and their officers, agents, and employees for injuries to individuals and for damage or destruction of property generally.

In all cases where an individual is injured, or his property damaged or destroyed, by the carelessness, negligence, or improper conduct of any railroad company or an officer, agent, or employee of such company, in or by the running of the cars or engines of the company, such company shall be liable to pay damages to anyone whose person or property may be so injured, damaged, or destroyed, notwithstanding any bylaws, rules, regulations, or notices which may be made, passed, or given by such company and which purport to limit the company's liability. (Ga. L. 1855-56, p. 154, § 2; Code 1863, § 3280; Code 1868, § 3292; Code 1873, § 3368; Code 1882, § 3368; Civil Code 1895, § 2320; Civil Code 1910, § 2779; Code 1933, § 94-702.)

Law reviews. — For article, "Actions for Wrongful Death in Georgia Part Three and Four," see 21 Ga. B.J. 339 (1959). For comment on Atlantic C.L.R.R. v. Dolan, 84 Ga. App. 734, 67 S.E.2d 243 (1951), see 3 Mercer L. Rev. 349 (1952).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
NATURE OF DUTIES AND STANDARD OF CARE
DUTIES TO PERSONS
1. IN GENERAL
2. PASSENGERS
3. TRESPASSERS
INJURIES TO ANIMALS
DEFENSES
PRACTICE AND PLEADING

General Consideration

Cases where this Code section held not applicable. — Former Civil Code 1895, § 2320 (see O.C.G.A. § 46-8-290) was not applicable to a case in which there is no evidence of any bylaws, rules, or regulations. *Willingham v. Macon & B. Ry.*, 113 Ga.

General Consideration (Cont'd)

374, 38 S.E. 843 (1901).

Former Civil Code 1910, § 2779 (see O.C.G.A. § 46-8-290) did not apply where company interposes regulation made in conformity with former Civil Code 1910, § 2774 (see O.C.G.A. § 46-9-40), allowing reasonable regulations for receipt of freight by common carriers. *Central of Ga. Ry. v. Smith*, 31 Ga. App. 135, 120 S.E. 30 (1923).

Private rules of company may not be set up to create cause of action. — Although the rules adopted by a railway company governing the conduct of its employees in the operation of trains may be admissible in evidence for the purpose of illustrating the negligence of the defendant in a situation to which the rule would be applicable, the measure of the duty owed by the company to a member of the traveling public is fixed by law, and, in an action for injury or death, the private rules of the company could not be set up for the purpose of founding a substantive cause of action upon a breach of them. *McGinnis v. Shaw*, 46 Ga. App. 248, 167 S.E. 533 (1933).

Cited in *Mitchell v. Western & A.R.R.*, 30 Ga. 22 (1860); *Holmes v. Central R.R. & Banking Co.*, 37 Ga. 593 (1868); *Cato v. Southern Ry.*, 26 Ga. App. 578, 107 S.E. 98 (1921); *Gainesville M.R.R. v. Allen*, 72 Ga. App. 736, 35 S.E.2d 12 (1945); *Fowler v. Western & A.R.R.*, 75 Ga. App. 176, 42 S.E.2d 499 (1947).

Nature of Duties and Standard of Care

Passengers alighting from train. — Railroad company is bound to exercise extraordinary diligence toward passenger while in act of alighting from train. *Metts v. Louisville & N.R.R.*, 52 Ga. App. 115, 182 S.E. 531 (1935).

Ordinarily there is no duty upon carrier to assist passenger in boarding or alighting from its train; whether in a given case the circumstances are such as to suggest the necessity of assisting a passenger to board or alight from a train or car is a question to be determined by the jury. *Metts v. Louisville & N.R.R.*, 52 Ga. App. 115, 182 S.E. 531 (1935).

It is duty of railroad company to provide suitable and reasonably safe means to enable passengers to alight from cars without danger. *Metts v. Louisville & N.R.R.*, 52 Ga. App.

115, 182 S.E. 531 (1935).

Avoiding injury to person in street. — Street railway companies must use due care and diligence to avoid injury to any person who is in the street. *Brown v. Savannah Elec. & Power Co.*, 46 Ga. App. 393, 167 S.E. 773 (1932).

Timely warnings of approach of streetcar should be given as will enable others to avoid any injury by it. *Brown v. Savannah Elec. & Power Co.*, 46 Ga. App. 393, 167 S.E. 773 (1932).

Mere presence of safety precautions does not absolve railroad from negligence. — Mere presence of safety precautions such as automatic signalling devices does not render railroad free from negligence as matter of law or relieve it from adopting such other measures as public safety and common prudence dictate; this is especially true when the evidence shows that a train was running at an undue and highly dangerous rate of speed over a much frequented crossing located in a city or town. *Seaboard Coast Line R.R. v. West*, 155 Ga. App. 391, 271 S.E.2d 36 (1980).

Duties to Persons**1. In General**

Duties to persons on tracks not declared by statute. — The defendant may owe many duties to a person on its tracks, the presence of whom it is bound to anticipate, whether as trespasser or licensee, which are not declared by statute. *Southern Ry. v. Waldrup*, 76 Ga. App. 356, 45 S.E.2d 775 (1947).

Duty of employees to keep lookout. — If those in control of the movement of the train have no reason to apprehend that there may likely be a human being on the track in front of the engine, they are under no duty to one who may in fact be there until they have actually discovered that one is there; but if, from the locality or surrounding circumstances, there is reason to apprehend that the track in front of the locomotive may not be clear of human beings, then it is the duty of the employees of the company to keep a lookout ahead of the train. *Hunt v. Pollard*, 51 Ga. App. 948, 181 S.E. 793 (1935), later appeal, 55 Ga. App. 423, 190 S.E. 71 (1937).

Peddler permitted to be on property a licensee. — A peddler, in going in between

the tracks to a railroad car for the purpose of vending the peddler's wares to the employees of a railroad company, where this was permitted by the employees for their benefit, is a licensee, and it can not be said that the peddler's presence there is negligence as a matter of law. *Hunt v. Pollard*, 51 Ga. App. 948, 181 S.E. 793 (1935), later appeal, 55 Ga. App. 423, 190 S.E. 71 (1937).

2. Passengers

Duration of carriers liability to passengers. — Liability of carrier to passengers begins at starting point and does not end until passenger is discharged. *Metts v. Louisville & N.R.R.*, 52 Ga. App. 115, 182 S.E. 531 (1935).

No liability generally to one traveling on gratuitous pass including liability limitation. — A railroad company cannot be held liable for injuries received by a passenger while being transported over the company's lines by virtue of a gratuitous pass, which exempted the company from liability for injuries caused by ordinary negligence, unless the injuries were inflicted willfully and wantonly; to authorize a recovery against the company by such a person, it must appear that the conduct of the defendant was such as to evince a willful intention to inflict such an injury, or else was so reckless or so charged with indifference to the consequences, where human life, limb, or health was involved, as to justify the jury in finding a wantonness equivalent in spirit to actual intent. *Devero v. Atlantic Coast Line R.R.*, 51 Ga. App. 699, 181 S.E. 421 (1935).

Employee traveling on gratuitous pass a passenger for hire. — Where one employed generally by a railroad is issued trip passes on trains to go to and from work, and who is also permitted to ride without the payment of fare without using one's pass, and who is not engaged in or within the scope of one's employment while so riding on a train, one occupies the status of a passenger for hire, and the railroad is liable to that person for injuries inflicted by its negligence, while one is so riding, and if the injury occurs at a time when the employee is using one's pass, a limitation therein relieving the railroad from liability on account of its negligence is void. *Fowler v. Western & A.R.R.*, 75 Ga. App. 156, 42 S.E.2d 499 (1947).

Ejection of passenger where negligence not involved may be improper conduct. — Where an action against a carrier was founded upon the alleged wrongful ejection of the plaintiff as a passenger, and no negligence of the carrier or the carrier's employees was alleged, the wrong complained of was to be regarded not as negligence, but as "improper conduct," under former Civil Code 1910, § 2779 (see *O.C.G.A.* § 46-8-290), and the law relating to diligence and negligence on the part of carriers with reference to their passengers is not involved. *Georgia Ry. & Power Co. v. Turner*, 33 Ga. App. 101, 125 S.E. 598 (1924).

Damages recoverable for unlawful ejection. — One who is unlawfully ejected from a train may recover all damages which proximately flow from the expulsion, excluding all damages which, although in some measure traceable to the wrongful act, are not its natural and probable consequence. *Devero v. Atlantic Coast Line R.R.*, 51 Ga. App. 699, 181 S.E. 421 (1935).

3. Trespassers

General rule of liability only to discovered trespasser. — The general rule is that a railroad company owes to a trespasser, walking upon its tracks, the duty not to injure the trespasser willfully or wantonly after the trespasser's presence is known to its servants in charge of the train; but this duty is not active until the trespasser's presence is actually known. *Collett v. Atlanta, B. & C.R.R.*, 51 Ga. App. 637, 181 S.E. 207 (1935).

Where party is a trespasser, and the party is not in a path which the railroad knows people customarily use, the only duty the railroad owes the party is not to wantonly or willfully injure the trespasser after the trespasser's presence is discovered. *Cook v. Southern Ry.*, 62 Ga. App. 613, 9 S.E.2d 123 (1940).

Ordinarily, the servants of a railway company are not bound to anticipate the presence of a trespasser on or about its tracks, and the duty of exercising ordinary care in order to protect such a trespasser does not generally arise until after the trespasser's presence has been actually discovered. *Southern Ry. v. Kelley*, 52 Ga. App. 137, 182 S.E. 631 (1935).

General rule of liability applies to dead body on tracks. — Ordinarily the only duty

Duties to Persons (Cont'd)**3. Trespassers (Cont'd)**

which a railway company owes to a trespasser upon or about its property is not to injure the trespasser willfully or wantonly after the trespasser's presence has been discovered, and this principle of law applies to the duty of a railway company towards a dead body which happens to be upon its tracks. *Pollard v. Phelps*, 56 Ga. App. 408, 193 S.E. 102 (1937).

Liability rule does not apply where private passageway used with knowledge of railroad.

— Where a number of persons habitually, with the knowledge and without the disapproval of a railroad company, use a private passageway for the purpose of crossing the tracks of the company at a given point, the employees of the company in charge of one of its trains, who are aware of the custom, are bound on a given occasion to anticipate that persons may be upon the tracks at this point, but it is not their duty to take such precautions as would prevent injury to such person; their duty is merely to take such precautions to prevent such injury as ordinary care and diligence would require. *Atlanta & W.P.R.R. v. Hemmings*, 66 Ga. App. 881, 19 S.E.2d 787 (1942); *Southern Ry. v. Waldrup*, 76 Ga. App. 356, 45 S.E.2d 775 (1947).

Where there is evidence that the portion of the switchyard where an accident occurred was not in fact used as a switchyard but rather was used as a passageway with the knowledge of the railroad, the rule that the railroad owes a duty of ordinary care to a trespasser only after discovering the trespasser does not apply. *McClain v. Seaboard Coast Line R.R.*, 473 F.2d 357 (5th Cir. 1973).

Liability rule requires railroads to anticipate trespassers in certain areas. — Whether plaintiff is a trespasser or licensee, the railroad is bound to use ordinary care and diligence in approaching and traversing places where there is reason for it to anticipate that persons might be on the track; in such a situation, the general rule, that the railroad owes a trespasser a duty of ordinary care only after discovery of the trespasser in a place of peril, does not apply. *McClain v. Seaboard Coast Line R.R.*, 473 F.2d 357 (5th Cir. 1973).

Where, from the locality, circumstances,

and known habits of the public generally, there is reason to apprehend that the track in front of the locomotive may not be clear of human beings, then the duty of anticipating the presence of and danger to such trespassers devolves on the employees of the company operating the train. *Southern Ry. v. Kelley*, 52 Ga. App. 137, 182 S.E. 631 (1935).

While it is true that a railroad track is a place of danger, and one who trespasses thereon is guilty of negligence, yet when the railroad company discovers this negligence, or has reason to anticipate it, and such a trespasser is on the track in an apparently helpless condition, ordinary diligence requires the use of every means then available to avoid running down and killing the trespasser; and if, under such circumstances, this degree of care is not exercised, and death results, the killing will be deemed in law to have been willful and wanton. *Hammontree v. Southern Ry.*, 50 Ga. App. 822, 179 S.E. 155 (1935).

Failure to anticipate or discover presence of people not willful or wanton misconduct.

— The mere failure of the employees of a railway company to discover the presence of a trespasser at a place where, and at a time when, it was their duty to anticipate the presence of trespassers, and thereafter to take such needful and proper measures for the trespasser's protection as ordinary care might require, might amount to a lack of ordinary care but would not, in and of itself, amount to willful and wanton misconduct. *Hammontree v. Southern Ry.*, 50 Ga. App. 822, 179 S.E. 155 (1935); *Southern Ry. v. Kelley*, 52 Ga. App. 137, 182 S.E. 631 (1935).

Railroad might be liable for lack of ordinary care in not anticipating trespasser's presence. — If the presence of a trespasser on the track at the time and place of the injury is brought about by peculiar facts and circumstances which relieve the trespasser from the guilt of a lack of ordinary care in thus exposing oneself, the company might be liable for a lack of ordinary care on its part in failing to anticipate the trespasser's presence at a time when and a place where it was charged with such duty, and in thereafter failing to take such proper precautions for the trespasser's safety as might seem reasonably necessary. *Southern Ry. v. Kelley*, 52 Ga. App. 137, 182 S.E. 631 (1935).

Injuries to Animals

Liability for failure to discover presence of livestock on tracks. — Railroad companies may be held liable for ordinary negligence in failing to discover presence of livestock or other domestic animals on tracks or in avoiding their injury, as well as for their willful or wanton killing by failing to exercise ordinary care after becoming aware of their presence. *Powell v. Nelson*, 52 Ga. App. 351, 183 S.E. 348 (1936).

Domestic animals not to be regarded as trespassers. — Domestic animals ranging on unenclosed rights of way of railroad companies are not to be regarded as trespassers, and the companies owe to the owners of such animals the duty of exercising ordinary care both in discovering their presence on railroad tracks and in avoiding their injury. *Powell v. Nelson*, 52 Ga. App. 351, 183 S.E. 348 (1936).

Railroad companies not required to reduce speed of trains during bad weather to avoid injuring animals. — The law expects railroad companies to run their passenger trains on schedule, so far as they may be able to do so; and they are not ordinarily required, when it is foggy or raining, to reduce their trains to such a rate of speed that the engineer may be in a position to discover livestock on the track in time to prevent injuring them. *Atlantic Coast Line R.R. v. Sears*, 80 Ga. App. 338, 56 S.E.2d 129 (1949).

Procedure where animal near track in place of safety. — Railroad company is not required to slow up or to check its trains when animal is seen near the track in place of safety, unless the animal is apparently approaching the track, or there is apparent danger that, through fright or otherwise, it will get on the track. *Atlantic Coast Line R.R. v. Sears*, 80 Ga. App. 338, 56 S.E.2d 130 (1949).

When engineer charged with duty of stopping train. — Only when the engineer sees, or by the exercise of ordinary diligence could see, that an animal in proximity to the track is in danger of getting on it in front of the moving train, is one charged with the duty of exercising all reasonable diligence to check the train and to avoid killing or injuring the animal. *Atlantic Coast Line R.R. v. Sears*, 80 Ga. App. 338, 56 S.E.2d 130 (1949).

Evidence insufficient to prove dog killed by train. — Evidence that the plaintiff's dog

was found lying dead about ten feet from the defendant's railroad track, that there were no marks or lacerations on the dog, but the slag along railroad looked as though something had been knocked or dragged over it, is insufficient to authorize inference that the dog was killed by the operation of one of the defendant's trains. *Alabama G.S.R.R. v. Raines*, 52 Ga. App. 589, 183 S.E. 926 (1936).

Defenses

No action where party could have avoided accident by exercising ordinary care. — Where one who is injured by the running of a railroad train could by the exercise of ordinary care for one's own safety, have avoided the consequences to oneself of the defendant's negligence after it came into existence and was known to defendant, or could have been discovered by the exercise of ordinary care, an action for damages against the railroad company on account of negligence will not lie. *Clements v. Central of Ga. Ry.*, 41 Ga. 310, 152 S.E. 849 (1930).

Negligence of person injured does not bar recovery where railroad guilty of gross negligence. — If a homicide occurs at a place upon the track of a railway company where it is the duty of the servants of the company to anticipate the presence of persons on the track, and their failure to so anticipate the presence of others thereon amounts to mere negligence, the negligence of the person killed, under such circumstances, amounting to the lack of ordinary care for one's safety, will prevent a recovery by a plaintiff who sues for such homicide, but if the servants of the company are guilty of willful and wanton negligence, which results in the homicide of the person killed, then the negligence of the person killed, however gross, will not defeat a recovery of damages for such homicide by a plaintiff who is entitled under the law to sue therefor. *Pressley v. Atlanta & W.P.R.R.*, 48 Ga. App. 382, 172 S.E. 731 (1934).

Operator of train may assume person will not leave place of safety. — While the operators of trains and cars are bound to anticipate the presence of persons crossing the tracks on pathways of the kind involved, yet, where they see a person in a position of safety on such pathway, and it is apparent to them that such person is proceeding in a direction of continued safety, such operators

Defenses (Cont'd)

have the right to presume that such person will continue in the place of safety, and not abruptly turn and step in front of the on-coming train or car. *Southern Ry. v. Waldrup*, 76 Ga. App. 356, 45 S.E.2d 775 (1947).

Duty of person in good health to look for approaching trains. — Person in generally good health is bound as matter of law to look for approach of trains and cars, and where such person steps upon the railroad tracks in front of oncoming cars without looking, and the employees of the company on the cars immediately shout at such person and apply the brakes, such operators are in the use of ordinary care for the protection of such pedestrian, and such pedestrian was lacking in due care for the pedestrian's own safety as a matter of law to such an extent as to bar recovery. *Southern Ry. v. Waldrup*, 76 Ga. App. 356, 45 S.E.2d 775 (1947).

Malice of employee not defense. — It was no defense to an action under former Code 1882, § 3368 (see O.C.G.A. § 46-8-290) by a person who was injured because one's horse ran away, frightened by the blowing of a whistle by an engineer, that the latter acted maliciously. *Georgia R.R. v. Newsome*, 60 Ga. 492 (1878).

Practice and Pleading

Complaint alleging mutilation of dead body sets out cause of action. — Complaint alleging that a railroad company wantonly and wrongfully ran its train over, mangled, and mutilated the dead body of the husband of the plaintiff, such mangling and mutilation not being incident to the homicide of the deceased but occurring thereafter, set out a cause of action in favor of the plaintiff where plaintiff was entitled in law to receive the body after death. *Pollard v. Phelps*, 56 Ga. App. 408, 193 S.E. 102 (1937).

Mere allegations of injuries insufficient to make case where railroad owed no duty. —

Where there were no allegations of willful and wanton negligence, nor is there any proof of the same, proof by plaintiff that injuries were caused by running of train does not make out a prima facie case against defendant railroad, where plaintiff was at a place where defendant owed plaintiff no duty until after plaintiff was discovered. *Collett v. Atlanta, B. & C.R.R.*, 51 Ga. App. 637, 181 S.E. 207 (1935).

Charge on invalidity of attempt to limit liability erroneous in absence of such attempt. — It is error to give charge that where the person or property of an individual shall be injured or the property destroyed, by the negligence of any railroad company, such company shall be liable to pay damages, notwithstanding any bylaws, rules, and regulations, or notice which may be given by such company, limiting its liability where there are no issues in the case involving an effort by the defendant to limit its liability by rules. *Atlantic Coast Line R.R. v. Green*, 84 Ga. App. 674, 67 S.E.2d 184 (1951).

Error to charge that burden on defendant to prove no liability. — Where the plaintiff relies entirely upon the presumption of negligence arising against railroad companies by proof of injury to persons or property by the running of the defendant's trains or cars, and the defendant introduces evidence which the jury would be authorized to find exonerates the defendant, it is error to charge the jury that the burden is upon the defendant to show that the railroad company was not liable. *Atlantic Coast Line R.R. v. Sears*, 80 Ga. App. 338, 56 S.E.2d 129 (1949).

Error to charge railroad has absolute duty to prevent injury at crossings. — Error to charge that railroad has absolute duty to take such precautions as would prevent injury to persons who might be on a railroad crossing. *Atlanta & W.P.R.R. v. Hemmings*, 66 Ga. App. 881, 19 S.E.2d 787 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, §§ 280 et seq., 356 et seq., 473, 474.

C.J.S. — 75 C.J.S., Railroads, §§ 995 et seq., 1153 et seq., 1262.

ALR. — Liability of interurban road for killing or injuring livestock running at large, 2 ALR 98; 25 ALR 1506.

Liability of railroad company for interfer-

ence with fire department while attempting to extinguish fire, 5 ALR 1651.

Liability of street railway company to passenger struck by vehicle not subject to its control, 12 ALR 1371; 31 ALR 572; 44 ALR 162.

Liability of master for damage to person or property due to servant's smoking, 13 ALR 997; 31 ALR 294.

Liability for death of, or injury to, soldier in service of government, by negligently constructed, maintained, or operated railroad, 13 ALR 1028.

Duty of railroad to fence track as against children, 16 ALR 944.

Personal care required of one riding in automobile driven by another as affecting his right to recover against third person, 18 ALR 309; 22 ALR 1294; 41 ALR 767; 47 ALR 293; 63 ALR 1432; 90 ALR 984.

Right of grantor of railroad right of way or his privy to recover damages for interference with surface water by construction of road, 19 ALR 487.

Duty and liability of carrier as to "step box" or other device to facilitate entering and leaving car, 20 ALR 914.

Liability of master for injury to child whom servant permits to ride on wagon or truck, 24 ALR 670.

Liability of railroad company where fence or cattle guard becomes ineffective because of snow, 26 ALR 679.

Independent contractor: remedial rights in respect of injuries caused by breaches of positive duties correlative to corporate franchises, 28 ALR 122.

Liability of railroad company for injuries from negligence of postal clerk on train, 34 ALR 520.

Liability of carrier for injuries from falling articles of freight, 40 ALR 501.

Failure to stop, look, and listen at railroad crossing as negligence per se, 41 ALR 405.

Running past stop signal as wanton or willful misconduct rendering railroad company liable for injury to trespasser, 41 ALR 1354.

Validity and construction, as regards buildings not on right of way, of contract relieving railroad from liability for destruction of buildings, 48 ALR 1003; 51 ALR 638.

Infrequent use of crossing by railroad company as affecting its duty or liability to traveler at crossing, 52 ALR 751.

Duty and liability of carrier as to assisting passenger to board or alight from car or train, 55 ALR 389; 59 ALR 940.

Contributory negligence of one who attempts to cross railroad tracks just after a train, or part of a train, has passed over the crossing, 56 ALR 543.

Duty and liability to passenger temporarily leaving train, 61 ALR 403.

Liability of a railroad for personal injury and property damage caused by frightening horses, 61 ALR 1078.

Liability for injury inflicted when vehicle is struck by overhang of street car rounding curve, 62 ALR 307.

Liability of master for injury to one whom servant, in violation of instructions, permits to ride on vehicle, 62 ALR 1167; 74 ALR 163.

Failure or delay in sounding crossing signals as affecting liability of railroad company to persons not crossing nor about to cross track, 66 ALR 811.

Failure of train employee to discover in time to avert accident that object seen on or near track is human being, as negligence, 70 ALR 1116.

Liability of railroad for damages other than those incident to bodily injury for blocking street or highway crossing, 71 ALR 917.

Liability of railroad company for acts of employees in ejecting trespassers from train, 72 ALR 536.

One in general employment of carrier as servant temporarily of shipper or consignee while aiding in loading or unloading or moving cars, as regards responsibility for his negligence, and vice versa, 102 ALR 514.

Liability for collision between street car and vehicle driven ahead of or toward it along or close to the track, 102 ALR 716.

Part or extent of highway adjoining railroad crossing for condition of which railroad is responsible, 105 ALR 547.

Liability of railroad company for injury to trespassers or licensees other than employees or passengers struck by object projecting, or thrown, from passing train, 112 ALR 850.

Sufficiency of complaint in action against railroad for killing or injuring person or livestock as regards time, and direction and identification of train, 115 ALR 1074.

Liability of railroad for injury to or death of one other than its employee due to defec-

tive condition of car received from another railroad which he was unloading or loading, 126 ALR 1095.

Liability for death or injury as result of suction from passing train, 149 ALR 907.

What conduct on part of railroad, in connection with crossing accident, amounts to wantonness, wilfulness, or the like, precluding defense of contributory negligence, 151 ALR 9.

Standing railroad car or streetcar and appliances as attractive nuisance, 152 ALR 1263.

Liability of railway company for personal injury, other than to passenger, caused by defective condition of car delivered to another company, 152 ALR 1313.

Liability of railroad company for negligence in extricating animal caught in tracks or trestle, 159 ALR 152.

What amounts to negligence of gate tender at railroad crossing, 160 ALR 731.

Duty of railroad toward persons using private crossing or commonly used footpath over or along railroad tracks, 167 ALR 1253.

What causes of loss are incident to the "operation" of a railroad, within clause of contract relieving the railroad from liability, 2 ALR2d 1074.

Liability of carrier for injuries to person boarding vehicle or ship for social or other purposes in connection with a passenger, 11 ALR2d 1075.

Construction and effect of liability exemption or indemnity clause in spur track agreement, 20 ALR2d 711.

Failure of occupants of motor vehicle stalled on railroad crossing to get out and move to place of safety as contributory negligence, 21 ALR2d 742.

Liability of railroad to adult pedestrian attempting to pass over, under, or between cars obstructing crossing, 27 ALR2d 369.

Railroad's duty to children walking longitudinally along railroad tracks or right of way, 31 ALR2d 789.

Attempt to board moving car or train as contributory negligence or assumption of risk, 31 ALR2d 931.

Railroad carrier's liability for loss of baggage or effects accompanying passenger, 32 ALR2d 630.

Duty of railroad to passengers to keep steps or vestibule of car free from debris or foreign substances other than snow or ice, 34 ALR2d 360.

Railroad's liability for injury or damage from collision of road vehicle with train or car at place other than crossing, 44 ALR2d 680.

Liability of carrier to passenger injured by hurling of object through window by a third person, 46 ALR2d 1098.

Duty of railroad company toward employee with respect to close clearance of objects alongside tracks, 50 ALR2d 674.

Status of employee or his family traveling on employer's interstate conveyance by means of pass issued pursuant to specific provision of employment or collective bargaining agreement, 55 ALR2d 766.

Railroad company's liability for injury or death of pedestrian due to condition of surface of crossing, 64 ALR2d 1199.

Liability of railroad for injury or damage resulting from motor vehicle striking bridge or underpass because of insufficient vertical clearance, 67 ALR2d 1364.

Liability of railroad for injury due to road vehicle running into train or car standing on highway crossing, 84 ALR2d 813.

Railroad's liability for crossing collision as affected by fact that train or engine was backing or engine was pushing train, 85 ALR2d 267.

Failure of signaling device at crossing to operate, as affecting railroad company's liability, 90 ALR2d 350.

Railroad's liability to owner or occupant of motor vehicle for accident allegedly resulting from defective condition of road surface at crossing, 91 ALR2d 10.

Railroad's liability for injury or death of one other than employee because of alleged unsafe or defective condition of its own freight car which he was loading or unloading, 99 ALR2d 176.

Contributory negligence of child injured while climbing over or through railroad train blocking crossing, 11 ALR3d 1168.

Validity, construction, and effect of agreement, in connection with real-estate lease or license by railroad, for exemption from liability or for indemnification by lessee or licensee, for consequences of railroad's own negligence, 14 ALR3d 446.

Liability, because of improper loading, of railroad consignee or his employee injured while unloading car, 29 ALR3d 1039.

Railroad's liability for injury to or death of child on moving train other than as paying or proper passenger, 35 ALR3d 9.

Carrier's liability for injury or death of infant passenger as affected by fact that child was in custody of parent or other adult, 74 ALR3d 1171.

Validity of release of prospective right to wrongful death action, 92 ALR3d 1232.

Application of *res ipsa loquitur* doctrine to accidents incurred by passenger while boarding or alighting from a carrier, 93 ALR3d 776.

Liability of common carrier for personal injury or death of passenger occasioned by inhalation of gases or fumes from exhaust, 99 ALR3d 751.

Width or design of lateral space between passenger loading platform and car en-

trance as affecting carrier's liability to passenger for injuries incurred from falling into space, 28 ALR4th 748.

Liability of land carrier to passenger who becomes victim of third party's assault on or about carrier's vehicle or premises, 34 ALR4th 1054.

Liability of land carrier to passenger who becomes victim of another passenger's assault, 43 ALR4th 189.

Measure and elements of damages for injury to bridge, 31 ALR5th 171.

Liability of owner or operator of shopping center, or business housed therein, for injury to patron on premises from criminal attack by third party, 31 ALR5th 550.

46-8-291. Consent and contributory negligence as defenses; comparative negligence as affecting amount of recovery.

No person shall recover damages from a railroad company for injury to himself or his property where the same is done by his consent or is caused by his own negligence, provided that if the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to him. (Orig. Code 1863, § 2979; Code 1868, § 2980; Code 1873, § 3034; Code 1882, § 3034; Civil Code 1895, § 2322; Civil Code 1910, § 2781; Code 1933, § 94-703.)

Law reviews. — For article discussing defenses to action for wrongful death in Georgia, see 22 Ga. B.J. 459 (1960). For article, "Reappraising the Jury's Role as Finder of Fact," see 20 Ga. L. Rev. 123 (1985).

For note "Plaintiff's Last Clear Chance and Comparative Negligence in Georgia," see 6 Ga. St. B.J. 47 (1969).

For comment on *Aycock v. Callaway*, 78 Ga. App. 219, 51 S.E.2d 53 (1948), see 11 Ga. B.J. 495 (1949). For comment discussing Georgia's comparative negligence laws in light of *Maki v. Frelk*, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967), see 19 Mercer L. Rev. 486 (1968).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

COMPARISON OF SECTION WITH COMMON LAW

COMPARISON OF SECTION WITH § 51-11-7

COMPARATIVE NEGLIGENCE RULE

WHEN PLAINTIFF'S NEGLIGENCE BARS RECOVERY

PLAINTIFF'S STANDARD OF CARE

1. IN GENERAL

2. SPECIFIC EXAMPLES

OTHER DEFENSES

TRESPASSERS

RECOVERY BY GUESTS

JURY QUESTIONS

INSTRUCTIONS

1. IN GENERAL
2. CHARGE OF THIS SECTION AND § 51-11-7
3. SPECIFIC INSTRUCTIONS

General Consideration

Cases to which this Code section applicable. — Former Code 1933, § 94-703 (see O.C.G.A. § 46-8-291) referred only to cases where concurring negligence of plaintiff and defendant combined proximately to cause injury. *Willis v. Jones*, 89 Ga. App. 824, 81 S.E.2d 517 (1954).

Accidents not within section. — Where the injury received by the plaintiff resulted from a mere accident, former Code 1882, § 3034 (see O.C.G.A. § 46-8-291) did not apply. *Murphy v. Atlanta & W.P.R.R.*, 89 Ga. 832, 15 S.E. 774 (1892).

Violation of stock law as evidence. — The existence of a stock law in any locality is a fact which the jury may consider, in ascertaining the amount of care and diligence exercised by each of the parties to the transaction, and in apportioning the extent of the liability of the company, if any. *Central R.R. v. Hamilton*, 71 Ga. 461 (1883).

Cited in *Macon & W.R.R. v. Davis*, 18 Ga. 679 (1855); *Baston v. Georgia R.R.*, 60 Ga. 339 (1878); *Stiles v. Atlanta & W.P.R.R.*, 65 Ga. 370 (1880); *Americus, P. & L.R.R. v. Luckie*, 87 Ga. 6, 13 S.E. 105 (1891); *Brunswick & W.R.R. v. Gibson*, 97 Ga. 489, 25 S.E. 484 (1895); *Southern Ry. v. Morrison*, 105 Ga. 543, 31 S.E. 564 (1898); *Central of Ga. Ry. v. McKenney*, 116 Ga. 13, 42 S.E. 229 (1902); *Western & A.R.R. v. Burnham*, 123 Ga. 28, 50 S.E. 984 (1905); *Macon & B. Ry. v. Parker*, 127 Ga. 471, 56 S.E. 616 (1907); *Charleston & W.C. Ry. v. Camp*, 3 Ga. App. 232, 59 S.E. 710 (1907); *Central of Ga. Ry. v. Brown*, 138 Ga. 107, 74 S.E. 839 (1912); *Georgia S. & F. Ry. v. Thornton*, 144 Ga. 481, 87 S.E. 388 (1915); *Hines v. Malone*, 25 Ga. App. 781, 105 S.E. 37 (1920); *Atlantic Coast Line R.R. v. Fulford*, 33 Ga. App. 631, 127 S.E. 812 (1925); *Seaboard Air-Line Ry. v. Sarman*, 38 Ga. App. 637, 144 S.E. 810 (1928); *Southern Ry. v. Cochran*, 29 F.2d 206 (5th Cir. 1928); *Western Union Tel. Co. v. Stephenson*, 36 F.2d 47 (5th Cir. 1929); *Southern Ry. v. Tudor*, 46 Ga. App. 563, 168 S.E. 98 (1933); *Taylor v. Morgan*, 54 Ga. App. 426, 188 S.E. 44 (1936); *Pollard v.*

Boatwright, 57 Ga. App. 565, 196 S.E. 215 (1938); *Wallace v. Howard*, 58 Ga. App. 428, 198 S.E. 812 (1938); *Gazaway v. Nicholson*, 61 Ga. App. 3, 5 S.E.2d 391 (1939); *Southern Ry. v. Maddox*, 63 Ga. App. 508, 11 S.E.2d 501 (1940); *Lord v. Southern Ry.*, 70 Ga. App. 273, 28 S.E.2d 299 (1943); *Porter v. Southern Ry.*, 74 Ga. App. 546, 40 S.E.2d 438 (1946); *Western & Atl. R.R. v. Burnett*, 79 Ga. App. 530, 54 S.E.2d 357 (1949); *Atlantic Coast Line R.R. v. Layne*, 88 Ga. App. 674, 77 S.E.2d 565 (1953); *Southern Ry. v. Jolley*, 267 F.2d 934 (5th Cir. 1959); *Southern Ry. v. Neely*, 284 F.2d 633 (5th Cir. 1960); *Central of Ga. Ry. v. Brower*, 218 Ga. 525, 128 S.E.2d 926 (1962); *Southern Ry. v. Campbell*, 309 F.2d 569 (5th Cir. 1962); *Southern Ry. v. Jackson*, 375 U.S. 837, 84 S. Ct. 77, 11 L. Ed. 2d 65 (1963); *Jackson v. Southern Ry.*, 317 F.2d 532 (5th Cir. 1963); *Seaboard Coast Line R.R. v. Clark*, 122 Ga. App. 237, 176 S.E.2d 596 (1970); *Morris v. Affleck*, 437 F.2d 82 (1st Cir. 1971); *McClain v. Seaboard Coast Line R.R.*, 473 F.2d 357 (5th Cir. 1973).

Comparison of Section with Common Law

Comparative negligence not common law. — So much of former Civil Code 1910, § 2781 (see O.C.G.A. § 46-8-291), as related to comparative negligence and diminution of damages was not a common-law doctrine. *Seaboard Air-Line Ry. v. Andrews*, 140 Ga. 254, 78 S.E. 925, 1914D Ann. Cas. 165 (1913).

This section and § 51-11-7 changed common law. — The common-law rule that if the injury to or death of a person resulted from any negligence attributable to the person, regardless of the degree, there could be no recovery, and no apportionment of damages, was changed in this state by former Code 1933, §§ 94-703 and 105-603 (see O.C.G.A. §§ 46-8-291 and 51-11-7. *Southland Butane Gas Co. v. Blackwell*, 211 Ga. 665, 88 S.E.2d 6 (1955). But see *Garrett v. NationsBank*, 228 Ga. App. 114, 491 S.E.2d 158 (1997).

Plaintiff's negligence a bar to recovery under common law. — Under the

common-law doctrine of contributory negligence, which now prevailed in most jurisdictions but which had been changed by former Code 1933, §§ 94-703 and 105-603 (see O.C.G.A. §§ 46-8-291 and 51-11-7), if the negligence of the plaintiff, no matter how small, contributed to the injury sustained by plaintiff, plaintiff could not recover of the defendants; this doctrine did not diminish the damages but precluded a recovery. The doctrine which prevails in this state, by reason of the statutes, is more accurately and properly designated as that of comparative negligence, rather than that of contributory negligence. *Rogers v. McKinley*, 48 Ga. App. 262, 172 S.E. 662 (1934), later appeal, 52 Ga. 161, 182 S.E. 805 (1935); *Georgia Power Co. v. Maxwell*, 52 Ga. App. 430, 183 S.E. 654 (1936).

Doctrine of contributory negligence has no place in rule of comparative negligence under this section. — The doctrine of contributory negligence under the common law and that doctrine as modified by the rule of the last clear chance under the common law, have no place in the rule of comparative negligence and apportionment of damages under former Code 1933, § 94-703 (see O.C.G.A. § 46-8-291) as such. *Smith v. AMOCO*, 77 Ga. App. 463, 49 S.E.2d 90 (1948).

Comparison of Section with § 51-11-7

This section not identical with § 51-11-7. — The defense provided for in former Code 1873, § 2792 (see O.C.G.A. § 51-11-7), was not identical with that under former Code 1882, § 3034 (see O.C.G.A. § 46-8-291); and while the doctrine of contributory negligence applied to both sections, yet the particular act of negligence in proof must be such as contributed to the thing that caused the injury sued for. *Central R.R. v. Harris*, 76 Ga. 501 (1886).

Construction in pari materia. — Former Civil Code 1910, §§ 2781 and 4426 (see O.C.G.A. §§ 46-8-291 and 51-11-7) to be construed in *pari materia*. *Southern Ry. v. Nichols*, 135 Ga. 11, 68 S.E. 789 (1910); *Wrightsville & T.R.R. v. Floyd*, 17 Ga. App. 461, 87 S.E. 688 (1916).

The qualification put upon former Code 1933, § 94-703 (see O.C.G.A. § 46-8-291) was that contained in § 51-11-7, which two sections were in *pari materia* and must be

construed with reference to each other. *Georgia Power Co. v. Gillespie*, 48 Ga. App. 688, 173 S.E. 755 (1934).

Sections provide distinct limitations on right to recover. — The defense stated in former Civil Code 1910, § 2781 (see O.C.G.A. § 46-8-291) to the effect that a plaintiff cannot recover for injuries caused by plaintiff's consent or due to plaintiff's own negligence is separate and distinct from the additional limitation or qualification of the right to recover stated in former Civil Code 1910, § 4426 (see O.C.G.A. § 51-11-7), which provided that notwithstanding the perilous situation might have been brought about in whole or in the greater part by the negligent acts of the defendant, it was nevertheless incumbent upon the injured party to exercise the care of an ordinarily prudent person to ascertain the defendant's negligence and thereafter to avoid its consequences. *Donaldson v. Central of Ga. Ry.*, 43 Ga. App. 480, 159 S.E. 738 (1931).

Former Civil Code 1910, §§ 2781 and 4426 (see O.C.G.A. §§ 46-8-291 and 51-11-7) not identical and should not be confused. This section provided that no recovery from a railroad company can be had where an injury has been occasioned by the plaintiff's own negligence (lack of ordinary care); while former § 4426 forbid a recovery where the plaintiff by ordinary care could have avoided the consequences to oneself caused by the defendant's negligence. *Georgia Power Co. v. Holmes*, 175 Ga. 487, 165 S.E. 284 (1932).

Defense granted by § 51-11-7 not limited by this section's comparative negligence rule. — Former Code 1933, § 105-603 (see O.C.G.A. § 46-8-291) gave defendant complete and perfect defense that was in no way limited by comparative negligence rule embodied in former Code 1933, § 94-703 (see O.C.G.A. § 46-8-291). *Pollard v. Kent*, 59 Ga. App. 118, 200 S.E. 542 (1938).

Distinction between active and passive plaintiffs. — Former Civil Code 1895, § 2322 (see O.C.G.A. § 46-8-291) dealt with an active plaintiff who personally caused the injury. Former Civil Code 1895, § 3830 (see O.C.G.A. § 46-8-291) dealt with a plaintiff who may have been passive, and may therefore not have caused, but might have avoided the injury. Neither section is exhaus-

Comparison of Section with § 51-11-7 (Cont'd)

tive of defenses which may be made. But relating, as they do, to different conditions, the two sections should not be charged in immediate connection one with the other, but separate and apart. *Macon & B. Ry. v. Anderson*, 121 Ga. 666, 49 S.E. 791 (1905).

Applicability of §§ 46-8-291 and 51-11-7 to all kinds of negligence. — Former Code 1933, §§ 94-703 and 105-603 (see O.C.G.A. §§ 46-8-291 and 51-11-7) were applied to all kinds of negligence except when special statute governs. *Willis v. Jones*, 89 Ga. App. 824, 81 S.E.2d 517 (1954).

Applicability of §§ 46-8-291 and 51-11-7 to action against railroad. — Both former Code 1933, §§ 94-703 and 105-603 (see O.C.G.A. §§ 46-8-291 and 51-11-7) were applicable in action against a railroad and constitute separate defenses. *Underwood v. Atlanta & W. Point R.R.*, 105 Ga. App. 340, 124 S.E.2d 758, *aff'd in part and rev'd in part*, 218 Ga. 193, 126 S.E.2d 785 (1962).

Comparative Negligence Rule

Section embodies comparative negligence law. — Former Civil Code 1910, § 2781 (see O.C.G.A. § 46-8-291) embodied law of comparative negligence and consequent diminution of damages. *Central of Georgia Ry. v. Rountree*, 10 Ga. App. 696, 73 S.E. 1095 (1912).

The doctrine which prevailed in this state, by reason of former Code 1933, §§ 94-703 and 105-603 (see O.C.G.A. §§ 46-8-291 and 51-11-7), was more accurately and properly designated as that of comparative negligence, rather than that of contributory negligence. *Georgia Power Co. v. Maxwell*, 52 Ga. App. 430, 183 S.E. 654 (1936).

Concurrent contributory negligence only reduces recovery. — Concurrent contributory negligence of plaintiff under former Code 1933, § 94-703 (see O.C.G.A. § 46-8-291) not a bar but only reduced the recovery. *Southern Ry. v. Wilbanks*, 67 F.2d 424 (5th Cir. 1933), *cert. denied*, 291 U.S. 678, 54 S. Ct. 530, 78 L. Ed. 1066 (1934).

Former Code 1933, § 94-703 (see O.C.G.A. § 46-8-291) made the contributory negligence of a plaintiff proper to be considered, when pleaded, not in bar, as at common law, but in reduction of damages in

proportion to the amount of default attributable to the plaintiff. *McCord v. Atlantic Coast Line R.R.*, 185 F.2d 603 (5th Cir. 1950).

Former Code 1933, §§ 94-703 and 105-603 (see O.C.G.A. §§ 46-8-291 and 51-11-7) provided that, when the negligence of both parties was concurrent and contributed to the injury, then the plaintiff shall not, as at common law, be barred entirely, but may recover damages reduced below full compensation for the injury by an amount proportioned to the amount of the default attributable to plaintiff. *Atlantic Coast Line R.R. v. Mitchell*, 157 F.2d 880 (5th Cir. 1946).

Contributory negligence does not bar recovery by plaintiff unless plaintiff's negligence is equal to or greater than that of defendant. If they are both negligent, but plaintiff's negligence is less than that of defendant, plaintiff may recover, but plaintiff's damages will be diminished by the jury in proportion to the amount of fault attributable to plaintiff. *Gross v. Southern Ry.*, 414 F.2d 292 (5th Cir. 1969).

Former Code 1933, § 94-703 (see O.C.G.A. § 46-8-291) was applied where the negligence of the plaintiff equalled or exceeded that of defendant, and in such cases there can be no recoveries; but if the negligence of the plaintiff was less than that of the defendant, and the plaintiff was otherwise entitled to recover against the defendant, the total amount of damages in dollars and cents should be diminished in proportion to the amount of fault attributable to the plaintiff. *Campbell v. Southern Ry.*, 198 F. Supp. 661 (N.D. Ga. 1961), *aff'd*, 309 F.2d 569 (5th Cir. 1962).

Contributory negligence of the plaintiff which does not equal, or exceed the negligence of the defendant does not defeat the recovery of damages but diminishes the amount thereof "in proportion to the amount of fault attributable to" the plaintiff. *Atlantic Coast Line R.R. v. Key*, 196 F.2d 64 (5th Cir. 1952).

The true comparative-negligence rule is that, if a plaintiff and defendant are both guilty of negligence which concurs proximately to bring about an injury to a plaintiff, and if the defendant's negligence is sufficient to predicate an action on, for example, ordinary negligence, and if the plaintiff is negligent, even if plaintiff's negligence

amounts to a failure to exercise ordinary care, and the plaintiff's negligence is not equal to or greater than that of the defendant, the plaintiff is still entitled to recover, provided the plaintiff could not have avoided the consequences of the defendant's negligence by the exercise of ordinary care after it was actually discovered or should have been discovered by the exercise of ordinary care. *Willis v. Jones*, 89 Ga. App. 824, 81 S.E.2d 517 (1954).

The comparative negligence rule is that where there is negligence by both parties which is concurrent and contributes to the injury sued for, a recovery by the plaintiff is not barred, but plaintiff's damages shall be diminished by an amount proportioned to the amount of fault attributable to plaintiff, provided that plaintiff's fault is less than the defendants, and that, by the exercise of ordinary care, plaintiff could not have avoided the consequences of the defendant's negligence after it became apparent or in the exercise of ordinary care should have been discovered by the plaintiff. *Rogers v. McKinley*, 48 Ga. App. 262, 172 S.E. 662 (1934), later appeal, 52 Ga. 161, 182 S.E. 805 (1935); *Georgia Power Co. v. Maxwell*, 52 Ga. App. 430, 183 S.E. 654 (1936).

If the negligent acts and conduct of the complainant only proximately contribute to the injury, but in some less degree than the negligence of the defendant, plaintiff can still recover partial damages under the comparative negligence rule, unless plaintiff could have avoided the consequences of defendant's negligence after it had or should have become known. *Donaldson v. Central of Ga. Ry.*, 43 Ga. App. 480, 159 S.E. 738 (1931).

Plaintiff must prove that negligence of defendant preponderated. — Former Civil Code 1910, § 2781 (see O.C.G.A. § 46-8-291) meant that where both parties are at fault, and the alleged injury was the fault of both, and if the jury should find from the evidence that the plaintiff, by the exercise of ordinary care and diligence, could not have avoided the alleged injury caused or occasioned by the defendant's negligence, then, though the plaintiff may have been to some extent negligent, the plaintiff would be entitled to damages, but the amount shall be diminished by the jury in proportion to the amount of fault attrib-

utable to the plaintiff; but the plaintiff cannot recover if guilty of negligence contributing to the injury, unless it is made to appear that the negligence of the defendant preponderated in causing the injury. *Lamb v. McAfee*, 18 Ga. App. 584, 90 S.E. 103 (1916), later appeal, 26 Ga. App. 3, 105 S.E. 250 (1920).

Defendant found liable where failed to exercise last clear chance to avoid injury. — If both plaintiff and defendant are negligent, the latter can be found solely liable for all the damage if defendant had a last clear chance to avoid the injury and did not exercise ordinary care. *Southern Ry. v. Brunswick Pulp & Paper Co.*, 376 F. Supp. 96 (S.D. Ga. 1974).

How damages calculated. — If jury finds the plaintiff was negligent, and that neither plaintiff's negligence nor defendant's negligence was the sole proximate cause of plaintiff's injuries, but that plaintiff's negligence and defendant's negligence combined to cause plaintiff's injuries, and the defendant's negligence was greater than the plaintiff's, then they should find a verdict for the plaintiff in an amount calculated by determining the total amount in which plaintiff has been damaged, and then reducing that amount in proportion to the negligence of the plaintiff compared with that of the defendant. *Underwood v. Atlanta & W. Point R.R.*, 105 Ga. App. 340, 124 S.E.2d 758, aff'd in part and rev'd in part, 218 Ga. 193, 126 S.E.2d 785 (1962).

Comparative negligence doctrine denies any recovery if plaintiff's negligence equals or exceeds defendant's. Damages are proportionately reduced where the latter's fault exceeds that of the plaintiff. Thus, if each party is 50 percent at fault, there can be no recovery. But should plaintiff's negligence be 49 percent, plaintiff is entitled to recover 51 percent of plaintiff's damages. *Southern Ry. v. Brunswick Pulp & Paper Co.*, 376 F. Supp. 96 (S.D. Ga. 1974).

When Plaintiff's Negligence Bars Recovery

Recovery by plaintiff denied for failure to exercise ordinary care. — Only where injured party fails to exercise ordinary care to escape consequences of negligence is recovery entirely defeated. *Weinstein v. Powell*, 61 F.2d 411 (5th Cir. 1932).

Where the plaintiff by the exercise of

When Plaintiff's Negligence Bars Recovery (Cont'd)

ordinary care could have avoided the consequences to oneself caused by the defendant's negligence, plaintiff is not entitled to recover. *Lowe v. Payne*, 156 Ga. 312, 118 S.E. 924 (1923).

The plaintiff can never recover in an action for personal injuries, no matter what the negligence of the defendant may be, short of actual wantonness, when the proof shows plaintiff could, by ordinary care, after the negligence of the defendant began or was existing, have avoided the consequences to oneself of that negligence; the law of contributory negligence is applicable only where both parties are at fault, and when, also, the plaintiff could not by ordinary care have avoided the injury which the defendant's negligence produced. *Pollard v. Kent*, 59 Ga. App. 118, 200 S.E. 542 (1938).

Under O.C.G.A. §§ 46-8-291 and 51-11-7 there can be no recovery of damages where the injured party has failed to use ordinary care to prevent an injury to oneself, unless the injury be willfully and wantonly inflicted upon the party. *Southland Butane Gas Co. v. Blackwell*, 211 Ga. 665, 88 S.E.2d 6 (1955). But see *Garrett v. NationsBank*, 228 Ga. App. 114, 491 S.E.2d 158 (1997).

In an action brought by an employee of a common carrier by railroad against the company, for personal injuries, the employee cannot recover if the employee's injuries were caused by the employee's own carelessness amounting to a failure to exercise ordinary care; or if by the exercise of ordinary care the employee could have avoided the consequences of the defendant's negligence. *Louisville & N.R.R. v. Dunn*, 21 Ga. App. 379, 94 S.E. 661 (1917).

Under former Civil Code 1910, §§ 2781 and 4426 (see O.C.G.A. §§ 46-8-291 and 51-11-7), where a person who was killed by the running of a train could by the exercise of ordinary care for one's own safety have avoided the consequences to oneself of the defendant's negligence after it came into existence and was known to the person or could have been discovered by the exercise of ordinary care, an action for damages against the railroad company on account of negligence will not lie. *Central of Ga. Ry. v. Tapley*, 145 Ga. 792, 89 S.E. 841 (1916).

Regardless of whether plaintiff's decedent stopped at a stop sign, the decedent violated O.C.G.A. § 40-6-141 and decedent's injuries were caused by decedent's failure to exercise ordinary care for his own safety. *Crockett v. Norfolk S. Ry.*, 95 F. Supp. 2d 1353 (N.D. Ga. 2000), *aff'd*, 239 F.3d 370, (11th Cir. 2000).

Recovery by plaintiff denied where negligence equal or for failure to exercise ordinary care. — There were only two exceptions in former Code 1933, §§ 94-703 and 105-603 (see O.C.G.A. §§ 46-8-291 and 51-11-7) to the right of recovery by a plaintiff who had been guilty of negligence concurring with that of a defendant to cause an injury; one was that a plaintiff may not recover if the plaintiff could have avoided the negligence of the defendant by the exercise of ordinary care, and the other is that a plaintiff cannot recover if the plaintiff's negligence is equal to or greater than that of the defendant. *Willis v. Jones*, 89 Ga. App. 824, 81 S.E.2d 517 (1954).

Recovery denied where plaintiff's negligence is proximate cause of injuries. — Plaintiff cannot recover where plaintiff's negligence is proximate cause of plaintiff's injuries. *Willis v. Jones*, 89 Ga. App. 824, 81 S.E.2d 517 (1954).

No person can recover damages from a railroad company for injuries to oneself where the same are caused by one's own negligence or where by the exercise of ordinary care one could have avoided the consequences to oneself caused by the company's negligence. *Coleman v. Western & A.R.R.*, 48 Ga. App. 343, 172 S.E. 577 (1933).

Rule of ordinary care extends to negligence discoverable by plaintiff. — The rule that, in order for the plaintiff to recover plaintiff must have exercised ordinary care to avoid the consequences to oneself caused by the defendant's negligence is not limited to the negligence of the defendant which may have been actually discovered, but extends also to the negligence which might have been discovered by the exercise of ordinary care on the plaintiff's part. *Georgia Power Co. v. Maxwell*, 52 Ga. App. 430, 183 S.E. 654 (1936).

Last clear chance doctrine applied to plaintiff. — The failure to exercise ordinary care to escape the consequences of the defendant's negligence which is a bar arises in situations in which the defendant's negli-

gence exists first and is apparent or may readily be known, and the plaintiff, by the exercise of ordinary care, can escape its consequences but does not. It is the doctrine of "the last clear chance" applied to the plaintiff instead of to the defendant. *Southern Ry. v. Wilbanks*, 67 F.2d 424 (5th Cir. 1933), cert. denied, 291 U.S. 678, 54 S. Ct. 530, 78 L. Ed. 1066 (1934).

No recovery where plaintiff had opportunity to avoid negligence of defendant. — Where the allegations of petition show that the plaintiff, with knowledge of the prior acts complained of, had full opportunity to avoid and escape the consequences thereof, plaintiff was not entitled to recover though the defendant may have been in some respects negligent. *Central of Ga. Ry. v. Roberts*, 213 Ga. 135, 97 S.E.2d 149 (1957).

No recovery where victim guilty of reckless conduct. — Where the evidence shows reckless conduct on the part of the decedent, under former Civil Code 1895, § 2322 (see O.C.G.A. § 46-8-291) the railroad company was not liable in damages for decedent's death, unless it was guilty of wanton or criminal negligence. *Hopkins v. Southern Ry.*, 110 Ga. 85, 35 S.E. 307 (1900).

Jumping from moving train. — Plaintiff's injuries were solely caused by plaintiff's own decision to jump from a train after helping a passenger on board, and a car attendant's actions did not constitute an inducement to plaintiff to attempt to leave the train while in motion, where the attendant exercised no control over the movement or management of the train, and the attendant specifically advised plaintiff to remain on the train until it stopped at the next station. *Giargiari v. National R.R. Passenger Corp.*, 185 Ga. App. 723, 365 S.E.2d 875 (1988).

Damages reduced to nothing where negligence equal. — A diminution of the plaintiff's damages in proportion to the amount of default attributable to plaintiff would, where the plaintiff's negligence is equal to the negligence of the defendant, reduce the plaintiff's damage to nothing. *Southern Ry. v. Reed*, 40 Ga. App. 332, 149 S.E. 582 (1929).

No bar where plaintiff guilty of negligence before duty arose to avoid defendant's negligence. — The mere fact that the plaintiff might have been guilty of ordinary negligence before the duty arose to discover and

avoid the defendant's negligence would not in and of itself preclude a recovery by the plaintiff. *Willis v. Jones*, 89 Ga. App. 824, 81 S.E.2d 517 (1954).

No bar to recovery where victim in such condition that he is unable to avoid injury. — Because the duty to avoid negligence does not arise until after the negligence is existing, and is either apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence, the doctrine that recovery cannot be had for a homicide if the deceased could by the exercise of ordinary care have avoided the consequences of the defendant's negligence, has no application to a case where the negligence came into existence at a time when the deceased was in such a condition that the deceased could not have done anything to avoid the consequences of the negligence. *Central of Georgia Ry. v. Pelfry*, 11 Ga. App. 119, 74 S.E. 854 (1912).

Plaintiff's Standard of Care

1. In General

Point at which duty to avoid negligence arises. — Duty to avoid negligence does not arise until after negligence to be avoided has become apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence. *Brown v. Savannah Elec. & Power Co.*, 46 Ga. App. 393, 167 S.E. 773 (1932).

Plaintiff's duty before negligence is apparent. — Failure to exercise ordinary care on the part of the person injured, before the negligence complained of was apparent, or should have been reasonably apprehended, would not preclude a recovery, but under former Civil Code 1895, § 2322 (see O.C.G.A. § 46-8-291) would authorize the jury to diminish the damages in proportion to the fault attributable to the person injured. *Western Atl. R.R. v. Ferguson*, 113 Ga. 708, 39 S.E. 306, 54 L.R.A. 802 (1901).

Plaintiff's conduct considered in light of surrounding circumstances. — In deciding whether ordinary care was exercised in a given case, the conduct in question must be considered in light of all the surrounding circumstances as shown by the evidence. *Campbell v. Southern Ry.*, 198 F. Supp. 661

Plaintiff's Standard of Care (Cont'd)**1. In General (Cont'd)**

(N.D. Ga. 1961), aff'd, 309 F.2d 569 (5th Cir. 1962).

Care by person in emergency. — Under former Civil Code 1895, § 2322 (see O.C.G.A. § 46-8-291), the duty of a person for that person's own safety, in an emergency, was not to be measured by the ordinary standard, but that allowance was to be made for the state of that person's emotions. *Atlanta, K. & N. Ry. v. Roberts*, 116 Ga. 505, 42 S.E. 753 (1902).

Where one is confronted with a sudden emergency, without sufficient time to determine with certainty the best course to pursue, one is not held to the same accuracy of judgment as would be required of a person if the person had time for deliberation. *Brown v. Savannah Elec. & Power Co.*, 46 Ga. App. 393, 167 S.E. 773 (1932).

Railroad not liable for damages caused by person's own negligence. — Railroad company is not liable to either grown person or minor for damages to the person caused by the person's own negligence, or where the person could have avoided the consequences of the defendant's negligence by the use of due care. *Linder v. Brown*, 137 Ga. 352, 73 S.E. 734 (1912).

Contributory negligence of those under 14 years of age. — Infants under 14 years of age are chargeable with contributory negligence resulting from want of such care as their mental and physical capacity fits them for exercising, and assume risks of those patently obvious and known dangers which they are able to appreciate and avoid. *Campbell v. Southern Ry.*, 198 F. Supp. 661 (N.D. Ga. 1961), aff'd, 309 F.2d 569 (5th Cir. 1962).

2. Specific Examples

Standard of care while crossing ahead at train. — All that is required of person about to cross ahead of observed railroad car is that the person exercise reasonable care. *Brown v. Savannah Elec. & Power Co.*, 46 Ga. App. 393, 167 S.E. 773 (1932).

Person is bound, before stepping from a place of safety on side of railroad track, to look for approach of trains and cars, and where such person steps upon the railroad tracks in front of oncoming cars without

looking, and the employees of the company on said cars immediately shout and apply the brakes, such operators are in the use of ordinary care for the protection of such pedestrian, and such pedestrian was lacking in due care for the pedestrian's own safety as a matter of law to such an extent as to bar recovery. *Southern Ry. v. Waldrup*, 76 Ga. App. 356, 45 S.E.2d 775 (1947).

Failure to stop, look, and listen not lack of ordinary care. — It cannot be said, as a matter of law, that the failure on the part of a person approaching and entering into a railroad crossing, and unaware of the approach of a train, to stop, look, and listen, renders that person guilty of the lack of ordinary care. *Brown v. Savannah Elec. & Power Co.*, 46 Ga. App. 393, 167 S.E. 773 (1932).

It is not, as a matter of law, negligence proximately causing an injury for a person, injured at a public railroad crossing by an approaching train, to proceed across the railroad track at the crossing without observing the approaching train, although had the person looked the person could have seen the train approaching in time to have avoided the injury. *Pollard v. Harris*, 51 Ga. App. 898, 181 S.E. 593 (1935).

Duty to use ordinary care in using path across railroad track. — One using path across railroad track is bound to use ordinary care for one's own safety, and ordinary care in such case is that care which an ordinarily prudent person would use under similar circumstances; the absence of such care defeats recovery where the exercise of such care would have avoided the injury. *Southern Ry. v. Waldrup*, 76 Ga. App. 356, 45 S.E.2d 775 (1947).

Motorist attempting to cross in front of oncoming streetcar. — A street railway company is not liable in damages to the plaintiff because of a collision between a streetcar and the plaintiff's automobile, at a crossing, that is brought about solely by the plaintiff's mistaken judgment that plaintiff had ample time to drive plaintiff's automobile across the defendant's railway tracks ahead of the oncoming streetcar. *Kirk v. Savannah Elec. & Power Co.*, 50 Ga. App. 468, 178 S.E. 470 (1935).

Railway not liable where motorist crosses in front of locomotive. — Where the plaintiff, having previously seen the moving train

approaching the crossing, miscalculated the time in which plaintiff could safely cross, and placed oneself on the track immediately in front of the moving locomotive, was caught by the pilot and injured, such injury is directly attributable to the negligence and want of ordinary care on the part of the plaintiff, which bar plaintiff's right of recovery under former Civil Code 1895, § 2322 (see O.C.G.A. § 46-8-291). *Southern Ry. v. Blake*, 101 Ga. 217, 29 S.E. 288 (1897).

Pedestrian may rely upon custom of streetcar stopping at crossing. — One about to cross streetcar track at crossing may rely upon stopping of car at that place in accordance with custom, with a stop sign, or rule of the company, and this even though one sees the car approaching. *Brown v. Savannah Elec. & Power Co.*, 46 Ga. App. 393, 167 S.E. 773 (1932).

No contributory negligence where exercising ordinary care would not have revealed approaching streetcar. — It is not contributory negligence for plaintiff to attempt to cross streetcar track where plaintiff does not see streetcar approaching, and by the exercise of ordinary care could not have seen it. *Brown v. Savannah Elec. & Power Co.*, 46 Ga. App. 393, 167 S.E. 773 (1932).

Plaintiff injured crossing tracks where vision obscured may be guilty of negligence. — Where there is evidence that the plaintiff proceeded across a track at a crossing, in the wake of a train which had just passed, when, at the time, plaintiff's vision along a parallel track upon which a train of the defendant was approaching was obscured by the train which had just passed, and that for this reason plaintiff could see along this track only a short distance, that plaintiff proceeded upon the track on which the approaching train was coming, and was hit by the train and injured, the evidence is sufficient to authorize the inference that the plaintiff was not in the exercise of ordinary care. *Central of Ga. Ry. v. Cooley*, 44 Ga. App. 118, 160 S.E. 812 (1931).

Motorist driving into cloud of smoke takes chance of hitting object. — Where plaintiff can see smoke emitted from locomotive that completely obscures highway when plaintiff drives into it, being unable to see what is ahead of plaintiff, and hits a parked truck, plaintiff takes the chance of there being some hidden obstruction or danger within

the smoke, and therefore proceeds at plaintiff's peril, and has no right to recover from defendant. *Reid v. Southern Ry.*, 52 Ga. App. 508, 183 S.E. 849 (1936).

Plaintiff consents to injuries where he drives faster than power of headlights. — Where it appears that, after voluntarily deflecting the headlights of plaintiff's automobile so that plaintiff could not see an unlighted railroad passenger car standing directly in front of plaintiff on a public highway until plaintiff was within ten or 15 feet of it, the plaintiff, driving at a speed of 30 miles an hour, with plaintiff's brakes in good working order, could not avoid striking said car with such force as to wreck plaintiff's automobile and seriously injure oneself, in a legal sense the plaintiff was in the attitude of consenting to the injuries alleged. *Baker v. Atlantic Coast Line R.R.*, 52 Ga. App. 624, 184 S.E. 381 (1936).

Other Defenses

"Consent" defined. — Under former Civil Code 1895, § 2322 (see O.C.G.A. § 46-8-291), one who knowingly and voluntarily took a risk of injury to one's person and property, the danger of which is so obvious that the act of taking such risk, in and of itself, amounted to a failure to exercise ordinary care and diligence for one's own safety and that of one's property, cannot hold another liable for damages from injuries thus occasioned. *Southern Ry. v. Hogan*, 131 Ga. 157, 62 S.E. 64 (1908); *Georgia R.R. & Banking Co. v. Greer*, 7 Ga. App. 292, 66 S.E. 961 (1910).

Section a defense where horse improperly loaded on car. — Former Civil Code 1895, § 2322 (see O.C.G.A. § 46-8-291) was a defense to an action by the owner of a horse that was injured because of the improper manner used by the plaintiff in loading the animal on a car. *Southern Ry. v. Bivings*, 3 Ga. App. 552, 60 S.E. 287 (1908); *Coweta County v. Central of Ga. Ry.*, 4 Ga. App. 94, 60 S.E. 1018 (1908).

Section a defense where person alights from train knowing it will not stop. — A person consented under former Civil Code 1910, § 2781 (see O.C.G.A. § 46-8-291) to any injury the person sustained when attempting to get off from a moving train at a station at which the person knew that the train would not stop. *Georgia R.R. & Bank-*

Other Defenses (Cont'd)

ing Co. v. Greer, 7 Ga. App. 292, 66 S.E. 691 (1910).

Section a defense where passenger injured boarding moving train. — Where a passenger waited until a train began to move, and was injured in an attempt to get on board by seizing the railing of the car, under former Civil Code 1910, § 2781 (see O.C.G.A. § 46-8-291), the passenger cannot recover damages on the ground that the railroad company was negligent in allowing trucks to be placed near the track. *Southern Ry. v. Nichols*, 135 Ga. 11, 68 S.E. 789 (1910).

Section not defense where carrier fails to keep train under control. — Former Civil Code 1895, § 2322 (see O.C.G.A. § 46-8-291) was no defense if the company, after omitting to warn the traveler of the impending danger, followed up its negligence by a total failure to observe the additional duty imposed upon it of having its train under perfect control, and itself inflicted the injuries by negligently running the traveler down with its locomotive. *Comer v. Barfield*, 102 Ga. 485, 31 S.E. 89 (1897).

Defenses where cow killed by train. — Where it was proved that a cow was killed by a railroad train, former Code 1882, § 3034 (see O.C.G.A. § 46-8-291) imposed on the company the burden of showing that it was in the exercise of all ordinary and reasonable care and diligence, or that the damage was caused solely by the negligence of the owner of the cow, or to diminish damages, that both were at fault. *Georgia R.R. v. Bird*, 76 Ga. 13 (1885).

Burden of proof of establishing defense on defendant. — In order to sustain the defense, the burden of proof is upon the defendant to make it affirmatively appear that the injury is the result of the negligence of the plaintiff's husband. *Central of Ga. Ry. v. North*, 129 Ga. 106, 58 S.E. 647 (1907).

Mere presence of safety precautions does not relieve railroad of liability. — Mere presence of safety precautions such as automatic signalling devices does not render railroad free from negligence as a matter of law or relieve it from adopting such other measures as public safety and common prudence dictate; this is especially true when the evidence shows that a train was running at an undue and highly dangerous rate of

speed over a much frequented crossing located in a city or town. *Seaboard Coast Line R.R. v. West*, 155 Ga. App. 391, 271 S.E.2d 36 (1980).

Trespassers

Duty to persons allowed to walk on track. — The use of the track by pedestrians with the company's knowledge does not bind it to the exercise of extraordinary care and diligence to protect them. If such use amounts to a license, it must be on condition that the pedestrian shall exercise ordinary care and diligence to avoid injury. *White v. Central R.R. & Banking Co.*, 83 Ga. 595, 10 S.E. 273 (1889); *Central of Ga. Ry. v. Pelfry*, 11 Ga. App. 119, 74 S.E. 854 (1912).

No liability to trespasser where trespasser has not exercised ordinary care. — A lack of ordinary care on the part of a railway company in failing to anticipate presence of a trespasser does not render it liable where the trespasser was personally guilty of a lack of ordinary care in exposing oneself to such peril, but might render the company liable if the presence of the trespasser on the track at such a time and place was free from a lack of ordinary care on the trespasser's part. *Southern Ry. v. Kelley*, 52 Ga. App. 137, 182 S.E. 631 (1935).

Railroad may be liable where it has duty to anticipate presence. — If the presence of a trespasser on the track at the time and place of the injury is brought about by peculiar facts and circumstances which relieve the trespasser from the guilt of a lack of ordinary care in thus exposing oneself, the company might be liable for a mere lack of ordinary care on its part in failing to anticipate the trespasser's presence at a time when and a place where it was charged with such duty, and in thereafter failing to take such proper precautions for the trespasser's safety as might seem reasonably necessary. *Southern Ry. v. Kelley*, 52 Ga. App. 137, 182 S.E. 631 (1935).

Railroad bound to anticipate presence of people using known passageway. — When persons habitually, with the knowledge but without the disapproval of the railroad, use private passageway crossing, the railroad's employees, who are in charge of its train, and who are aware of the custom, are bound to anticipate that persons may be upon the tracks at such point and have a duty to

exercise ordinary care and diligence to prevent injury to such persons. *Campbell v. Southern Ry.*, 198 F. Supp. 661 (N.D. Ga. 1961), *aff'd*, 309 F.2d 569 (5th Cir. 1962).

Recovery by Guests

Recovery allowed by guest of driver of team. — If the negligence of the defendant and the driver of a mule hitched to a buggy concurred in causing the injuries, the plaintiff could recover, provided plaintiff could not by the exercise of ordinary care have avoided being injured; and plaintiff's damages should not be diminished on account of the driver's negligence, even if such negligence amounted to the want of ordinary care on the driver's part, as the negligence of the driver could not be imputed to the plaintiff a guest of the driver. *Central of Ga. Ry. v. Reid*, 23 Ga. App. 694, 99 S.E. 235 (1919).

Recovery allowed by guest in automobile. — A person riding in an automobile as the guest of the driver is not, as a matter of law, guilty of negligence barring a recovery against the railroad company for an injury received by that person from the automobile in which the person was riding being run into by a train of the defendant at a public crossing, in failing to observe the approaching train when it is close upon the person, although the view down the track for a long distance in the direction from which the train approached is in full and unobstructed view of a person approaching the crossing. *Atlanta & W.P.R.R. v. McCord*, 54 Ga. App. 811, 189 S.E. 403 (1936).

Jury Questions

Questions as to diligence and negligence are jury questions. — Questions as to diligence and negligence, including contributory negligence, and what negligence constitutes the proximate cause of the injury are questions peculiarly for the jury, except where the solution of the question appears to be palpably clear, plain, and indisputable. *Brown v. Savannah Elec. & Power Co.*, 46 Ga. App. 393, 167 S.E. 773 (1932); *Iler v. Seaboard Air Line R.R.*, 214 F.2d 385 (5th Cir. 1954).

Questions of negligence, proximate cause and failure to exercise due care in avoiding the consequences of another's negligence,

or where the conduct charged or relied on as negligence is such that different minds might reasonably draw different conclusions therefrom, are for the trier of facts. *Campbell v. Southern Ry.*, 198 F. Supp. 661 (N.D. Ga. 1961), *aff'd*, 309 F.2d 569 (5th Cir. 1962).

Questions as to diligence and negligence, including contributory negligence, being questions peculiarly for the jury, the court will decline to solve them except in plain and indisputable cases. *Wall v. Southern Ry.*, 196 Ga. App. 483, 396 S.E.2d 266 (1990).

Question of comparative negligence is exclusively jury question. — Question of comparative negligence is exclusively a jury question and not a question that may be determined by the court as a matter of law. *Southern Ry. v. Haynes*, 293 F.2d 291 (5th Cir. 1961).

Jury does not determine negligence previously decided by statute or ordinance. — The question as to what acts do or do not constitute negligence is for determination by the jury, except where a particular act is declared to be negligence, either by statute or by a valid municipal ordinance. *Brown v. Savannah Elec. & Power Co.*, 46 Ga. App. 393, 167 S.E. 773 (1932).

Jury decides whether ordinary care exercised. — Where, in an action for personal injury, the case turns upon the question whether the party injured could, by the exercise of ordinary care, have avoided the injury, and the evidence does not show such conduct on that party's part as to amount to negligence per se, the question as to the exercise of ordinary care is for the jury. *Brown v. Savannah Elec. & Power Co.*, 46 Ga. App. 393, 167 S.E. 773 (1932).

Jury decides whether train operated at safe speed. — Whether train was being operated at a speed so as to avoid doing injury to persons on the crossing and whether if the emergency brakes had been applied earlier those persons would not have been injured presented questions of negligence which were properly within the province of the jury. *Seaboard Coast Line R.R. v. West*, 155 Ga. App. 391, 271 S.E.2d 36 (1980).

Jury decides whether railroad bound to look out for presence of trespasser. — Whether or not the locality, the time, and the circumstances of injury to one using the

Jury Questions (Cont'd)

right of way of a railroad, and the known habits and frequency of the public in using it, create such a condition as will charge the servants of the company operating the locomotive and the cars with a special duty of looking out for the presence of a trespasser at the time and place of the injury, is a question for the trier of facts, in the light of all the evidence introduced. *Campbell v. Southern Ry.*, 198 F. Supp. 661 (N.D. Ga. 1961), *aff'd*, 309 F.2d 569 (5th Cir. 1962).

Right of jury to consider youth of plaintiff. — Under former Code 1882, § 3034 (see O.C.G.A. § 46-8-291) the jury had the right to weigh all the facts, to consider the youth of the injured party, the circumstances surrounding the injured party and urging the injured party's return to the injured party's home with the injured party's young companions on the train where the injury occurred, the short time allowed for decision and action, and the invitation given by an employee of the road, dressed in its uniform, and who, though humble, was in this action the representative of the company, and one for whose action it was responsible. *Western & A.R.R. v. Wilson*, 71 Ga. 22 (1883).

Instructions

1. In General

Charging section in its entirety not error. — Charge of former Code 1933, § 94-703 (see O.C.G.A. § 46-8-291) in its entirety was not error as being an incorrect statement of law. *Southern Ry. v. Lee*, 59 Ga. App. 316, 200 S.E. 569 (1938).

Charge of section harmless even where not justified by evidence. — While there was no evidence whatsoever that an injured person consented to the tort, it is not reversible error that the court charged, in substance, the entire first sentence of former Civil Code 1910, § 2781 (see O.C.G.A. § 46-8-291), referring to "negligence" and "consent" on the part of the person injured, the part of the charge as to negligence being applicable. The giving of the inapplicable part as to consent was not prejudicial. *Sarman v. Seaboard Airline Ry.*, 33 Ga. App. 315, 125 S.E. 891 (1924).

Duty to charge section on request. — Where the evidence authorized the infer-

ence that the plaintiff was negligent, it was error prejudicial to the defendants not to comply with a written request to charge in effect the rule of former Civil Code 1910, § 2781 (see O.C.G.A. § 46-8-291). *Southern Ry. v. Bottoms*, 35 Ga. App. 804, 134 S.E. 824 (1926).

Failure to charge section in negligent homicide action. — Failure to charge former Civil Code 1910, § 2781 (see O.C.G.A. § 46-8-291) was error in action for negligent homicide. *Central of Ga. Ry. v. Prior*, 142 Ga. 536, 83 S.E. 117 (1914).

Section properly charged in action arising from collision of automobile and train. — Former Civil Code 1910, § 2781 (see O.C.G.A. § 46-8-291) was properly charged in an action against a railroad company for damages from injuries to an automobile and to the person who was operating it, where it appeared that the injury occurred on a public crossing, and that at the time of the injury the plaintiff was driving plaintiff's car in violation of a statute in regard to running automobiles over railroad crossings, and that the defendant was violating a city ordinance in regard to running trains over public crossings within the city. *Louisville & N.R.R. v. Stafford*, 146 Ga. 206, 91 S.E. 29 (1916).

No error in failing to charge express words of section where jury fully instructed.

— Where the court has instructed the jury that the plaintiff could not recover if the decedent could have avoided death by the exercise of ordinary care or if decedent's negligence was the proximate cause of death, and having also fully instructed the jury upon the law of comparative negligence, there was no error, especially in the absence of a written request, in the failure of the court to give in charge the express terms of former Civil Code 1910, § 2781 (see O.C.G.A. § 46-8-291). *Southern Ry. v. Weatherby*, 20 Ga. App. 399, 93 S.E. 31 (1917); *Georgia R.R. & Banking Co. v. Wallis*, 29 Ga. App. 706, 116 S.E. 883 (1923).

Not charging comparative negligence not error where defendant fails to raise issue. — Where the issue of avoidance or of comparative negligence is not raised by the defendant's answer or plea there is no error in failing to charge on these items, absent a timely written request. *Davis v. Hammock*, 123 Ga. App. 33, 179 S.E.2d 283 (1970).

Amount of evidence making comparative negligence charge appropriate. — The

amount of evidence which makes a comparative negligence charge appropriate, and thus rendered it error to refuse a timely request, need not be great, but it was sufficient if there was slight evidence from which inferences of negligence can be drawn by the jury. *Davis v. Hammock*, 123 Ga. App. 33, 179 S.E.2d 283 (1970).

Applicability of apportionment rule. — Apportionment rule is applicable where plaintiff could not have avoided consequences of defendant's negligence by ordinary care. *Underwood v. Atlanta & W. Point R.R.*, 105 Ga. App. 340, 124 S.E.2d 758, *aff'd* in part and *rev'd* in part, 218 Ga. 193, 126 S.E.2d 785 (1962).

2. Charge of this Section and § 51-11-7

Section 51-11-7 should be charged along with comparative negligence. — Even where law of comparative negligence under former Code 1933, § 94-703 (see O.C.G.A. § 46-8-291) was given in charge, rule of law enunciated in former Code 1933, § 105-603 (see O.C.G.A. § 51-11-7) should be charged. *Pollard v. Watkins*, 51 Ga. App. 762, 181 S.E. 798 (1935).

This section and § 51-11-7 to be charged separately. — The different rules contained in this section and § 51-11-7 should not be so stated as to mislead the jury into believing that they would be authorized to find that the plaintiff, in an action for personal injuries against a railroad company, can recover when, by the use of ordinary care, plaintiff could have avoided the consequences to oneself caused by the defendant's negligence. *Wrightsville & T.R.R. v. Gornto*, 129 Ga. 204, 58 S.E. 769 (1907).

Not error to charge this section and § 51-11-7. — It was not error for court to charge in immediate connection with each other former Code 1933, §§ 94-703 and 105-603 (see O.C.G.A. §§ 46-8-291 and 51-11-7). Each was a separate and distinct proposition of law, and neither one modified or qualified the other. *Southern Ry. v. Lee*, 59 Ga. App. 316, 200 S.E. 569 (1938).

Failure to charge § 51-11-7 not error where qualification of diminished damages unnecessary. — Where the court, in stating to the jury a number of contingencies in which the plaintiff could not recover, instructs the jury that if the negligence of the plaintiff was equal to or greater than that of

the defendant the plaintiff could not recover, the charge is not error for the reason that the court failed to qualify the diminished damages rule by the provisions of former Code 1933, § 105-603 (see O.C.G.A. § 51-11-7), because if the plaintiff's negligence was not merely less than, but equal to or greater than, that of the defendant, the defendant would not be liable, and the qualification was unnecessary. *Berry v. Jowers*, 59 Ga. App. 24, 200 S.E. 195 (1938).

Charge held not to be confusing blend of this section and § 51-11-7. — In an action for damages alleged to have been occasioned by the negligence of a defendant railroad company, a charge "that the plaintiff must further show that his injury, if any, was not caused by his own negligence and that he could not have avoided the injury by the exercise of ordinary care and diligence," was not open to the criticism that it confused and blended former Civil Code 1895, §§ 2322 and 3830 (see O.C.G.A. §§ 46-8-291 and 51-11-7) to the prejudice of the defendant. *Southern Ry. v. Wallis*, 133 Ga. 553, 66 S.E. 370, 30 L.R.A. (n.s.) 401, 18 Ann. Cas. 67 (1909).

3. Specific Instructions

Charge that plaintiff could have avoided injury by exercise of ordinary care. — In the trial of an action wherein the plaintiff seeks recovery of damages for injuries alleged to be due to the negligence of a railroad company at a public crossing, where the evidence authorizes a finding that the plaintiff could have avoided the negligence of the railroad company by the exercise of ordinary care, it is error for the court to refuse to give a charge on request that if the plaintiff, by the exercise of ordinary care, could have avoided the consequences to oneself caused by defendant's negligence, plaintiff would not be entitled to recover. *Atlantic Coast Line R.R. v. Green*, 84 Ga. App. 674, 67 S.E.2d 184 (1951).

Charging no recovery where plaintiff's negligence equal to or greater than defendant's. — It is proper for court to instruct jury that plaintiff cannot recover if his negligence is equal to or greater than defendant's negligence. *Yellow Cab Co. v. Adams*, 71 Ga. App. 404, 31 S.E.2d 195 (1944).

Where the judge charged the law of contributory negligence and diminution of

Instructions (Cont'd)**3. Specific Instructions (Cont'd)**

damages substantially as set out in former Code 1933, § 94-703 (see O.C.G.A. § 46-8-291), it furnishes no ground for a new trial that the court failed, in connection with such charge, to also instruct the jury that if the parties were equally negligent there could be no recovery. *Southern Ry. v. Maddox*, 63 Ga. App. 508, 11 S.E.2d 501 (1940).

Charge on diminishing damages proper. — A charge that, if the plaintiff and the defendant are both at fault, the plaintiff may nevertheless recover, but the damage should be diminished in proportion to the amount of default attributable to the plaintiff, states a correct rule of law and is not subject to the objection that it contains as instruction to the jury that the plaintiff can recover, if plaintiff's negligence is equal to the negligence of the defendant. *Southern Ry. v. Reed*, 40 Ga. App. 332, 149 S.E. 582 (1929).

The instruction: "If you find that the deceased and the defendant were both negligent, and then negligence of the deceased was equal to or greater than that of the defendant, the plaintiff would not be entitled to recover. If you should find that both the deceased and the defendant were negligent, but that the negligence of the defendant was greater than that of the deceased, then the plaintiff would be entitled to recover, if otherwise entitled to recover under the rules I have given you, but in such event you would reduce the amount of the recovery in proportion to the negligence of the deceased, if she was guilty of such negligence," is not reversible error. *Georgia R.R. & Banking Co. v. Farmer*, 45 Ga. App. 130, 164 S.E. 71 (1932).

Error to charge negligence before duty to avoid negligence arises. — A court errs in charging the jury that, under the comparative-negligence rule and doctrine, the plaintiff would be barred from recovery if the plaintiff was guilty of a failure to exercise ordinary care before plaintiff's duty to discover and avoid the negligence of the defendant arose. *Willis v. Jones*, 89 Ga. App. 824, 81 S.E.2d 517 (1954).

Charging "avoidance of consequences" and "apportionment of damages" together. — It is error to charge "avoidance of conse-

quences" rule and in immediate connection therewith "apportionment of damages" rule, in such manner as to qualify the former by the latter, and without making the proper explanation as to the class of cases to which this latter charge is applicable. *Underwood v. Atlanta & W. Point R.R.*, 105 Ga. App. 340, 124 S.E.2d 758, aff'd in part and rev'd in part, 218 Ga. 193, 126 S.E.2d 785 (1962).

Charging plaintiff's negligence less than failure to exercise ordinary care. — Where court instructed that, in order for the plaintiff to be entitled to a reduced recovery in the event the plaintiff and defendant both were negligent, the jury must find that the plaintiff's negligence was "less than failure to exercise ordinary care," the instruction was improper. *Underwood v. Atlanta & W. Point R.R.*, 105 Ga. App. 340, 124 S.E.2d 758, aff'd in part and rev'd in part, 218 Ga. 193, 126 S.E.2d 785 (1962).

Error to charge recovery where plaintiff's negligence greater than defendant's. — It is error to charge that plaintiff can recover if both plaintiff and the defendant were negligent although plaintiff's negligence exceeded that of defendant. *Georgia Power Co. v. Maxwell*, 52 Ga. App. 430, 183 S.E. 654 (1936).

Error to charge plaintiff's negligence bars recovery in car collision. — In an action by a traveler upon a highway, against a railway company, for damages resulting from a collision between a car of the company and the vehicle in which the traveler was riding, it is error to charge the jury that "the plaintiff's contributory negligence in such a case defeats recovery, and your verdict must be for the defendant." *Thomas v. Gainesville & D.E. Ry.*, 124 Ga. 748, 52 S.E. 801 (1906); *Savannah Elec. Co. v. Crawford*, 130 Ga. 421, 60 S.E. 1056 (1908).

Comparative negligence charge does not exclude defense that plaintiff's negligence greater. — Where a trial judge charged the jury in substance that where both parties were negligent, but the plaintiff could not have avoided injury by the exercise of ordinary care, and the defendant's was greater than that of the plaintiff, that the rule of comparative negligence and consequent diminution of damages was applicable, this instruction did not exclude the defense that the plaintiff's injury was brought about by plaintiff's own failure to exercise ordinary

care. *Atlantic Coast Line R.R. v. Anderson*, 35 Ga. App. 292, 133 S.E. 63 (1926).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, §§ 342 et seq., 393, 394 et seq.

C.J.S. — 74 C.J.S., Railroads, §§ 851, 853, 896, 897 et seq., 971 et seq., 1040 et seq., 1078, 1207 et seq., 1269.

ALR. — Liability for death of, or injury to, soldier in service of government, by negligently constructed, maintained, or operated railroad, 11 ALR 1443; 13 ALR 1028.

Liability of master for damage to person or property due to servant's smoking, 13 ALR 997; 31 ALR 294.

Liability of master for injury to child whom servant permits to ride on wagon or truck, 24 ALR 670.

Intoxication as affecting contributory negligence of one killed or injured at a railroad crossing, 36 ALR 336.

Liability of carrier for injuries from falling articles of freight, 40 ALR 501.

Running past stop signal as wanton or willful misconduct rendering railroad company liable for injury to trespasser, 41 ALR 1354.

Validity and construction, as regards buildings not on right of way, of contract relieving railroad from liability for destruction of buildings, 48 ALR 1003; 51 ALR 638.

Infrequent use of crossing by railroad company as affecting its duty or liability to traveler at crossing, 52 ALR 751.

Liability of master for injury to one whom servant, in violation of instructions, permits to ride on vehicle, 62 ALR 1167; 74 ALR 163.

Liability of railroad company for acts of employees in ejecting trespassers from train, 72 ALR 536.

Personal care required at railroad crossing of one riding in automobile driven by another as affecting his right to recover against third persons, 90 ALR 984.

Liability for collision between streetcar and vehicle driven ahead of or toward it along or close to the track, 102 ALR 716.

Statute abolishing or modifying contributory negligence rule in certain class of cases or situations, as denial of equal protection of the laws, 142 ALR 631.

What conduct on part of railroad, in connection with crossing accident, amounts to

wantonness, willfulness, or the like, precluding defense of contributory negligence, 151 ALR 9.

Standing railroad car or streetcar and appliances as attractive nuisance, 152 ALR 1263.

Release or contract after injury as affected by provision of Federal Employers' Liability Act invalidating contract, rule, or device to exempt carrier from liability, 166 ALR 648.

Construction and effect of liability exemption or indemnity clause in spur track agreement, 20 ALR2d 711.

Failure of occupants of motor vehicle stalled on railroad crossing to get out and move to place of safety as contributory negligence, 21 ALR2d 742.

Intoxication of person injured or killed as affecting applicability of last clear chance doctrine, 26 ALR2d 308.

Liability of railroad to adult pedestrian attempting to pass over, under, or between cars obstructing crossing, 27 ALR2d 369.

Railroad's duty to children walking longitudinally along railroad tracks or right of way, 31 ALR2d 789.

Attempt to board moving car or train as contributory negligence or assumption of risk, 31 ALR2d 931.

Railroad's liability for injury or damage from collision of road vehicle with train or car at place other than crossing, 44 ALR2d 680.

Contributory negligence of adult struck by train while walking or standing beside railroad track, 63 ALR2d 1226.

Railroad company's liability for injury or death of pedestrian due to condition of surface of crossing, 64 ALR2d 1199.

Duty and standard of care, with respect to contributory negligence, of person with physical handicap, such as impaired vision or hearing, approaching railroad crossing, 65 ALR2d 703.

Failure of signaling device at crossing to operate, as affecting railroad company's liability, 90 ALR2d 350.

Comparative negligence rule where misconduct of three or more persons is involved, 8 ALR3d 722.

Railroad's liability for injury to or death of child on moving train other than as paying or proper passenger, 35 ALR3d 9.

Modern development of comparative negligence doctrine having applicability to negligence actions generally, 78 ALR3d 339.

Application of *res ipsa loquitur* doctrine to accidents incurred by passenger while boarding or alighting from a carrier, 93 ALR3d 776.

Modern trends as to contributory negligence of children, 32 ALR4th 56.

Applicability of comparative negligence principles to intentional torts, 18 ALR5th 525.

Applicability of comparative negligence doctrine to actions based on negligent misrepresentation, 22 ALR5th 464.

46-8-292. Proof of injury from running of train as prima-facie evidence of lack of reasonable skill and care.

In all actions against railroad companies for damages to persons or property, proof of injury inflicted by the running of locomotives or cars of such companies shall be prima-facie evidence of the lack of reasonable skill and care on the part of the servants of the companies in reference to such injury. (Ga. L. 1929, p. 315, § 1; Code 1933, § 94-1108.)

Law reviews. — For comment on *Atlantic C.L.R.R. v. Dolan*, 84 Ga. App. 734, 67 S.E.2d 243 (1951), see 3 Mercer L. Rev. 349 (1952).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

OPERATION OF RULE

WHEN PRESUMPTION VANISHES

SPECIFIC EXAMPLES

INSTRUCTIONS

General Consideration

Editor's notes. — In light of the substantial similarity of the provisions, decisions under former Code 1933, §§ 18-607 and 68-710, are included in the annotations for this section.

Constitutionality. — For constitutionality of former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292), see *Georgia S. & F. Ry. v. Wilson*, 93 Ga. App. 94, 91 S.E.2d 71 (1955); *Seaboard Coast Line R.R. v. Wroblewski*, 138 Ga. App. 793, 227 S.E.2d 438 (1976).

Former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) did not raise unconstitutional presumption of negligence. *Darlington Corp. v. Finch*, 113 Ga. App. 825, 149 S.E.2d 861 (1966).

Origin of Code section. — Former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292)

was taken from the statute of Mississippi upon this subject. *Macon, D. & S.R.R. v. Stephens*, 66 Ga. App. 636, 19 S.E.2d 32 (1942).

Cases before 1929 of no benefit. — Cases decided before 1929 are of no benefit in determining where the burden of proof rests after the plaintiff has made out a prima facie case. *Atlantic Coast Line R.R. v. Thomas*, 83 Ga. App. 477, 64 S.E.2d 301 (1951).

Construction with former Code 1933, §§ 18-607 and 68-710. — Former Code 1933, §§ 18-607, 68-710 and 94-1108 were construed alike since they contained almost the exact same language and they were intended to operate only when the facts in a case were not or could not be produced, in which event the burden was upon the railroad or bus company to produce the facts which were, as a general rule, peculiarly

within its knowledge. An instruction upon the principle embraced in these sections ought not to be given where the testimony in the case sufficiently explained every material fact connected with the infliction of the injury; and these sections have served their purpose when they compel the railroad or bus company to explain how the injury occurred; and that the question of negligence or no negligence was to be decided from the facts in the case. *Scott v. Torrance*, 69 Ga. App. 309, 25 S.E.2d 120 (1943).

Presumption of negligence repealed. — The legal presumption of negligence against a carrier was codified, found unconstitutional, recodified as a burden-shifting standard and, as to buses for hire, subsequently repealed by Ga. L. 1992, p. 1179, § 1; therefore, the presumption is no longer valid. *Adams v. Metropolitan Atlanta Rapid Transit Auth.*, 246 Ga. App. 698, 542 S.E.2d 130 (2000).

Applicability of section to actions in justice of the peace courts. — Although the strictness of pleading necessary in action in the superior and city courts is not required in justice of the peace courts, nevertheless, where an action is brought in a justice of the peace court against a railroad company for the killing of livestock, it is essential that the plaintiff should, at least in general terms, allege that the killing was the result of the negligence of the defendant company, the presumption of negligence which the law raises against a railroad company being a rule of evidence, and not of pleading, applicable as such to all actions brought against railroad companies for damage sustained by the running of their engines, cars, or other machinery. *Powell v. Anderson*, 56 Ga. App. 592, 193 S.E. 450 (1937).

Airport "people mover" not railroad. — "People mover" at Hartsfield International Airport is not a railroad, and the prima-facie evidence provisions of O.C.G.A. § 46-8-292 are not applicable thereto. *Westinghouse Elec. Corp. v. Williams*, 173 Ga. App. 118, 325 S.E.2d 460 (1984), *aff'd*, 183 Ga. App. 845, 360 S.E.2d 411 (1987).

Cited in *Foster v. Southern Ry.*, 42 Ga. App. 830, 157 S.E. 371 (1931); *Western & A.R.R. v. Gray*, 172 Ga. 286, 157 S.E. 482 (1931); *Southern Ry. v. Bartlett*, 44 Ga. App. 710, 162 S.E. 831 (1932); *Slaton v. Southern Ry.*, 45 Ga. App. 781, 165 S.E. 883 (1932);

Southern Ry. v. Slaton, 178 Ga. 314, 173 S.E. 161 (1934); *Southern Ry. v. Slaton*, 50 Ga. App. 570, 178 S.E. 392 (1934); *Pidcock v. Stripling*, 66 Ga. App. 692, 19 S.E.2d 178 (1942); *Scott v. Torrance*, 69 Ga. App. 309, 25 S.E.2d 120 (1943); *Southern Ry. v. Taylor*, 76 Ga. App. 711, 47 S.E.2d 77 (1948); *Sherill v. Callaway*, 82 Ga. App. 499, 61 S.E.2d 548 (1950); *Sylvania C. Ry. v. Gay*, 82 Ga. App. 486, 61 S.E.2d 587 (1950); *Atlantic Coast Line R.R. v. Hodges*, 90 Ga. App. 870, 84 S.E.2d 711 (1954); *Atlantic Coast Line R.R. v. Bennefield*, 91 Ga. App. 835, 87 S.E.2d 219 (1955); *Atlantic Coast Line R.R. v. Sapp*, 248 F.2d 889 (5th Cir. 1957); *Brown v. Kirkland*, 108 Ga. App. 651, 134 S.E.2d 472 (1963); *Tennessee, A. & Ga. Ry. v. Andrews*, 117 Ga. App. 164, 159 S.E.2d 460 (1968); *Turner v. Southern Ry.*, 46 F.R.D. 71 (N.D. Ga. 1968); *Nelson v. Seaboard Coast Line R.R.*, 125 Ga. App. 764, 188 S.E.2d 887 (1972); *Central of Ga. Ry. v. Luther*, 128 Ga. App. 178, 196 S.E.2d 149 (1973); *Seaboard Coast Line R.R. v. Mobil Chem. Co.*, 172 Ga. App. 543, 323 S.E.2d 849 (1984); *Wall v. Southern Ry.*, 196 Ga. App. 483, 396 S.E.2d 266 (1990).

Operation of Rule

Code section operates only when facts are not or cannot be produced. — Former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) was intended to operate only when facts were not or cannot be produced, in which event the burden was upon the company to explain how the injury occurred by producing facts which were, as a general rule, peculiarly within its knowledge. *Seaboard Coast Line R.R. v. Wroblewski*, 138 Ga. App. 793, 227 S.E.2d 438 (1976).

Rule of evidence under this section exists in favor of plaintiff. — In an action against a railroad for damages because of injury sustained by the running of its train there existed a rule of evidence in favor of the plaintiff in the beginning of plaintiff's case which did not apply against defendants in general; this provision was found in former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292). *Atlantic Coast Line R.R. v. Thomas*, 83 Ga. App. 477, 64 S.E.2d 301 (1951).

Presumption of liability of railroad arises where injury caused by operation of trains. — When it is proved that the damage was occasioned because of the operation of trains, the presumption arises that the rail-

Operation of Rule (Cont'd)

road company is liable, but the railroad company may rebut this presumption by introducing evidence to show that it was not liable; the burden of procedure is shifted from the plaintiff to the railroad company. *Central of Ga. Ry. v. Hester*, 94 Ga. App. 226, 94 S.E.2d 124 (1956).

Former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) was only a rule of evidence, but by its very terms the proof of injury made a prima facie case for the plaintiff, and the burden was then shifted to the defendant to go forward with evidence rebutting such presumption. Until the defendant puts in some evidence, the presumption continued in force and was a positive aid to the plaintiff's case. *Ellis v. Southern Ry.*, 89 Ga. App. 407, 79 S.E.2d 541 (1953), later appeal, 99 Ga. App. 687, 101 S.E.2d 230 (1957).

Presumption of railroad's liability is rebuttable. — Presumption of liability of railroad arising where injury is caused by operation of trains is rebuttable. *Powell v. Rogers*, 75 Ga. App. 165, 42 S.E.2d 573 (1947).

Inference terminated where negligence a jury question. — Where under the evidence the question of the defendant's negligence is for the jury, the inference of liability is terminated. *McVeigh v. Harrison*, 68 Ga. App. 316, 22 S.E.2d 752 (1942) (decided under former Code 1933, § 68-710).

Initial burden placed on railroad. — O.C.G.A. § 46-8-292 places the initial burden of production on the railroad to prove all facts that are peculiarly within the railroad's knowledge. *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548 (11th Cir. 1991), aff'd, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993).

Proof of injury alone sufficient to carry case to jury. — If the plaintiff introduces no evidence tending to support the allegations of negligence contained in the petition, the proof of injury from the operation of the train would be sufficient to carry the case to the jury unless the plaintiff's evidence showed nonliability on the part of the defendant as a matter of law. *Fowler v. Western & Atl. R.R.*, 75 Ga. App. 156, 42 S.E.2d 499 (1947).

No prima facie case where no proof that injury caused by running of train. — Under

Ga. L. 1929, p. 315, § 1 (see O.C.G.A. § 46-8-292) proof of an injury is prima facie evidence of the want of reasonable skill and care on the part of the servants of the railroad company only in a case where such injury is inflicted by the running of a locomotive or cars of such company. If the proof does not disclose that the injury was inflicted by the running of a locomotive or cars of the company, then there is no prima facie evidence of want of reasonable skill and care on the part of the servants of the company. *Seaboard A.L. Ry. v. Fountain*, 173 Ga. 593, 160 S.E. 789 (1931).

Defendant may prove negligence by showing plaintiff's lack of ordinary care. — If the plaintiff sets up in the petition other allegations of negligence than the mere fact that the damage was occasioned by other acts of negligence than the operation of its trains, the defendant must in some way put up evidence in its behalf to show that the defendant is not liable for any reason which it may show; among those reasons is that even though the defendant was negligent in some manner or other of the acts of negligence alleged by the plaintiff, nevertheless the plaintiff would not be entitled to recover, because by the exercise of ordinary care plaintiff could have avoided the negligence of the defendant. *Central of Ga. Ry. v. Hester*, 94 Ga. App. 226, 94 S.E.2d 124 (1956).

Other acts of negligence of defendant may be proved as part of res gestae. — Negligent conduct of the defendant, if a part of the res gestae of the transaction in which the plaintiff is injured, though not the proximate cause thereof, may be alleged and proved in connection with the negligent acts of the defendant through which the injury did directly occur. *Alabama G.S.R.R. v. McBryar*, 65 Ga. App. 153, 15 S.E.2d 563 (1941) (decided under former Code 1933, § 18-607).

When Presumption Vanishes

Burden on railroad to produce evidence countering prima facie case. — Former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) casts upon railway company burden of producing some evidence contrary to prima facie case; and when that was done the inference was at an end. *Floyd v. Colonial*

Stores, Inc., 121 Ga. App. 852, 176 S.E.2d 111 (1970).

Code section is rule of evidence. — Former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) was rule of evidence only and when it was relied upon by the plaintiff in showing that the stock was killed by the operation of the defendant's train and the railroad company introduced some evidence of the exercise of reasonable care and skill, then the prima facie rule vanished and the burden was on the plaintiff to prove by a preponderance of the evidence that the negligence of the defendant was the proximate cause of the injury. *Atlantic Coast Line R.R. v. Rowe*, 83 Ga. App. 540, 64 S.E.2d 216 (1951).

Code section replaces proof of negligence alleged. — Former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) simply took the place of proof of negligence alleged, and where the defendant introduced evidence disproving the negligence alleged the presumption vanished, and it then became incumbent on the plaintiff to introduce other evidence of negligence. *Georgia Power Co. v. Watts*, 56 Ga. App. 322, 192 S.E. 493 (1937); *McVeigh v. Harrison*, 68 Ga. App. 316, 22 S.E.2d 752 (1942).

Section's purpose served when railroad has explained cause of injury. — The inference created by a prima facie proof of injury by the running of railroad cars is at an end and vanishes when the railroad company produces some evidence to the contrary. In such a situation former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) had served its purpose when the railroad was compelled to explain how the injury occurred and the question of negligence or nonnegligence was to be decided by the entire facts of the case. Then the plaintiff must prove by a preponderance of the evidence that the negligence of the defendant was the proximate cause of the alleged injury. *Atlantic Coast Line R.R. v. Rowe*, 83 Ga. App. 540, 64 S.E.2d 216 (1951).

Former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) served its purpose when it compelled the railroad to explain how the injury occurred, and the question of negligence or no negligence was to be decided by the facts of the case. *Parrish v. Southwestern R.R.*, 57 Ga. App. 847, 197 S.E. 66 (1938); *McVeigh v. Harrison*, 68 Ga. App. 316, 22 S.E.2d 752 (1942).

Former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) served its purpose when it compelled common carrier to explain how injury occurred, and the question of negligence was then to be decided by the facts of the case. *Knight v. Atlanta Transit Sys.*, 137 Ga. App. 667, 224 S.E.2d 790 (1976) (decided under former Code 1933, § 68-710).

Prima facie presumption rebutted with positive evidence to the contrary. — Where as a result of proved facts, only a prima facie presumption arises that certain additional facts exist in favor of one party, and positive, unequivocal, and uncontradicted testimony is introduced in behalf of the other party, emphatically denying the facts thus presumed, such presumption is legally rebutted and cannot prevail against such testimony. *Floyd v. Colonial Stores, Inc.*, 121 Ga. App. 852, 176 S.E.2d 111 (1970).

By showing that plaintiff's mule was killed by the operation of train, plaintiff successfully invoked the prima facie presumption of want of reasonable skill and care afforded by former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292); but the inference created by proof of injury by the running of the defendants' train came to an end when defendants produced evidence to the contrary, and the burden then fell on the plaintiff to make out a case without any aid from that section. *Jones v. Powell*, 71 Ga. App. 202, 30 S.E.2d 446 (1944).

Where testimony purported to explain all of the material facts connected with the injury and to rebut the allegations of negligence, the presumption of liability on the part of the railroad was not applicable, and the case should have been submitted to the jury without reference to that presumption. *Southern Ry. v. James*, 170 Ga. App. 73, 316 S.E.2d 159 (1984).

Prima facie presumption disappears after rebuttal. — When the presumption created by former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) was rebutted by evidence, it disappeared from the case and the burden was on plaintiff to prove negligence as alleged by a clear preponderance of the evidence. *Brooks v. Southern Ry.*, 86 F.2d 920 (5th Cir.), cert. denied, 300 U.S. 674, 57 S. Ct. 613, 81 L. Ed. 880 (1937).

The inference created by proof of injury by the running of the defendant's cars is at

When Presumption Vanishes (Cont'd)

an end when the defendant has produced some evidence to the contrary. *Parrish v. Southwestern R.R.*, 57 Ga. App. 847, 197 S.E. 66 (1938); *Dodd v. Callaway*, 76 Ga. App. 629, 46 S.E.2d 740 (1948).

The inference of fault of a railroad company in an action for injuries inflicted by the running of railroad cars, disappears with the first evidentiary rebuttal by defendant of alleged negligence. *Bennett v. Seaboard Coast Line R.R.*, 302 F. Supp. 271 (S.D. Ga. 1969).

Inference terminated where defendant carrier has produced contrary evidence. — The purpose of former Code 1933, § 68-710 (see O.C.G.A. § 46-8-292) was to create an inference and cast upon the defendant carrier the duty of producing some evidence to the contrary, and when that was done the inference was at an end and the question of negligence became one for the jury upon all the evidence. *Knight v. Atlanta Transit Sys.*, 137 Ga. App. 667, 224 S.E.2d 790 (1976) (decided under former Code 1933, § 68-710).

The presumptions of negligence against a carrier towards a passenger who is injured by a carrier in the running of its train vanishes upon the introduction by the defendant of testimony in rebuttal of such presumption, and the question of negligence is then for the jury. The burden then rests upon the plaintiff to establish the alleged negligence by a preponderance of the evidence. *Alabama G.S.R.R. v. McBryar*, 65 Ga. App. 153, 15 S.E.2d 563 (1941) (decided under former Code 1933, § 18-607).

Rule is applicable only where defendant rebuts each act of negligence alleged. — The rule that when the railroad company introduced evidence that its employees were not negligent in the operation of the train the presumption under former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) disappeared was only applicable when the defendant's testimony showed that the trainmen were not guilty of any of the acts of negligence alleged in the petition and relied on by the plaintiff as the basis of recovery. *Ellis v. Southern Ry.*, 96 Ga. App. 687, 101 S.E.2d 230 (1957).

Contrary evidence may show exercise of reasonable skill and care by railroad. — The

presumption afforded by O.C.G.A. § 46-8-292 is a rebuttable presumption and disappears when the railroad company introduces evidence showing the exercise of reasonable care and skill, that is, ordinary care, by its employees in the operation of the train at the time and place in question. *Gay v. Sylvania Cent. Ry.*, 79 Ga. App. 362, 53 S.E.2d 713 (1949); *Houston v. Georgia N.E.R.R.*, 193 Ga. App. 687, 388 S.E.2d 762 (1989).

This is a rule of evidence, and the presumption thus created is overcome by the introduction of evidence of the exercise of reasonable care and skill on the part of the servants of the railroad at the time and place in question, and such evidence is controlling, if not discredited or contradicted, in the absence of any evidence of negligence on the part of such servants at the time and place in question. *Atlantic Coast Line R.R. v. Mercer*, 82 Ga. App. 312, 60 S.E.2d 649 (1950).

Contrary evidence may explain cause of injury. — Defendant railroad, to overcome the presumption under former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292), does not have to introduce evidence showing that its servants were in the exercise of reasonable skill and care, but only has the burden of explaining how the injury occurred and producing some evidence to the contrary of the plaintiff's charges of negligence. *Macon, D. & S.R.R. v. Stephens*, 66 Ga. App. 636, 19 S.E.2d 32 (1942).

Burden of evidence shifting back to plaintiff. — When the railroad offers opposing evidence as to each act of alleged negligence the statutory presumption immediately vanishes, and the plaintiff must go forward with the evidence if any more is needed to establish a preponderance of the evidence. Plaintiff does this, not because the burden of proof has been shifted to plaintiff, since such a burden never left plaintiff from the beginning of the case, but because the burden of evidence was shifted back to plaintiff. *Atlantic Coast Line R.R. v. Thomas*, 83 Ga. App. 477, 64 S.E.2d 301 (1951).

The prima facie presumption of want of reasonable skill and care on the part of the servants of railroad companies which arises upon proof of injury inflicted by the running of their locomotives or cars disappears upon the introduction of some evidence

showing absence of such negligence. The burden of proof then shifts to the plaintiff to show such negligence as will authorize recovery. *Atlantic Coast Line R.R. v. Carver*, 81 Ga. App. 26, 57 S.E.2d 692 (1950).

Presumption vanishes where claimant particularizes various acts of negligence. — When any evidence is produced showing that the railroad company was not negligent, the presumption vanishes, or when a claimant particularizes various acts of negligence, such as the defective crossing, the presumption vanishes. *Brown v. Seaboard Coast Line R.R.*, 405 F.2d 601 (5th Cir. 1968).

Evidence introduced by railroad cannot be arbitrarily disregarded. — This rule is merely a rule of evidence, so that the presumption thus created is overcome by the introduction by the railroad company of evidence of the exercise by it or its servants operating the train of reasonable skill and care in the performance of their duties at the particular time and place in question. Such evidence on behalf of the railroad cannot arbitrarily be disregarded in the absence of any evidence to discredit or contradict it. *Atlantic Coast Line R.R. v. Hodges*, 79 Ga. App. 563, 54 S.E.2d 500 (1949); *Wright v. Central of Ga. Ry.*, 85 Ga. App. 654, 69 S.E.2d 902 (1952).

Evidence introduced by railroad is controlling if not contradicted. — Where it is shown that injury was inflicted by the running of a railroad train, a presumption of negligence arises against the railroad, but the presumption is overcome by evidence on behalf of the railroad showing the exercise of ordinary and reasonable care and skill, and, in the absence of any evidence to discredit or contradict this evidence, or showing negligence on the part of servants of the railroad, it is controlling, and a verdict for the plaintiff is unauthorized. *Atlantic Coast Line R.R. v. Martin*, 79 Ga. App. 194, 53 S.E.2d 176 (1949); *Atlantic Coast Line R.R. v. Clemmons*, 87 Ga. App. 177, 73 S.E.2d 210 (1952).

Case to be decided on facts alone after presumption rebutted. — Where testimony is introduced tending to explain every material fact connected with the infliction of the injury, and to rebut every allegation of negligence, the presumption is dead, and the case is to be decided upon its facts alone. *Louisville & N.R.R. v. Bennett*, 89 Ga. App.

534, 80 S.E.2d 195 (1954).

Question of negligence is for jury from all evidence. — Proof of injury inflicted by the running of a locomotive or cars of a railroad company is prima facie evidence of the want of reasonable skill and care on the part of the servants of the company, and proof thereof casts upon the railroad company the burden of producing some evidence to the contrary; and when this is done the inference is at an end, and the question of negligence is one for the jury from all the evidence. *Georgia Power Co. v. Braswell*, 48 Ga. App. 654, 173 S.E. 763 (1934).

Infliction of injury amounts to evidence in certain circumstances. — Under former Code 1933, § 18-607 (see O.C.G.A. § 46-8-292) infliction of injury amounted to evidence under certain circumstances until rebuttal evidence had been introduced. *Seaboard Air Line Ry. v. Benton*, 175 Ga. 491, 165 S.E. 593 (1932) (decided under former Code 1933, § 18-607).

Assumption of risk. — Evidence adduced by the railroad rebutted the presumption of negligence granted by O.C.G.A. § 46-8-292, where decedent's actions in going upon a trestle and relying on a water barrel stand as a place of safety in the event a train passed constituted assumption of the risk and would bar recovery. *Munger v. Central R.R. Co.*, 199 Ga. App. 301, 404 S.E.2d 647 (1991), cert. denied, 199 Ga. App. 906, 404 S.E.2d 647 (1991).

Specific Examples

Presumption overcome by testimony of only eyewitnesses. — Presumption of negligence on the part of the defendant railroad created by proof that the plaintiff's cattle were killed by the running of defendant's train, was entirely overcome and rebutted by the defendant when it introduced the testimony of the engineer and firemen of the train, who were the only eyewitnesses to the killing, and this clearly and sufficiently explained every material fact connected with the killing. *Macon, D. & S.R.R. v. Stephens*, 66 Ga. App. 636, 19 S.E.2d 32 (1942).

Presumption overcome by testimony that weather too foggy to avoid injury. — Where relying entirely upon the presumption of negligence against railroad companies the plaintiff shows that one of plaintiff's cows had been killed by the defendant company's

Specific Examples (Cont'd)

train, and the presumption is overcome by the uncontradicted evidence of the engineer that the weather was so foggy that it was impossible for the engineer to have seen the animal in time to avoid killing it, in the absence of anything to discredit or contradict such evidence a verdict was demanded for the railroad company. *Atlantic Coast Line R.R. v. Sears*, 80 Ga. App. 338, 56 S.E.2d 129 (1949).

Burden of evidence upon railroad in wrongful death action. — In a parent's action against a railroad for the death of a child, after it was shown that the child was killed by the railroad's engine, the burden of evidence was upon the railroad to disprove its negligence and introduce proof that it was not negligent in the particulars alleged in the complaint. *Georgia S. & F. Ry. v. Wilson*, 93 Ga. App. 94, 91 S.E.2d 71 (1955).

Under former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292), proof of the fact that deceased was killed by train casts the burden upon the defendant to show the exercise of due care and skill in the operation of the locomotive at the time and place of the homicide. *Ellis v. Southern Ry.*, 89 Ga. App. 407, 79 S.E.2d 541 (1953), later appeal, 99 Ga. App. 687, 101 S.E.2d 230 (1957).

Dog found dead near railroad tracks does not imply dog killed by train. — Evidence that the plaintiff's dog was found lying dead about ten feet from the defendant's railroad track, that there were no marks or lacerations on the dog, but the slag along said railroad looked as though something had been knocked or dragged over it, was insufficient to authorize the inference that the dog was killed by the operation of one of the defendant's trains. *Alabama G.S.R.R. v. Raines*, 52 Ga. App. 589, 183 S.E. 926 (1936).

Proof that train did not jerk on prior occasions not relevant in passenger injury. — In an action for injuries to passenger alighting from train, court did not err in refusing to permit the defendant to show by witness that the witness had habitually ridden to work on the same diesel engine train, and that during all of such times it had never jerked in starting since question was not whether the diesel engine train had jerked on former occasions but on the occasion of the plaintiff's injury. *Alabama G.S.R.R. v.*

McBryar, 65 Ga. App. 153, 15 S.E.2d 563 (1941) (decided under former Code 1933, § 18-607).

Proper instruction where driver confronted with emergency. — In an action against a carrier for wrongful death of a passenger due to negligent operation of a bus, the judge should instruct the jury that the duty of the driver to exercise extraordinary care continued in all events, whether or not the jury believed that the driver was confronted with a sudden emergency, but that if they should conclude that a sudden emergency did arise, in deciding whether the driver continued to exercise extraordinary care they should take into consideration the fact that when one is confronted with a sudden emergency one is not to be held to the same accuracy of judgment as would be required of the person if one had time for deliberation. *Scott v. Torrance*, 69 Ga. App. 309, 25 S.E.2d 120 (1943) (decided under former Code 1933, § 68-710).

Location of trees. — O.C.G.A. § 46-8-292 placed the burden of production upon the railroad to show that trees, which were alleged to have contributed to the dangerous condition of a grade crossing, were not on the railroad's property. *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548 (11th Cir. 1991), aff'd, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993).

Instructions

No error in failing to charge section where presumption rebutted. — It is not error for the court to fail to charge the jury on the provisions of former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) where the defendant railroad company introduced evidence in rebuttal of plaintiff's allegations of negligence, and to charge that the burden of proof rested on the plaintiff to prove the essential allegations of the complaint. *Parrish v. Southwestern R.R.*, 57 Ga. App. 847, 197 S.E. 66 (1938).

Failure to charge section not error where inference rebutted. — Where there was any evidence tending to rebut the inference raised by the provisions of former Code 1933, § 68-710 (see O.C.G.A. § 46-8-292) failure to charge its provisions was not error. *Brown v. Kirkland*, 108 Ga. App. 651, 134 S.E.2d 472 (1963) (decided under former Code 1933, § 68-710).

Charge on section not to be given where testimony explains injury. — An instruction upon the principle embraced in former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) ought not to be given where the testimony in the case sufficiently explained every material fact connected with the infliction of the injury. *Seaboard Coast Line R.R. v. Wroblewski*, 138 Ga. App. 793, 227 S.E.2d 438 (1976).

Error to charge on presumption of section where presumption rebutted. — In an action against a railroad company for damages to persons or property resulting from the running of its locomotives or cars, the inference created by proof of injury so inflicted was at an end when the company introduced evidence in rebuttal of the plaintiff's allegations of negligence; and it was then reversible error for the court to charge the provisions of former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292). *Macon, D. & S.R.R. v. Stephens*, 66 Ga. App. 636, 19 S.E.2d 32 (1942).

When all of the facts touching the injury inflicted were in evidence, both from the testimony of the plaintiff and of the defendant, the court should not give former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) in charge to the jury. *Atlantic Coast Line R.R. v. Paulk*, 104 Ga. App. 316, 121 S.E.2d 688 (1961).

Where the defendant introduced evidence sufficient to authorize a finding of its exercise of ordinary care under the circumstances and introduced material facts connected with the collision, the principle set out in former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) had no place and court erred in charging thereon. *Atlantic Coast Line R.R. v. Parker*, 90 Ga. App. 251, 82 S.E.2d 706 (1954).

Where, on the trial of an action against a railroad company for damages because of alleged injuries from the operation of a train, there was evidence in rebuttal of the plaintiff's allegations of negligence, it was error for the court to give former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) in charge. *Central of Ga. Ry. v. Cooper*, 45 Ga. App. 735, 165 S.E. 858 (1932).

In an action for damages against railway company for the killing of plaintiff's cow by defendant's locomotive, where the defendant introduced testimony as to the manner

in which the cow was killed, the presumption of negligence ceased to exist and should not have been given in the charge to the jury. *Louisville & N.R.R. v. Bennett*, 89 Ga. App. 534, 80 S.E.2d 195 (1954).

Error to charge that burden is on defendant to show no liability. — Where the plaintiff relies entirely upon the presumption of negligence arising against railroad companies by proof of injury to persons or property by the running of the defendant's trains or cars, and the defendant introduces evidence which the jury would be authorized to find exonerates the defendant, it is error to charge the jury that the burden is upon the defendant to show that the railroad company was not liable, that is, that the servants or employees of the company exercised all due and ordinary care and diligence on their part. *Atlantic Coast Line R.R. v. Sears*, 80 Ga. App. 338, 56 S.E.2d 130 (1949).

Error to require defendant to show exercise of ordinary care by preponderance of evidence. — Where the defendant railroad company has produced some evidence contrary to each of the alleged acts of negligence testified to on behalf of the plaintiff, it is reversible error, in the absence of corrective instructions elsewhere in the charge, for the court to charge the jury that when it is shown that livestock is killed by the railroad company that the burden shifts to the defendant railroad company to show by a preponderance of the evidence that it has exercised ordinary care and diligence to prevent the injury and damage. *Atlantic Coast Line R.R. v. Rowe*, 83 Ga. App. 733, 64 S.E.2d 689 (1951).

How error in charging section may be cured. — Error committed by court in charging in effect that injury inflicted by locomotive is presumed to have been caused by railroad's negligence, although railroad's evidence destroyed such presumption, may be cured where there is an express withdrawal by the court of that portion of the charge in another part thereof, but it is not cured merely by further explanation to the effect that, when railroad introduces evidence as to its manner of running its locomotives and cars, the question of negligence is then to be decided upon its facts. *Louisville & N.R.R. v. Bennett*, 89 Ga. App. 534, 80 S.E.2d 195 (1954).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Carriers, §§ 929, 932, 936.

C.J.S. — 74 C.J.S., Railroads, § 864.

ALR. — Statute creating presumption of negligence against railroad company as applicable to receiver operating road, 1 ALR 1180.

Applicability of *res ipsa loquitur* doctrine where person or vehicle is struck by street-car, 2 ALR 1610.

Liability of street railway company to passenger on account of crowded condition of cars, 5 ALR 1257; 42 ALR 1329.

Liability of carrier for injury to passenger due to obstruction of aisle or platform by property of another passenger, 19 ALR 1372.

Res ipsa loquitur as applicable to injury to passenger in a collision where one of the vehicles is not within carrier's control, 25 ALR 690; 83 ALR 1163; 161 ALR 1113.

Liability of carrier for injury to passenger by car window, 29 ALR 1262; 45 ALR 1541.

Intoxication as affecting contributory negligence of one killed or injured at a railroad crossing, 36 ALR 336.

Running past stop signal as wanton or willful misconduct rendering railroad company liable for injury to trespasser, 41 ALR 1354.

Liability for personal injury to passenger in Pullman car, 41 ALR 1397.

Liability of street railway company to passenger struck by vehicle not subject to its control, 44 ALR 162.

Contributory negligence of passenger in standing near door of car, 50 ALR 1365.

Infrequent use of crossing by railroad company as affecting its duty or liability to traveler at crossing, 52 ALR 751.

Duty of driver whose view at railroad crossing is obstructed to leave vehicle in order to get an unobstructed view before crossing, 56 ALR 647; 91 ALR 1055.

Carrier's liability for injury to passenger by heating apparatus, 58 ALR 692.

Duty of railroad to maintain gates, gongs, or other safety devices at crossings, 60 ALR 1096.

Failure of train employee to discover in time to avert accident that object seen on or near track is human being, as negligence, 70 ALR 1116.

Presumption as to due care by person killed at railroad crossing, 84 ALR 1221.

Duty and liability of carrier of passengers for hire by automobile, 96 ALR 727.

Liability of railroad for injury to or death of one other than its employee due to defective condition of car received from another railroad which he was unloading or loading, 126 ALR 1095.

Res ipsa loquitur, or presumption, or inference of negligence on part of carrier where passenger is injured by object coming from outside, through or against, car window, 129 ALR 1340.

Liability for death or injury as result of suction from passing train, 149 ALR 907.

Standing railroad car or streetcar and appliances as attractive nuisance, 152 ALR 1263.

Liability of railway company for personal injury, other than to passenger, caused by defective condition of car delivered to another company, 152 ALR 1313.

What amounts to negligence of gate tender at railroad crossing, 160 ALR 731.

Res ipsa loquitur as applicable to injury to passenger in collision where other vehicle was not within carrier's control, 161 ALR 1113.

Release or contract after injury as affected by provision of Federal Employers' Liability Act invalidating contract, rule, or device to exempt carrier from liability, 166 ALR 648.

Carrier's liability to person in street or highway for purpose of boarding its vehicle, 7 ALR2d 549.

Open door as ground of liability of carrier for injury to passenger falling or alighting from vehicle, 7 ALR2d 1427.

Duty and liability of carrier to intoxicated passenger while en route, 17 ALR2d 1085.

Duty of railroad company to maintain flagman at crossing, 24 ALR2d 1161.

Intoxication of person injured or killed as affecting applicability of last clear chance doctrine, 26 ALR2d 308.

Liability of carrier to passenger for injury due to crowded condition of motorbus, or pushing or crowding of passengers therein, 26 ALR2d 1219.

Error as to instructions on burden of proof under doctrine of *res ipsa loquitur* as prejudicial, 29 ALR2d 1390.

Railroad's duty to children walking longitudinally along railroad tracks or right of way, 31 ALR2d 789.

Attempt to board moving car or train as contributory negligence or assumption of risk, 31 ALR2d 931.

Liability of motor carrier to passenger for injuries assertedly caused by failure to heat conveyance adequately, 33 ALR2d 1358.

Finding of decedent's body on or near tracks as creating presumption or inference of railroad's negligence, or as affecting burden of proof relating thereto, 40 ALR2d 881.

Applicability of *res ipsa loquitur* or doctrine of exclusive control to injury or damage caused by fall of object from train, 41 ALR2d 932.

Liability for injury occurring when clothing of one outside motor vehicle is caught as vehicle is put in motion, 43 ALR2d 1282.

Liability of motor carrier for injuries to passengers from accident occasioned by blowout or other failure of tire, 44 ALR2d 835.

Liability of carrier to passenger injured by hurling of object through window by a third person, 46 ALR2d 1098.

Liability for injury or damage from stone or other object on surface of highway thrown by passing vehicle, 56 ALR2d 1392.

Liability of motor carrier for injury or death of passenger inflicted by the vehicle from which he has alighted, 58 ALR2d 932.

Liability of motor carrier for injury or death of passenger who has alighted, caused by conditions at place of alighting, 58 ALR2d 948.

Contributory negligence of adult struck by train while walking or standing beside railroad track, 63 ALR2d 1226.

Liability of carrier to passenger injured

through fall of baggage or other object from overhead repository, 68 ALR2d 667.

Liability of railroad for injury due to road vehicle running into train or car standing on highway crossing, 84 ALR2d 813.

Railroad's liability to owner or occupant of motor vehicle for accident allegedly resulting from defective condition of road surface at crossing, 91 ALR2d 10.

Liability, because of improper loading, of railroad consignee or his employee injured while unloading car, 29 ALR3d 1039.

Liability of owner or operator of motor vehicle or aircraft for injury or death allegedly resulting from failure to furnish or require use of seat belt, 49 ALR3d 295.

Liability for injury to or death of passenger from accident due to physical condition of carrier's employee, 53 ALR3d 669.

Carrier's liability for injury or death of infant passenger as affected by fact that child was in custody of parent or other adult, 74 ALR3d 1171.

Application of *res ipsa loquitur* doctrine to accidents incurred by passenger while boarding or alighting from a carrier, 93 ALR3d 776.

Liability of taxicab carrier to passenger injured while alighting from taxi, 98 ALR3d 822.

Liability of common carrier for personal injury or death of passenger occasioned by inhalation of gases or fumes from exhaust, 99 ALR3d 751.

Liability of land carrier to passenger who becomes victim of third party's assault on or about carrier's vehicle or premises, 43 ALR4th 189.

ARTICLE 11

VENUE AND SERVICE OF PROCESS FOR ACTIONS AGAINST RAILROAD COMPANIES

JUDICIAL DECISIONS

Breach of railroad's private rules. — Private rules of railroad company cannot be set up for purpose of founding substantive

cause of action upon breach of them. *Foster v. Southern Ry.*, 42 Ga. App. 830, 157 S.E. 371 (1931).

46-8-310. Venue for actions against lessee or possessor of railroad.

The lessees of any railroad or the company having possession of the railroad shall be liable to an action of any kind in the same court or

jurisdiction as were the lessors or owners of the railroad before the lease. (Ga. L. 1862-63, p. 161, § 1; Code 1868, § 3330; Code 1873, § 3407; Code 1882, § 3407; Civil Code 1895, § 2335; Civil Code 1910, § 2799; Code 1933, § 94-1102.)

Cross references. — Further provisions regarding venue for actions against railroad companies, § 46-1-2.

Law reviews. — For note discussing prob-

lems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

JUDICIAL DECISIONS

Identity of roads retained. — Although one railroad may be leased to and operated by another, by which, in accordance with former Code 1873, § 3407 (see O.C.G.A. § 46-8-310), the latter makes itself responsible for acts done on the road leased, yet neither loses its identity, and any tort committed upon the line of the one or the other should be so alleged and proved, and this was especially true where both roads were constructed through the territory of the same county. *Central R.R. v. Brinson*, 64 Ga. 475 (1880).

Foreign corporations within section. — Former Code 1868, § 3330 (see O.C.G.A. § 46-8-310) applied to foreign as well as domestic corporations. *Breed v. Mitchell*, 48 Ga. 533 (1873); *Williams v. East Tenn., V. & Ga. Ry.*, 90 Ga. 519, 16 S.E. 303 (1892).

Venue where action brought against foreign corporation operating domestic franchise. — Where a foreign corporation leases or operates a domestic franchise, under former Civil Code 1895, § 2335 (see O.C.G.A. § 46-8-310), an action may be brought in the county of the residence of the company owning the franchise. *Coakley v. Southern Ry.*, 120 Ga. 960, 48 S.E. 372 (1904).

Venue of tort where line operates partly in another state. — The lessee of a line of railroad partly within this state and partly within the state of Alabama is subject to an action here, in accordance with former Code 1882, § 3407 (see O.C.G.A. § 46-8-310), by an employee for a personal injury sustained in Alabama while engaged in duties as an employee upon the line. *Watson v. Richmond & D.R.R.*, 91 Ga. 222, 18 S.E. 306 (1892).

Service of summons on superintendent valid. — Under former Code 1882, § 3407 (see O.C.G.A. § 46-8-310), service of summons in an action against a lessee railroad company, by leaving a copy at the office of the superintendent in the county in which the declaration alleged were and are situated the principal offices of the lessor and lessee, was good. *Hills v. Richmond & D.R.R.*, 37 F. 660 (N.D. Ga. 1888).

Fact of lease can be proved without producing the writing. *Central R.R. v. Whitehead*, 74 Ga. 441 (1885).

Cited in *Logan & Co. v. Central R.R.*, 74 Ga. 684 (1885); *Nashville C. & S.L. Ry. v. Edwards*, 91 Ga. 24, 16 S.E. 347 (1892); *Savannah & A. Ry. v. Newsome*, 90 Ga. App. 390, 83 S.E.2d 80 (1954).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 232.

C.J.S. — 74 C.J.S., Railroads, § 451 et seq.

46-8-311. Manner of service of process on lessee of railroad.

When any person is sued as the lessee of a railroad, service of a petition, summons, or other process may be effected by delivering a copy thereof to the depot agent or other officer of such lessee in the county where the

action is pending, or by leaving a copy at the place where the usual and ordinary public business of such lessee in said county is transacted. (Ga. L. 1884-85, p. 49, § 2; Civil Code 1895, § 2336; Civil Code 1910, § 2800; Code 1933, § 94-1103.)

JUDICIAL DECISIONS

Single service though defendant sued in double capacity. — Where a corporation is sued in its corporate name generally, and also as lessee of another corporation, for a tort committed jointly by the corporation

individually and as lessee, service of process properly made upon an agent of the corporation is good against it in both capacities. *Snipes v. Atlanta & W.P.R.R.*, 7 Ga. App. 700, 67 S.E. 1046 (1910).

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2192, 2194. 62B Am. Jur. 2d, Process, §§ 108, 109.

C.J.S. — 72 C.J.S., Process, § 29. 74 C.J.S., Railroads, § 69 et seq.

46-8-312. Service of process on lessor railroad company, generally.

Whenever any railroad company incorporated under the laws of this state or whose line of road may extend into this state has leased its line of road to any person and such lessee is in possession of the road, service on such lessor company may be perfected by delivering a copy of the summons and complaint to the president or other officer of the lessor company; provided, however, that if service cannot be had in this manner, then service may be made upon such company by delivering to the Secretary of State two copies of the summons and complaint, one copy of which shall be mailed by the Secretary of State to the lessor company at its last known address according to the Secretary of State. In addition, the plaintiff shall cause a copy of the summons and complaint to be served upon the lessee by the sheriff of the county where the action is brought or by his deputy or by the marshal or his deputy. (Ga. L. 1889, p. 137, § 1; Civil Code 1895, § 2337; Civil Code 1910, § 2801; Code 1933, § 94-1104.)

JUDICIAL DECISIONS

Constitutionality. — The provisions for perfecting service on leasing railroads, as set forth in former Civil Code 1910, § 2801 (see O.C.G.A § 46-8-312), did not contravene U.S. Const., Amend. 14, Sec. 1 or Ga. Const. 1976, Art. I, Sec. I, Para. I. *Georgia R.R. & Banking Co. v. Bennefield*, 138 Ga. 670, 75 S.E. 981 (1912).

Section is cumulative. — Former Civil Code 1910, § 2801 (see O.C.G.A § 46-8-312) was merely cumulative, and provided another and different method of ser-

vice from that provided for in former Civil Code 1910, § 2798 (see O.C.G.A § 46-1-2), to be resorted to where it was desired to bind both the lessor and the lessee. *Southwestern R.R. v. Vellines*, 14 Ga. App. 674, 82 S.E. 166 (1914).

Jurisdiction where tort committed by agent of lessee. — Under former Civil Code 1910, § 2801 (see O.C.G.A § 46-8-312), the court of the county where a cause of action originated against a lessor railroad company, by reason of the tort of an agent of the lessee

company, has jurisdiction of the lessor company, though it had no agent or place of business in that county, but its office and principal place of business was in a different

county in this state. *Georgia R.R. & Banking Co. v. Bennefield*, 138 Ga. 670, 75 S.E. 981 (1912).

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2192, 2194. 62B Am. Jur. 2d, Process, §§ 108, 109.

C.J.S. — 72 C.J.S., Process, § 29. 74 C.J.S., Railroads, § 69 et seq.

46-8-313. Manner of service where address of president of company unknown.

If the residence of the president of the lessor company is unknown to the plaintiff and his attorney, an affidavit showing the fact, filed with the Secretary of State, together with the petition, shall be sufficient, instead of the notice to the president required in Code Section 46-8-312, provided that the plaintiff shall not be compelled to bring an action against any such lessor and give the notice as provided in this Code section, but may do so at his option; but when such notice is given to the lessor, the judgment rendered in said action shall be as binding upon the lessor as though service had been made as provided by law for service upon railroad companies. (Ga. L. 1889, p. 137, § 2; Civil Code 1895, § 2338; Civil Code 1910, § 2802; Code 1933, § 94-1105.)

JUDICIAL DECISIONS

Cited in *Southwestern R.R. v. Vellines*, 14 Ga. App. 674, 82 S.E. 166 (1914).

46-8-314. Venue and service of process in actions against receivers, trustees, and other officers of railroad companies; obtaining leave to sue.

Actions may be brought against receivers, trustees, assignees, and other like officers operating railroads in this state, in the same county, and service may be perfected by serving them or their agents in the same manner, as if the action had been brought against the corporation whose property or franchise is being operated by them. All such actions may be brought without leave to sue first having been obtained from any court. (Ga. L. 1895, p. 103, § 2; Civil Code 1895, § 2325; Civil Code 1910, § 2789; Code 1933, § 94-1107.)

Cross references. — Further provisions regarding venue for actions against railroad companies, § 46-1-2.

Law reviews. — For note discussing prob-

lems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

JUDICIAL DECISIONS

Applicability to contract and tort actions.

— Former Civil Code 1910, § 2789 (see O.C.G.A § 46-8-314) applied whether action arose in contract or tort. *Munson v. Houser*, 9 Ga. App. 346, 71 S.E. 595 (1911).

Section not applicable to nonemployees.

— Former Civil Code 1910, § 2789 (see O.C.G.A § 46-8-314) did not apply to an action brought against the receivers of a

railroad company to recover damages arising from personal injuries to one not an employee of the receivers. *Fried v. Sullivan*, 27 Ga. App. 326, 108 S.E. 127, cert. denied, 27 Ga. App. 836 (1921); *Hancock v. Miller*, 28 Ga. App. 387, 111 S.E. 80 (1922).

Cited in *Lamb v. McElwaney*, 143 Ga. 490, 85 S.E. 705 (1915).

RESEARCH REFERENCES

Am. Jur. 2d. — 77 Am. Jur. 2d, Venue, § 32 et seq.

C.J.S. — 92A C.J.S., Venue, §§ 77, 78.

ALR. — Appointment of receiver for rail-

road as affecting service of process on agent or employee in action against company, 9 ALR 228.

ARTICLE 12

STREET, SUBURBAN, AND INTERURBAN RAILROADS

RESEARCH REFERENCES

ALR. — Liability of street railway company to passenger struck by a vehicle not subject to its control, 1 ALR 953; 12 ALR 1371; 31 ALR 572; 44 ALR 162.

Status as street car passenger of person transferring from one car to another, 22 ALR 315.

Duty to run a street car or train at a speed that will not prevent its being stopped within the distance covered by its own lights, 29 ALR 1045.

Power of Public Service Commission with respect to regulation of street railways, 39 ALR 1517.

Liability for injuries due to collision between street car and automobile at street intersection, 46 ALR 1000.

Liability for striking one who alighted

from vehicle in path approaching street car, 46 ALR 1184.

Street easements as a factor in fixing a rate base for a street railway company, 49 ALR 1477.

Liability for collision between street car and vehicle driven ahead of or toward it along or close to the track, 63 ALR 10; 102 ALR 716.

Change from street cars to motorbuses as affecting rights as between street railway companies and abutting owners or owners across whose property the company has a right of way, 102 ALR 391.

Validity, construction, and application of municipal ordinances relating to loading or unloading passengers by interurban busses on streets, 144 ALR 1119.

46-8-330. "Interurban railroads" defined.

As used in this article, the term "interurban railroads" means railroads which are operated by gas or electricity and which run from, into, and between cities. (Ga. L. 1916, p. 44, § 1; Ga. L. 1921, p. 107, § 1; Code 1933, § 94-1001.)

RESEARCH REFERENCES

C.J.S. — 74 C.J.S., Railroads, § 1 et seq.

46-8-331. Incorporation, control, and management of interurban, suburban, and street railroads.

All of the provisions of this title regarding the incorporation, control, and management of railroad companies in general shall also apply to interurban, suburban, and street railroad companies, insofar as such provisions are applicable and appropriate thereto. Any group of at least ten persons who desire to be incorporated as an interurban, suburban, or street railroad company may form a corporation in the same manner as provided for the formation of other railroad companies, with the additional requirement that they shall in their petition specify in what cities, and in what streets thereof, they propose to construct and build the railroad, provided that no street railroad or interurban railroad incorporated under this chapter shall be constructed within the limits of any incorporated city without the consent of the corporate authorities; provided, further, that all railroad companies incorporated under this chapter shall be subject to all just and reasonable rules and regulations by the corporate authorities and shall be liable for all assessments and other lawful burdens that may be imposed upon them with reference to the railroad or the portion thereof located within the limits of the municipal corporation; provided, further, that only such powers and franchises as are conferred on other railroad companies by this title shall belong to interurban, suburban, or street railroad companies, as shall be necessary and appropriate thereto, and such other provisions of this title as apply to other railroads located outside of urban or suburban areas shall apply to interurban, suburban, and street railroad companies insofar as that portion of their roads is concerned; provided, further, that nothing in Code Section 46-8-127, which provides that the general direction and location of railroads sought to be constructed in this state shall be ten miles from a railroad constructed or laid out and selected to be constructed, shall be applicable to street, suburban, or interurban railways, or the selection of the route or the construction of the same. (Ga. L. 1894, p. 69, § 1; Civil Code 1895, § 2180; Ga. L. 1903, p. 38, § 1; Civil Code 1910, § 2600; Ga. L. 1916, p. 44, § 1; Ga. L. 1921, p. 107, § 1; Code 1933, § 94-1002.)

JUDICIAL DECISIONS

Power of condemnation. — Suburban and street railroad companies incorporated under the general law pursuant to Ga. L. 1903, p. 38, § 1 (see O.C.G.A. § 46-8-331) have power to condemn private property outside of the limits of incorporated towns and

cities. *Piedmont Cotton Mills v. Georgia Ry. & Elec. Co.*, 131 Ga. 129, 62 S.E. 52 (1908).

Authority of municipalities to tax. — The municipal authorities have power, to levy and collect an occupation or business tax from street railroad companies for use and

occupation of the city streets by their tracks and cars, when such companies' principal business is the transportation of passengers from points within the city limits to other like points. *Savannah, T. & I. H. Ry. v. Mayor of Savannah*, 112 Ga. 164, 37 S.E. 393 (1900).

City's authority to pave streets and assess portion of costs against street railway. — A city has authority to pave its streets and to assess a portion of the costs of such improvement against a street railway company occu-

pying and using, with the consent of the city, the street paved, irrespective of benefit to the company, which authority came both within the taxing and the police power reserved in the state. *Georgia Power Co. v. City of Decatur*, 181 Ga. 187, 182 S.E. 32 (1935), *aff'd sub nom. Georgia Ry. & Elec. Co. v. City of Decatur*, 297 U.S. 620, 56 S. Ct. 606, 80 L. Ed. 925 (1936).

Cited in *Georgia Power Co. v. City of Rome*, 172 Ga. 14, 157 S.E. 283 (1931).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 2.

C.J.S. — 74 C.J.S., Railroads, § 1 et seq.

ALR. — Liability of interurban road for killing or injuring livestock running at large, 2 ALR 98; 25 ALR 1506.

Grant of perpetual franchise to public service corporation, 2 ALR 1105.

Carrying freight on electric railway in street or highway as an additional servitude, 2 ALR 1404; 46 ALR 1472.

Assessment of parkway occupied by street railway company for street improvement, 10 ALR 164.

Paving ordinance as impairment of obligation of street railway franchise, 10 ALR 897.

Construction of provision of statute, ordinance, or franchise relating to "repair" of street railway zone, 10 ALR 928.

Street easements as a factor in fixing a rate base for a street railway company, 49 ALR 1477.

Franchise or permit for transportation on street or highway as including transportation of freight or express, 76 ALR 1186.

46-8-332. Power of street, suburban, or interurban railroad corporation to increase capital stock; manner of increase.

(a) Any corporation owning or operating a street, suburban, or interurban railroad in this state shall have the right to increase its capital stock from time to time.

(b) In no case shall an increase of capital stock be made except by a vote of two-thirds of the outstanding capital stock entitled to vote by the terms of the charter, represented either in person or by proxy at an annual or special meeting of stockholders called for the purpose and after each stockholder has been notified in the manner, if any, prescribed for giving notice of stockholders' meetings in the bylaws of the corporation. In addition to such notice, there shall be published in some newspaper in the town or city where the principal office of the corporation is located, once a week for four weeks prior to the time of holding said meeting, a notice stating that at such meeting an increase of the stock of the company will be considered. (Ga. L. 1902, p. 68, § 1; Civil Code 1910, § 2601; Ga. L. 1925, p. 94, § 1; Code 1933, §§ 94-1003, 94-1004.)

46-8-333. Use of electricity, gasoline, or gas by street, suburban, and interurban railroads; operation of gas and electric plants, generation and furnishing of gas and electricity by railroads.

(a) Any street, suburban, or interurban railroad company may use electricity, gasoline, or gas in propelling its engines or cars, running machinery, and for other purposes.

(b) Any such company may operate gas and electric plants and generate and furnish gas and electric light, heat, and power to any county or city and also to companies and private citizens, and may charge and collect reasonable compensation for the same, to be fixed and determined by the commission.

(c) Any street, suburban, or interurban railroad company may buy, own, hold, lease, and use such property as may be necessary or convenient in the exercise of the powers granted by this Code section. (Ga. L. 1916, p. 44, § 1; Ga. L. 1921, p. 107, § 1; Ga. L. 1923, p. 128, § 1; Code 1933, § 94-1006.)

JUDICIAL DECISIONS

Cited in Southern Ry. v. Jenkins, 39 Ga. App. 585, 147 S.E. 800 (1929); Georgia Power Co. v. City of Rome, 172 Ga. 14, 157 S.E. 283 (1931).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 22. **C.J.S.** — 74 C.J.S., Railroads, §§ 87, 88.

46-8-334. Purchase, mortgage, transfer, or disposal of capital stock, bonds, or other indebtedness; acquisition of property, rights, and franchises.

By vote of a majority of the outstanding capital stock, any corporation formed under the laws of this state for the purpose of operating by electricity a street railroad, suburban railroad, or interurban railroad, or for the purpose of generating electricity, may guaranty; purchase or otherwise acquire; own; hold; mortgage; pledge; sell; assign; and transfer or otherwise dispose of all of its capital stock, bonds, securities, or other evidence of indebtedness and may issue its bonds and stock in payment thereof. Any electric railroad corporation organized under the laws of this or any adjacent state for the purpose of connecting its railroad, constructed or about to be constructed, with any railroad constructed by any other electric railroad company, or for the purpose of obtaining motive power for its operation, may acquire, by lease, purchase, merger, or consolidation, the property, rights, and franchises of any other electric railroad corporation, or of any corporation formed for the purpose of generating electricity, organized under the laws of this or any adjacent state; and any railroad or electric corporation organized under the laws of this state is authorized in

any such case to dispose, in like manner, of its property, rights and franchises. No act shall be deemed authorized under this Code section which is inhibited by any provision of the Constitution of Georgia or by any provision of the Constitution or statutes of the United States, or which has the effect or is intended to have the effect of defeating or lessening competition or of encouraging monopoly. (Ga. L. 1909, p. 163, § 1; Ga. L. 1910, p. 95, § 1; Civil Code 1910, § 2607; Code 1933, § 94-1014.)

JUDICIAL DECISIONS

Cited in *Southern Ry. v. Jenkins*, 39 Ga. App. 585, 147 S.E. 800 (1929); *Georgia Power Co. v. City of Decatur*, 170 Ga. 699, 154 S.E. 268 (1930); *Georgia Power Co. v. City of Rome*, 172 Ga. 14, 157 S.E. 283 (1931); *Georgia Power Co. v. Bell*, 43 Ga. App. 559, 159 S.E. 589 (1931); *Georgia Power Co. v. City of Decatur*, 179 Ga. 471, 176 S.E. 494 (1934); *Florida Blue Ridge Corp. v. Tennessee Elec. Power Co.*, 106 F.2d 913 (5th Cir. 1939).

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2503, 2608, 2610, 2613, 2654, 2659. 65 Am. Jur. 2d, Railroads, §§ 198 et seq., 210 et seq., 224, 230 et seq.

C.J.S. — 19 C.J.S., Corporations, §§ 644-647, 794, 796. 74 C.J.S., Railroads, §§ 431, 436 et seq., 439 et seq., 447 et seq., 478 et seq., 485, 486.

46-8-335. Time of effectiveness of guaranty or acquisition of stock, property, and franchises; protection of rights of dissenting stockholders.

(a) No guaranty or acquisition of stock, securities, property, rights, or franchises of any corporation shall become effective under Code Section 46-8-334 until the expiration of 30 days from the authorization of such guaranty or acquisition by the stockholders.

(b) If any stockholder who does not vote in favor of such action files with the secretary of the corporation, within 30 days of the authorization by the other stockholders, his written disapproval thereof, no such guaranty or acquisition shall become effective until the ascertainment and payment of the award provided for in this Code section. If such disapproval is so filed, either the dissenting stockholder or the corporation may, within ten days thereafter, apply by petition to the commission, on 15 days' notice, for an adjudication by the commission as to whether the action so authorized is for the public benefit. If the commission does not find that such action is for the public benefit, the guaranty or acquisition shall not become effective unless the consent of all of the other stockholders is given thereto within 30 days after the report of the findings of the commission. If the commission finds that such action is for the public benefit, the value of the stock of the dissenting stockholder, without regard to appreciation or depreciation thereof in consequence of such action, shall be ascertained by a proceeding to be held in the county of the principal office of the corporation and

thereafter paid to such dissenting stockholder, all in accordance with Title 22, so far as such title may be applicable; and thereupon the dissenting stockholder shall transfer his stock to the corporation, to be disposed of by the directors or to be retained for the benefit of the remaining stockholders. (Ga. L. 1909, p. 163, § 2; Civil Code 1910, § 2608; Code 1933, § 94-1015.)

JUDICIAL DECISIONS

Cited in Georgia Power Co. v. City of Decatur, 170 Ga. 699, 154 S.E. 268 (1930); Georgia Power Co. v. City of Rome, 172 Ga. 14, 157 S.E. 283 (1931); Georgia Power Co. v. Bell, 43 Ga. App. 559, 159 S.E. 589 (1931); Georgia Power Co. v. City of Decatur, 179 Ga. 471, 176 S.E. 494 (1934).

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2618, 2659, 2660-2666, 2675, 2676. 65 Am. Jur. 2d, Railroads, § 202. **C.J.S.** — 19 C.J.S., Corporations, §§ 798-801. 74 C.J.S., Railroads, §§ 435, 482.

46-8-336. Manner of acquiring property, franchises, and rights; nature of rights and privileges of purchasing or consolidated corporation; Secretary of State's certificate as evidence of existence of corporation.

(a) Before any acquisition under Code Section 46-8-334 of the physical property, rights, and franchises of any corporation shall become effective, the directors of the selling and purchasing corporations shall enter into a joint agreement prescribing the terms and conditions of the transaction; the name by which the purchasing or consolidated corporation shall be known; the number, names, and places of residence of the first directors and the officers thereof (who shall hold their offices until their successors have been chosen or appointed); the number of the shares of the capital stock, whether common or preferred, and the amount or par value of each share thereof, of such purchasing or consolidated corporation; and all such other provisions and details as such first-mentioned directors shall deem necessary to perfect such acquisition.

(b) The agreement shall thereafter be considered by the stockholders of each of the corporations. If the agreement is ratified by a vote of a majority of the stock of each of the corporations, that fact shall be certified upon the agreement by the secretaries of the respective corporations, under the seals thereof; and the agreement so adopted, ratified, and certified shall be filed in the office of the Secretary of State.

(c) If the Secretary of State is satisfied that Code Sections 46-8-334 and 46-8-335 have been complied with in relation to such acquisition, and that the acquisition is not inhibited by any provision of the Constitution of Georgia or of the Constitution and statutes of the United States, he shall

thereupon issue his certificate that said corporations have complied with said Code sections and that such purchasing or consolidated corporation shall thenceforth constitute a corporation by the name provided in the agreement.

(d) After the issuance of the certificate by the Secretary of State, the purchasing or consolidated corporation shall be possessed of all the rights, privileges, powers, and franchises, of both a public and a private nature, and be subject to all the duties and liabilities, debts, and obligations of each of the corporations participating in the agreement; and said certificate of the Secretary of State, or a duplicate thereof duly certified, shall be conclusive evidence of the existence of such corporation in all the courts of this state. (Ga. L. 1909, p. 163, § 3; Civil Code 1910, § 2609; Code 1933, § 94-1016.)

JUDICIAL DECISIONS

Cited in Georgia Power Co. v. City of Decatur, 170 Ga. 699, 154 S.E. 268 (1930); Georgia Power Co. v. City of Rome, 172 Ga. 471, 176 S.E. 494 (1934).
 Bell, 43 Ga. App. 559, 159 S.E. 589 (1931); Georgia Power Co. v. City of Decatur, 179 Ga. 14, 157 S.E. 283 (1931); Georgia Power Co. v.

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2614, 2615, 2621, 2623-2628, 2704-2706, 2708, 2709, 2711, 2723-2728.
C.J.S. — 19 C.J.S., Corporations, §§ 644-648, 651, 652, 655, 796, 798.

46-8-337. Issuance of bonds, notes, or other indebtedness by consolidated corporation; pledge of security.

The consolidated corporation formed pursuant to Code Sections 46-8-334 through 46-8-336 shall have authority to issue its bonds, notes, and other evidences of indebtedness and to secure the same by mortgage or deed of trust, or otherwise, upon all its property or franchises, for any corporate purpose, within the limitations and in the manner prescribed by the laws of this state. (Ga. L. 1909, p. 163, § 4; Civil Code 1910, § 2610; Code 1933, § 94-1017.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2629, 2630.
C.J.S. — 19 C.J.S., Corporations, § 809.

46-8-338. Tax exemption for property and capital stock of street, suburban, or interurban railroad companies with tracks and appurtenances extended into adjoining state.

Any company that extends its railroad into an adjoining state shall not be required to pay to this state or to any county or municipality herein any

taxes with respect to so much of the property or capital stock of such company as is situated or employed in the adjoining state. (Ga. L. 1902, p. 69, § 2; Civil Code 1910, § 2604; Code 1933, § 94-1012.)

RESEARCH REFERENCES

Am. Jur. 2d. — 71 Am. Jur. 2d, State and Local Taxation, § 344 et seq. **C.J.S.** — 84 C.J.S., Taxation, § 570.

46-8-339. Authority of street, suburban, and interurban railroad companies to furnish steam for heating and power purposes and to lay and maintain steampipes.

Street, suburban, and interurban railroad companies incorporated under the laws of this state shall have the authority to furnish steam for heating and power purposes to any person within the limits of the counties in which such companies operate, with authority to charge and collect reasonable compensation for the same and with full power to do any and all things necessary or convenient to carry into full effect the authority conferred by this Code section, and to use the streets and public places to lay and maintain their pipes and other appliances for conveying and distributing such steam, provided that before any such company shall be entitled to use any of the streets of any city in this state, the consent of such city shall be obtained. (Ga. L. 1903, p. 684, § 1; Civil Code 1910, § 2606; Code 1933, § 94-1005.)

JUDICIAL DECISIONS

Cited in Georgia Power Co. v. City of Rome, 172 Ga. 14, 157 S.E. 283 (1931).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 19 et seq. **C.J.S.** — 74 C.J.S., Railroads, §§ 87, 88.

46-8-340. Free transportation for policemen, firemen, and other members of municipal and county utility departments by street, suburban, and interurban railroad companies.

Any street, suburban, or interurban railroad company may furnish free transportation, over its lines operated in any city, to the members of that city's police force and fire, sanitary, and water departments, if that city has a regularly organized police force and fire, sanitary, and water departments; to city marshals and their deputies; and to police officers of the county in which that city is located. Nothing in this Code section shall authorize any such company to grant individual members of such municipal and county forces and departments any transportation or other special privilege not

participated in by all of the members thereof on like terms and under like conditions. All grants or concessions made pursuant to this Code section shall be made to the governing authority of such city, for and in behalf of the members of such municipal and county forces and departments and shall be formally accepted by such authority. (Ga. L. 1909, p. 168, § 1; Civil Code 1910, § 2605; Code 1933, § 94-1009; Ga. L. 1982, p. 3, § 46.)

Cross references. — Acceptance of favors grounds for impeachment of judges, or free passes from railroads as constituting § 15-1-7.

RESEARCH REFERENCES

- Am. Jur. 2d.** — 14 Am. Jur. 2d, Carriers, officials or employees, 8 ALR 682.
 §§ 910, 911. Constitutionality of statute authorizing issuance of passes by carriers, 33 ALR 373.
C.J.S. — 13 C.J.S., Carriers, § 367.
ALR. — Carriers: free passes to public

46-8-341. Lease and sale of roads, franchises, and property between street, suburban, and interurban railroad companies; property purchaser's liability for debts and claims against lessor or vendor.

All street, suburban, and interurban railroad companies may lease or sell their roads, franchises, and other property to any other company created under the laws of this state for street, suburban, or interurban railroad purposes; and their franchises and property so sold shall remain liable, in the hands of the lessee or purchaser, for all debts or claims against the company making the conveyance. Nothing in this Code section shall be construed to authorize any such company to sell, lease, or otherwise dispose of any of its property or franchises so as to defeat or lessen competition or to encourage monopoly. (Ga. L. 1890-91, p. 170, § 1; Civil Code 1895, § 2184; Civil Code 1910, § 2614; Code 1933, § 94-1013.)

JUDICIAL DECISIONS

Lease or sale cannot lessen competition. — Lease or sale cannot be made for purpose of defeating or lessening competition. Trust Co. v. State, 109 Ga. 736, 35 S.E. 323, 48 L.R.A. 520 (1900).

Bona fide sale in contemplation of section. — Former Civil Code 1910, § 2614 (see O.C.G.A § 46-8-341) contemplated a bona fide sale to a purchaser able and willing to carry on and maintain the street railroad business in the city, as obligated by the street railroad company in acceptance of the fran-

chise to do such business. Georgia Power Co. v. City of Rome, 172 Ga. 14, 157 S.E. 283 (1931).

Railroad property not to be sold separately from light and power property. — Former Civil Code 1910, § 2614 (see O.C.G.A § 46-8-341) did not authorize street railroad company to sell its railroad property separately from its light and power property. Georgia Power Co. v. City of Rome, 172 Ga. 14, 157 S.E. 283 (1931).

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2503, 2608, 2610, 2613, 2654, 2659. 65 Am. Jur. 2d, Railroads, §§ 198 et seq., 210 et seq., 224, 230 et seq.

C.J.S. — 19 C.J.S., Corporations, §§ 644-647, 794, 796. 74 C.J.S., Railroads, §§ 431, 436 et seq., 439 et seq., 447 et seq., 478 et seq., 485, 486.

46-8-342. Acquisition, sale, operation, transfer, or disposal of motor buses and trackless trolleys by street, suburban, and interurban railroad companies.

(a) All street, suburban, or interurban railroad companies incorporated under the laws of this state shall have the power to purchase, acquire, own, hold, lease, operate, mortgage, sell, assign, transfer, pledge, or otherwise dispose of motor buses or trackless trolleys; to purchase, acquire, own, hold, mortgage, sell, assign, transfer, pledge, or otherwise dispose of the capital stock, bonds, or other securities or evidences of indebtedness of corporations organized to own and operate motor buses or trackless trolleys; to issue their own capital stock or bonds or other securities in payment therefor; and, while they are the owners of such stock in such companies, to exercise all the rights of stockholders, provided that nothing in this Code section shall be construed to confer upon any person any exclusive or irrevocable right or franchise to operate motor buses or trackless trolleys upon the public highways of this state or upon the public streets, lanes, or alleys of any municipality. Such person shall, in regard to the operating of such motor buses and trackless trolleys, be subject, in addition to its occupation or other taxes or assessments, to the same occupation or other taxes as are those persons engaged exclusively in the business of operating motor buses or trackless trolleys. This Code section shall not be construed to confer any right to use the public streets, lanes, or alleys of any municipality without the consent of such municipality; and such municipality shall have no authority to confer any irrevocable right to such companies to use such public streets, lanes, or alleys.

(b) Any motor buses and trackless trolleys when operated by any such railroad company shall be subject to the rules and regulations of the commission, provided that trackless trolleys shall be classed as streetcars and the operations thereof shall be subject to the same municipal ordinances, rules, and regulations, and the vehicles and structures incident to the operations thereof shall be subject to the same state, county, municipal, and school district taxes that apply to the operation of streetcars. Such taxes shall be allocated among counties, municipalities, and school districts served on the same basis as is required of street railroads by law.

(c) Nothing in this Code section shall be construed to modify Code Section 46-8-343, relating to substitution by street, suburban, or interurban railroad companies of trackless trolleys for rail systems in parts thereof. Nothing in this Code section shall be construed to impair any valid contract

or ordinance contract existing between any municipality and any street, suburban, or interurban railroad company as of March 27, 1941. The commission shall not have the power or authority to increase or authorize the increase of, in regard to trackless trolley service, fares which have been fixed prior to March 27, 1941, by contract or ordinance contract on the lines on which trackless trolleys may be substituted pursuant to Code Section 46-8-343. Such fares shall in all respects appertain and apply to such substituted service when inaugurated. (Ga. L. 1924, p. 99, § 1; Ga. L. 1925, p. 219, §§ 1, 2; Code 1933, § 94-1010; Ga. L. 1941, p. 529, §§ 1, 2.)

JUDICIAL DECISIONS

Cited in *Tiller v. Georgia Power Co.*, 68 Ga. App. 224, 22 S.E.2d 623 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Corporations, §§ 150, 151, 186-188, 192-195. 65 Am. Jur. 2d, Railroads, §§ 6, 19, 20, 22, 25.

C.J.S. — 18 C.J.S., Corporations, § 25. 74 C.J.S., Railroads, §§ 27, 87, 88, 748, 749.

ALR. — Trolley poles in street as nuisance, 2 ALR 496.

Grant of perpetual franchise to public service corporation, 2 ALR 1105.

Substitution of motor buses for street cars, 66 ALR 1245.

Franchise or permit for transportation on street or highway as including transportation of freight or express, 76 ALR 1186.

46-8-343. Utilization of trackless trolleys by street, suburban, or interurban railroad companies.

Any company owning, leasing, or operating street railroads, suburban railroads, or interurban railroads in this state shall, by virtue of this Code section, and without any action on the part of the commission, have the right and privilege of substituting what are known as trackless trolleys on any part or line of its railroad system, provided that consent thereto is obtained from each municipality affected by any such proposed substitution, which consent on the part of any municipality shall not be construed to impair any valid existing contract or ordinance contract now in existence between any such municipality and any such company; provided, further, that nothing in this Code section shall be construed to impair any valid existing contract or ordinance contract now in existence between any such municipality and any such company; provided, further, that the commission shall not have the power or authority to increase or authorize the increase of, in regard to such substituted service, fares which have been fixed prior to March 30, 1937, by contract or ordinance contract on the line or lines on which such trackless trolleys may be so substituted, which fares shall in all respects appertain and apply to such substituted service when thus inaugurated. (Ga. L. 1937, p. 798, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 46. **C.J.S.** — 74 C.J.S., Railroads, §§ 297, 298, 748, 749.

46-8-344. Sale of street, suburban, or interurban railroad and bus transportation operations by companies engaged in operating electric generating plants, generally.

Any electric street, suburban, or interurban railroad company which is incorporated under the laws of Georgia and which, in pursuance of the laws of this state, in addition to operating street, suburban, or interurban railroad and bus transportation facilities, is engaged in the operation of electric generating plants for the purpose of supplying motive power for the operation of its railroad and for the production, distribution, and sale of electricity for light, heat, and power purposes in the area served may sell and dispose of its railroad and bus transportation service and equipment, its railroad and bus franchises, and may continue its corporate existence and the operation of its electric power plants and facilities for the production, distribution, and sale of electricity for light, heat, and power purposes under the charter granted to it as a street, suburban, and interurban railroad corporation to the date of expiration of such charter, notwithstanding the sale or other disposition of its railroad and bus properties and franchises. (Ga. L. 1945, p. 260, § 1; Ga. L. 1947, p. 495, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, § 2081, 2082. **C.J.S.** — 19 C.J.S. Corporations, §§ 651, 652. 74 C.J.S., Railroads, §§ 427, 431.

46-8-345. Consent by municipality to sale of street, suburban, or interurban railroad and bus properties and franchises; hearing for approval of sale; filing of board resolution, resolution of municipality, and order of approval.

Any electric street, suburban, or interurban railroad corporation which desires to avail itself of the provisions of Code Section 46-8-344 shall, before consummating such sale or other disposition of its railroad and bus properties and franchises:

(1) Secure the consent of the mayor and council or other governing body of the municipality served by such railroad and bus transportation facilities to the sale or other disposition of the railroad and bus properties and franchises, such consent to be evidenced by a certified copy of a resolution or an ordinance of such governing body;

(2) Apply by petition to the commission on 15 days' notice for an adjudication, after a public hearing on the merits of the proposed sale, the solvency and eligibility under the laws of Georgia of the prospective

purchaser and his ability and capacity to render adequate and satisfactory service, as to whether the proposed sale or other disposition is in the public interest. A certified copy of the order of the mayor and council or other governing body of the municipality, evidencing its consent to the sale or other disposition of the railroad and bus property, shall be attached to and made a part of such petition; and

(3) After securing the order of approval of the commission of the sale or other disposition of such railroad and bus properties and franchises as being in the public interest, file with the Secretary of State, as an amendment to its charter, a certified copy of a resolution of the board of directors reciting that the company elects to sell its railroad and bus properties and franchises and to avail itself of the provisions of Code Section 46-8-344. The company shall attach to the resolution a certified copy of the resolution or ordinance of the mayor and council or other governing body of the municipality evidencing its consent to such sale or other disposition of its railroad and bus properties and franchises. The company shall also attach to the resolution a certified copy of the commission's order of approval of the sale or other disposition of the railroad and bus property as being in the public interest. (Ga. L. 1945, p. 260, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2081, 2082.

ALR. — Power of Public Service Commission with respect to regulation of street railways, 39 ALR 1517.

C.J.S. — 19 C.J.S., Corporations, §§ 651, 652. 74 C.J.S., Railroads, §§ 427, 431.

46-8-346. Effect of sale on corporate existence, powers, and liabilities of company.

Upon compliance with Code Sections 46-8-344 and 46-8-345, the electric street, suburban, or interurban railroad company shall be authorized to sell or otherwise dispose of its railroad and bus properties and franchises and to continue its corporate existence and the operation of its electric plants and properties for the sale and distribution of electricity for light, heat, and power purposes under its current charter to the date of expiration thereof, with all of the rights, powers, and liabilities which it previously exercised, in such manner as if no sale of such railroad and bus properties and franchises had been made. (Ga. L. 1945, p. 260, § 3.)

RESEARCH REFERENCES

Am. Jur. 2d. — 19 Am. Jur. 2d, Corporations, §§ 2081, 2082.

C.J.S. — 19 C.J.S., Corporations, §§ 651, 652. 74 C.J.S., Railroads, §§ 427, 431.

46-8-347. Adoption of chapter by railroad companies.

Any railroad company desiring to adopt this chapter as a part of its charter may so signify by resolution of its board of directors filed with the Secretary of State. The certificate of the Secretary of State that such resolution has been filed with him shall be conclusive evidence of such filing and shall clothe the company with the powers specified in this article. (Ga. L. 1894, p. 70, § 3; Civil Code 1895, § 2183; Civil Code 1910, § 2613; Code 1933, § 94-1008.)

46-8-348. Jurisdiction of commission over interurban railroads; applicability of laws pertaining to other railroad companies; existing contracts between municipalities and railroad companies; fares established by contract prior to August 16, 1921.

Nothing in this article shall be construed as depriving the commission of jurisdiction over interurban railroad companies or limiting its powers in any way, but all of the laws of this state which apply to railroads in general, and to street and suburban railroads in particular, shall, as far as applicable or appropriate, apply to interurban railroads, unless interurban railroads are expressly excluded from the provisions of such laws by the terms thereof. The benefits of this article shall extend to all companies incorporated in this state prior to August 19, 1916, with the power to build or operate electric street and suburban railroads and which, as of August 19, 1916, were operating street and suburban railroads partly in an incorporated city and extending through the country to another incorporated city, including those railroads which run between an incorporated city in Georgia and an incorporated city in an adjoining state. Nothing in this article shall be construed to impair any valid, subsisting contract existing as of August 16, 1921, between any municipality and any railroad company or any street or interurban railroad company. Nothing in this article shall operate to repeal any municipal ordinance existing as of August 16, 1921. The commission shall not have the power and authority under this article to increase fares on the lines of such companies which fares have been fixed by contract between such companies and any municipality prior to August 16, 1921. (Ga. L. 1916, p. 44, § 1; Ga. L. 1921, p. 107, § 1; Code 1933, § 94-1007.)

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 22 et seq.

C.J.S. — 74 C.J.S., Railroads, § 88.

ALR. — Power to require railroads or street railways to permit use of tracks in

street by other companies, 28 ALR 969.

Power of Public Service Commission with respect to regulation of street railways, 39 ALR 1517.

ARTICLE 13

ACTS OR ATTEMPTS RESULTING IN INSOLVENCY OR JUDICIAL
SEIZURE OF A COMPANY**46-8-360. “To wreck” defined.**

As used in this article, the term “to wreck” means to perform any act, either singly or in conjunction with other acts, rendering a railroad company insolvent or causing a company to be seized under any judicial procedure in consequence of insolvency, either by the appointment of a permanent receiver to take possession of the same or under final process for the sale of the same. (Ga. L. 1892, p. 111, § 5; Penal Code 1895, § 689; Penal Code 1910, § 738; Code 1933, § 94-9914; Ga. L. 1984, p. 22, § 46.)

46-8-361. Wrecking a railroad company.

Any person who is a director or other officer or agent of a railroad company which owns a railroad situated in this state and who, either alone or in conjunction with any other person, whether or not such person is an officer, stockholder, or agent of a railroad company, does any act with the intent and purpose of wrecking the company and by which act the company is wrecked shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than three nor more than 20 years. (Ga. L. 1892, p. 111, § 1; Penal Code 1895, § 685; Penal Code 1910, § 734; Code 1933, § 94-9909.)

46-8-362. Attempting to wreck a railroad company.

Any person who is a director or other officer or agent of a railroad company which owns a railroad situated in this state and who does any act with the intent and purpose of wrecking the company, although by the act the company is not thus wrecked, shall be guilty of the felony of attempting to wreck such company and shall be punished by imprisonment for not less than one year nor more than ten years. (Ga. L. 1892, p. 111, § 2; Penal Code 1895, § 686; Penal Code 1910, § 735; Code 1933, § 94-9910.)

46-8-363. Conspiring to wreck a railroad company — Successful attempt to wreck.

Any person who is not a director or other officer or agent of a railroad company which owns a railroad situated in this state and who conspires with any director or other officer or agent of the company to do any act with the intent and purpose of wrecking the company or who induces or agrees with any person who is a director or other officer or agent of said company to do any act with the intent and purpose of wrecking it, by which said act the

company is wrecked, shall be guilty of the felony of railroad wrecking and, upon conviction thereof, shall be punished by imprisonment for not less than three nor more than 20 years. (Ga. L. 1892, p. 111, § 3; Penal Code 1895, § 687; Penal Code 1910, § 736; Code 1933, § 94-9911.)

46-8-364. Conspiring to wreck a railroad company — Unsuccessful attempt to wreck.

Any person who is not a director, agent, or other officer of a railroad company which owns a railroad situated in this state and who conspires with a director, agent, or other officer of such company to do any act with the intent and purpose of wrecking the company or who induces or agrees with any person who is a director, agent, or other officer of said company to do any act with the intent and purpose of wrecking said company, although the company is not thus wrecked by the act, shall be guilty of the felony of attempting to wreck such company and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years. (Ga. L. 1892, p. 111, § 4; Penal Code 1895, § 688; Penal Code 1910, § 737; Code 1933, § 94-9912.)

46-8-365. Acts done with intent and purpose of depreciating the value of stock as prima-facie evidence of intent to wreck.

Any act done by any parties subject to Code Sections 46-8-361 through 46-8-364 with the intent and purpose of depreciating the value of the stock of a railroad company shall be taken as prima-facie evidence of an intent to wreck the company, provided that nothing in this Code section shall exclude from the consideration of the court and jury any other fact which under the rules of law shall be proper evidence of the existence of such intent on the trial of any person indicted and tried under any of the provisions of Code Sections 46-8-361 through 46-8-364. (Ga. L. 1892, p. 111, § 6; Penal Code 1895, § 690; Penal Code 1910, § 739; Code 1933, § 94-9913.)

ARTICLE 14

MISCELLANEOUS OFFENSES

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 32. **C.J.S.** — 13 C.J.S., Carriers, §§ 333, 354, 355.

46-8-380. Intruding on railroad tracks.

Any person intruding unlawfully upon the constructed track of a railroad company, contrary to the will of the company, shall be guilty of a

misdemeanor. (Laws 1837; Cobb's 1851 Digest, p. 850; Code 1863, § 4334; Code 1868, § 4370; Code 1873, § 4437; Ga. L. 1875, p. 26, § 1; Code 1882, § 4437; Penal Code 1895, § 519; Penal Code 1910, § 521; Code 1933, § 94-9908.)

JUDICIAL DECISIONS

Walking upon track. — Walking upon track was not unlawful intruding in the sense of former Code 1882, § 4437 (see O.C.G.A. § 46-8-380). *Savannah, F. & W. Ry. v. Stewart*, 71 Ga. 427 (1883).

Cited in *Kent v. Southern Ry.*, 52 Ga. App. 731, 184 S.E. 638 (1936).

RESEARCH REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d, Railroads, § 74.

C.J.S. — 75 C.J.S., Railroads, § 1281.

46-8-381. Hiding on train for purpose of stealing a ride.

Any person who rides or attempts to ride on a railroad train of any character and conceals himself from the conductor or train authorities by hiding under the train, or on top of the train, or in box cars, on tenders, or elsewhere, for the purpose of avoiding the payment of fare or of stealing a ride thereon, shall be guilty of a misdemeanor. (Ga. L. 1897, p. 116, §§ 1, 2; Penal Code 1910, § 717; Code 1933, § 18-9912.)

JUDICIAL DECISIONS

Constitutionality. — Ga. L. 1897, p. 116, §§ 1 and 2 (see O.C.G.A. § 46-8-381) was constitutional. *Pressley v. State*, 118 Ga. 315, 45 S.E. 395 (1903).

Nature of offense. — The gist of the offense punished by former Penal Code 1910, § 717 (see O.C.G.A. § 46-8-381) was the fraudulent concealing of oneself by a person in a car of a railroad company for the purpose of stealing a ride and to escape payment of fare therefor. *Dixon v. State*, 27 Ga. App. 228, 107 S.E. 777 (1921).

Hoboes as such are law violators. *Atlantic Coast Line R.R. v. Godard*, 93 Ga. App. 671, 92 S.E.2d 626 (1956).

No violation found. — No violation occurs where car belongs to circus of which accused is employee. *Dixon v. State*, 27 Ga. App. 228, 107 S.E. 777 (1921).

No violation occurs where one openly enters and remains in a car. *Mack v. State*, 119 Ga. 352, 46 S.E. 437 (1904).

Ejectment not a defense. — Subsequent ejectment after openly entering and remaining in a car is no defense. *Mack v. State*, 119 Ga. 352, 46 S.E. 437 (1904).

Intoxication is not a defense where person conceals oneself after ordered to leave train. *Brazzell v. State*, 119 Ga. 559, 46 S.E. 837 (1904).

Arresting train officer not liable in damages. — Train officer arresting person under circumstances indicating intention to steal not liable in damages. *Summers v. Southern Ry.*, 118 Ga. 174, 45 S.E. 27 (1903).

46-8-382. Neglect or refusal of officer, agent, or employee of railroad company to make and furnish report required by commission; obstructing commission.

Every officer, agent, or employee of any railroad company who willfully neglects or refuses to make and furnish any report required by the commission, as necessary to the purposes of this title, or who willfully and unlawfully hinders, delays, or obstructs the commission in the discharge of the duties imposed upon it by this title, shall be subject to a penalty of not less than \$100.00 nor more than \$5,000.00 for each offense, to be recovered in an action in the name of the state. (Ga. L. 1878-79, p. 125, § 16; Code 1882, § 719p; Civil Code 1895, § 2211; Civil Code 1910, § 2654; Code 1933, § 93-401.)

CHAPTER 8A

RAPID RAIL PASSENGER SERVICE

Sec.		Sec.	
46-8A-1.	"Person" defined.	46-8A-4.	Permit for extension of line or system.
46-8A-2.	Line or system permit required.		
46-8A-3.	Permit application process.		

Cross references. — Jurisdiction of Public Service Commission over rapid rail passenger service, § 46-2-20.

46-8A-1. "Person" defined.

As used in this chapter, the term "person" means any corporation, company, firm, association, or individual operating a public rapid rail passenger service line in this state, provided that said term shall not include any public corporation or governmental entity. (Code 1981, § 46-8A-1, enacted by Ga. L. 1990, p. 856, § 4.)

46-8A-2. Line or system permit required.

Except as provided in Code Section 46-8A-4, no person shall operate any rapid rail passenger service line or system or any extension thereof in this state without first obtaining a permit from the Public Service Commission. The commission shall grant a permit to any person who complies with the guidelines and standards established by the commission. (Code 1981, § 46-8A-2, enacted by Ga. L. 1990, p. 856, § 4.)

46-8A-3. Permit application process.

The application for any permit provided for in Code Section 46-8A-2 shall be made under such rules and regulations as the commission may from time to time prescribe. Upon the receipt of any such application for such permit, the commission shall cause notice thereof to be given by mail or by personal service to the chief executive officer of the municipalities affected, if any, and shall publish such notice once a week for three consecutive weeks in a newspaper of general circulation in each county affected. (Code 1981, § 46-8A-3, enacted by Ga. L. 1990, p. 856, § 4.)

46-8A-4. Permit for extension of line or system.

This Code section shall not be construed to require any person to secure a permit for an extension of a rapid rail passenger service line or system into

territory contiguous to that already served by that person and not receiving similar service from another person if no permit has been issued to or applied for by any other person. (Code 1981, § 46-8A-4, enacted by Ga. L. 1990, p. 856, § 4.)

CHAPTER 9

TRANSPORTATION OF FREIGHT AND PASSENGERS
GENERALLY

Article 1		Sec.	
General Provisions			
Sec.			natory through rates to proper state railroad officials.
46-9-1.	Standard of care for carriers and common carriers; presumption of negligence by common carriers arising from loss of goods.	46-9-24.	Report by commission of excessive, unreasonable, or discriminatory through rates to Interstate Commerce Commission.
46-9-2.	Power of common carrier to limit liability.	46-9-25.	Representation of commission by Attorney General.
46-9-3.	Showings required by common carrier as prerequisite to use of exceptions under Code Sections 46-9-1 and 46-9-2.	46-9-26.	Commission to prescribe schedule of maximum rates and charges for freight storage by railroad companies.
46-9-4.	Liability of common carrier corporation for acts committed outside of scope of charter.		
46-9-5.	Limitation of actions by common carriers for recovery of charges.	Article 3	
46-9-6.	Limitation of actions against carriers for recovery of overcharges; requirements regarding rates, charges, and claims for loss or damage.	Transportation and Storage of Freight and Livestock	
46-9-7.	Time of accrual of actions under Code Sections 46-9-5 and 46-9-6.	PART 1	
46-9-8.	Requiring specific bonding company as surety.	DUTIES AND LIABILITIES OF CARRIERS GENERALLY	
46-9-9.	Right of employee or surety to cancel bond; notice of cancellation.	46-9-40.	Duty of common carriers to receive goods.
Article 2		46-9-41.	Duty of common carriers to transport and deliver goods safely and without unreasonable delay.
Establishment and Revision of Rates for Railroad Transportation		46-9-42.	Effect of strike by carrier's employees on carrier's duty to transport goods.
46-9-20.	Schedules of transportation rates for passengers and freight by railroad companies as evidence of just and reasonable nature of rates; commission to change and revise schedules periodically.	46-9-43.	Measure of damages for delay in delivery of goods by carrier.
46-9-21.	Giving notice of new and revised rate schedules; giving proof of authenticity of schedules.	46-9-44.	Estoppel of carrier to dispute title to goods delivered to him for shipment.
46-9-22.	Investigation by commission of through rates.	46-9-45.	Commencement and termination of carrier's responsibility for goods.
46-9-23.	Report by commission of excessive, unreasonable, or discriminatory through rates to proper state railroad officials.	46-9-46.	Effect of delivery to consignee at intermediate point.
		46-9-47.	Fraud on carrier as to nature and value of goods.
		46-9-48.	Adjustment and payment by common carriers of claims for loss of property or overcharge for freight; effect of failure by common carrier to adjust and pay claim.

- Sec.
 46-9-49. Duty of railroad or transportation company to furnish facilities for weighing freight; measure of damages for overcharges caused by overweights or false billing.
 46-9-50. Weighing of railroad cars by certified public weighers; manner of weighing cars.
 46-9-51. Written application for railroad cars as prerequisite for consignors' and shippers' taking advantage of penalties or forfeitures for failure of company to supply cars.
 46-9-52. Unjust discrimination in freight-transportation rates by common carriers generally.
 46-9-53. Discrimination by railroad companies in applying freight-storage charges.
 46-9-54. Making and retaining freight-storage charges in accordance with rates fixed by commission.
 46-9-55. Remedy for persons charged excessive freight-storage rates or subjected to discrimination in application of freight-storage rates.
 46-9-56. False billing, false weighing, or false report of weight by common carriers.
 46-9-57. False billing or false weighing by a person who delivers property for transportation to a common carrier or for whom, as consignor or consignee, such carrier transports property.

PART 2

TRANSPORTATION OF LIVESTOCK AND DOMESTIC ANIMALS BY COMMON CARRIERS

46-9-70 through 46-9-72. [Reserved].

PART 3

FURNISHING OF REFRIGERATOR CARS BY RAILROAD COMPANIES

- 46-9-90. Duty of railroad companies to furnish refrigerator cars; filing of application for cars by shipper.
 46-9-91. Liability of company for failure to furnish cars; written claim for damages by shipper; time of pay-

- Sec.
 46-9-92. Liability of shipper for failing or refusing to accept cars; liability of shipper for failure or refusal to pay damages upon written demand therefor.

PART 4

FREIGHT RECEIPTS, FREIGHT BILLS, AND FREIGHT LISTS

- 46-9-110. Issuance of receipts by common carriers to persons delivering goods for transportation; contents of receipts.
 46-9-111. Issuance by railroad companies of duplicate freight receipts to shippers; contents of receipts; delivery of freight to consignee on presentation of railroad receipt.
 46-9-112. Contents of freight bills and freight lists.

Article 4

Transportation of Passengers

PART 1

TRANSPORTATION BY CARRIERS GENERALLY

- 46-9-130. Duty of common carrier to receive passengers generally.
 46-9-131. Extent of right of carriers to refuse admittance to persons and to eject passengers.
 46-9-132. Duty of carriers of passengers to exercise extraordinary diligence.
 46-9-133. Duty of common carriers of passengers to furnish comfortable seats and to light and ventilate cars.
 46-9-134. Duty of conductors or other railroad employees to assign passengers to cars and compartments; investing of conductors and railroad employees with police powers.
 46-9-135. Duty of passengers to remain in assigned car, compartment, or seat; ejectment of passenger by conductor and railroad employees.
 46-9-136. Carriage of baggage.
 46-9-137. Granting of passes by common

- Sec. carriers to former employees and their immediate family.
- 46-9-138. Granting of annual passes by common carriers to sheriffs and their deputies.
- 46-9-139. Selling or dealing in passenger tickets by person other than authorized agent of common carrier issuing such tickets.
- 46-9-140. Duty of common carriers to redeem unused tickets and unused portions of tickets.

PART 2

TRANSPORTATION BY RAILROAD COMPANIES

- 46-9-150. Duty of railroad companies to furnish passengers with drinking water and lights.
- 46-9-151. Duty of railroad companies to telegraph and post bulletins of delayed trains.
- 46-9-152. Duty of railroad companies to provide conductors and other employees with baggage checks; duty of conductors to check trunks and baggage.

PART 3

ISSUANCE OR SALE OF TICKETS FOR PASSAGE ON VESSELS

- 46-9-170. Failure of person issuing or selling passenger tickets on board vessel to include country of registry on advertisement, circular, or other printed paper in regard to passage.
- 46-9-171. Contents of tickets, certificates, orders, or receipts issued as evidence of a right of passage on the high seas; required signatures on such tickets, certificates, orders, or receipts.
- 46-9-172. Penalty.

Article 5

Carriers' Liens

- 46-9-190. Lien of carrier for fare and baggage charges.
- 46-9-191. Lien of carrier for freight charges.
- 46-9-192. Priority of carriers' liens.

Article 6

Connecting Carriers Generally

- Sec.
- 46-9-210. Duty of railroad companies to put on sale and to sell tickets of connecting roads and to check baggage over such roads.
- 46-9-211. Duty of railroad companies to place their tickets for sale with connecting roads; duty to accept such tickets and to receive and transport baggage checked upon such tickets; security for tickets.
- 46-9-212. Switching off and delivering to connecting roads all cars assigned to points over or beyond the connecting roads.
- 46-9-213. Discrimination by railroad companies in freight-transportation rates charged to connecting lines and routes.
- 46-9-214. Applicability of Code Sections 46-9-212 and 46-9-213 to interstate shipments and consignments.
- 46-9-215. Duty of railroad companies to receive freight cars from connecting roads; measure of damages for failure or refusal to receive cars.
- 46-9-216. Civil penalty.

Article 7

Express Companies

- 46-9-230. Manner of incorporation of express companies.
- 46-9-231. Organization of express companies.
- 46-9-232. Location of principal office.
- 46-9-233. Powers of express companies generally.
- 46-9-234. Venue; binding effect of judgment.
- 46-9-235. Service of process; effect of judgment.
- 46-9-236. Posting of name of president or chief officer of express company.

Article 8

Miscellaneous Offenses

- 46-9-250. Demand or receipt by railroad companies of more than a fair and reasonable rate for transport

Sec.

tation of passengers or freight or for transportation of railroad cars.

- 46-9-251. Unjust discrimination by railroad companies as to rates or charges for transportation of passengers or freight and for use and transportation of railroad cars.
- 46-9-252. Overcharging by officers, agents, or other employees of common carriers.
- 46-9-253. Transportation of gunpowder, dynamite, or other explosives.

Article 9

Georgia Rail Passenger Authority Law

- 46-9-270. Short title.
- 46-9-271. Legislative purpose.
- 46-9-272. Definitions.
- 46-9-273. Powers of authority generally.
- 46-9-274. Membership of authority; filling of vacancies; disclosure of pecuniary interests; election of officers; expense allowance and travel costs.
- 46-9-275. Issuance of revenue bonds, notes, or other obligations; re-funding bonds.
- 46-9-276. Authority to execute agreements or instruments; use of proceeds from sale of bonds and other obligations; issuance of subsequent obligations; bond anticipation notes; validation and form of bonds.
- 46-9-277. Public purpose of article.
- 46-9-278. Liberal construction to effect stated purpose.
- 46-9-279. Status of bonds and other obligations as constituting debt or obligation of state, county, or other political subdivisions.
- 46-9-280. Exemption of authority from taxes or assessments.

Sec.

- 46-9-281. Effect of article on other authorities.

Article 9A

Railway Passenger Service Corridor System

- 46-9-290. Designated Georgia Rail Passenger Corridors.
- 46-9-291. Planning and development.

Article 10

Rapid Rail Transit Compact

- 46-9-300. Authority of Governor to execute compact for a designated state; legislative approval of compact; text of compact.

Article 11

Southwest Georgia Railroad Excursion Authority

- 46-9-320. Short title.
- 46-9-321. Creation; administrative assignment.
- 46-9-322. Definitions.
- 46-9-323. Powers.
- 46-9-324. Membership; civil office; chairperson; conflicts of interest; compensation.
- 46-9-325. Members accountable as trustees; records.
- 46-9-326. Revenue bonds, notes, and other obligations.
- 46-9-327. Provisions of obligations; use of proceeds; form of bonds.
- 46-9-328. Implementation of rail passenger excursion projects.
- 46-9-329. Liberal construction of provisions.
- 46-9-330. Indebtedness not obligation of state or political subdivision.
- 46-9-331. Purpose of authority's creation; tax exemption.
- 46-9-332. Authorization for rail passenger excursion projects not limited.

Cross references. — Powers and duties of Department of Transportation relating to mass transportation, Ch. 9, T. 32.

ARTICLE 1

GENERAL PROVISIONS

46-9-1. Standard of care for carriers and common carriers; presumption of negligence by common carriers arising from loss of goods.

Carriers as such are bound to exercise ordinary diligence. Common carriers as such are bound to use extraordinary diligence, and in cases of loss the presumption of law is against them, and no excuse avails them unless the loss was occasioned by the act of God or the public enemies of the state. (Orig. Code 1863, §§ 2038, 2039; Code 1868, §§ 2039, 2040; Code 1873, §§ 2065, 2066; Code 1882, §§ 2065, 2066; Civil Code 1895, §§ 2263, 2264; Civil Code 1910, §§ 2711, 2712; Code 1933, § 18-102.)

Cross references. — Standard of care for carriers who issue bills of lading, § 11-7-309.

Law reviews. — For annual survey on law of torts, see 43 Mercer L. Rev. 395 (1991).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATIONS

ACTS OF GOD

CARRIER AS INSURER

PROCEDURE AND PLEADINGS

General Considerations

Federal preemption. — The Carmack Amendment to the Interstate Commerce Act, 40 U.S.C. § 11707(a)(1), preempts state law remedies against common carriers for negligent loss or damages to goods shipped under a lawful bill of lading. *Joseph Land & Co. v. Christopher Edwards Cos.*, 211 Ga. App. 597, 440 S.E.2d 234 (1993).

"Extraordinary diligence" defined. — Extraordinary diligence is defined as that extreme care and caution which very prudent and thoughtful persons use under like circumstances. *Richmond & D.R.R. v. White & Co.*, 88 Ga. 805, 15 S.E. 802 (1892); *Atlanta & W.P.R.R. v. Jacobs' Pharmacy Co.*, 135 Ga. 113, 68 S.E. 1039 (1910).

Rule of extraordinary diligence imposed upon common carriers by former Civil Code 1895, §§ 2263 and 2264 (see O.C.G.A. § 46-9-1), required the exercise of that degree of diligence to avoid needlessly exposing goods to injury or destruction by an unforeseen act of God, such as an extraordinary flood or freshet, and also to protect and preserve the goods after the peril became

apparent. *Richmond & D.R.R. v. White & Co.*, 88 Ga. 805, 15 S.E. 802 (1892).

"Loss" construed. — "Loss," as used in former Code 1882, §§ 2065 and 2066 (see O.C.G.A. § 46-9-1), included injury or damage to the goods. *Central R.R. v. Hasselkus & Stewart*, 91 Ga. 382, 17 S.E. 838, 44 Am. St. R. 37 (1892).

Common carrier distinguished from ordinary carrier. — A carrier was bound to exercise ordinary diligence while a common carrier was bound to use extraordinary diligence under former Civil Code 1910, §§ 2711 and 2712 (see O.C.G.A. § 46-9-1). *Western & A.R.R. v. Waldrup*, 18 Ga. App. 263, 89 S.E. 346 (1916).

Private carrier held to ordinary diligence. — Person undertaking to transport goods as private carrier and not as a common carrier is bound only to ordinary diligence. *Bloomberg-Michael Furn. Co. v. Urquhart*, 38 Ga. App. 304, 143 S.E. 789 (1928).

Private carrier is liable for willful tort of its servant. — A carrier is absolutely liable for the willful tort of its servant against a passenger, even where the carrier was a

General Considerations (Cont'd)

private carrier and was thus held only to the duty of reasonable care for the passenger's protection against the carrier's negligence. *Bricks v. Metro Ambulance Serv., Inc.*, 177 Ga. App. 62, 338 S.E.2d 438 (1985).

Common carrier's absolute liability as insurer. — Law fixes upon common carrier absolute liability as insurer, from which it may free itself only by showing that the loss or damage was occasioned by "the act of God or the public enemies of the state." *Seaboard Air Line R.R. v. Henry Chanin Corp.*, 84 Ga. App. 442, 66 S.E.2d 113 (1951).

Carrier of passengers to exercise extraordinary care for passenger's safety. — While carrier of passengers is not insurer in sense as common carrier of goods, the carrier is bound to exercise extraordinary care and diligence for the safety of the carrier's passengers, and it matters not the kind of conveyance used or the nature of the motive power employed. *Sheffield v. Lovering*, 51 Ga. App. 353, 180 S.E. 523 (1935).

Rule requiring exercise of extraordinary care applicable to partial loss. — The rule under former Civil Code 1910, §§ 2711 and 2712 (see O.C.G.A § 46-9-1) which placed upon a common carrier the burden of showing the exercise of extraordinary diligence in the transportation of goods applied not only in cases of total loss, but also in case of partial loss by injury or damage to the goods from delay in transportation or delivery, and required that extraordinary diligence shall be shown as to the time of completing this service. *Southern Cotton-Oil Co. v. Louisville & N.R.R.*, 15 Ga. App. 751, 84 S.E. 198 (1915).

General grounds of common carrier's liability. — When a carrier fails to deliver the goods intrusted to the carrier's care, or delivers them in a damaged condition, no excuse avails the carrier, unless it was occasioned by the act of God, the public enemy, an inherent vice or natural deterioration of the object carried, or, in case of livestock, the viciousness of the animals, or that the carrier is excused by special contract made with the shipper, by statute, or by negligence of the shipper. *Hines v. Vann*, 26 Ga. App. 704, 106 S.E. 921 (1921).

Goods seized under legal process. — If goods are seized and taken from the carrier's possession under legal process, its liability ceases. *Savannah, G. & N.A.R.R. v. Wilcox, Gibbs & Co.*, 48 Ga. 432 (1873).

er's possession under legal process, its liability ceases. *Savannah, G. & N.A.R.R. v. Wilcox, Gibbs & Co.*, 48 Ga. 432 (1873).

If delivery by the carrier has been prevented and rendered impossible by the seizure of the shipment in the enforcement by properly constituted legal officials of existing laws, the carrier is bound not to violate the law by making delivery of the goods which have been seized by properly authorized officers. *Central of Ga. Ry. v. Evans*, 172 Ga. 53, 157 S.E. 313 (1931).

Cited in *Cooper v. Raleigh & G.R.R.*, 110 Ga. 659, 36 S.E. 240 (1900); *Coweta County v. Central of Ga. Ry.*, 4 Ga. App. 94, 60 S.E. 1018 (1908); *Central of Ga. Ry. v. Council Bros.*, 36 Ga. App. 573, 137 S.E. 569 (1927); *Southern Ry. v. Atlantic Ice & Coal Co.*, 40 Ga. App. 103, 149 S.E. 71 (1929); *Atlantic Coast Line R.R. v. South Ga. Milling Co.*, 44 Ga. App. 316, 161 S.E. 282 (1931); *Atlantic C.L.R.R. v. Tifton Produce Co.*, 56 Ga. App. 776, 194 S.E. 72 (1937); *Powell v. First Nat'l Bank*, 58 Ga. App. 648, 199 S.E. 668 (1938); *A.A.A. Hwy. Express, Inc. v. Bone & Hendrix*, 69 Ga. App. 763, 26 S.E.2d 658 (1943); *Seaboard Air Line R.R. v. Henry Chanin Corp.*, 84 Ga. App. 442, 66 S.E.2d 113 (1951); *Darlington Corp. v. Finch*, 113 Ga. App. 825, 149 S.E.2d 861 (1966); *Atlanta Transit Sys. v. Hines*, 138 Ga. App. 746, 227 S.E.2d 489 (1976).

Acts of God

"Act of God" distinguished from unavoidable accident. — There is, doubtless, a distinction between an act of God and an unavoidable accident. The former covers only natural accidents, such as lightning, earthquakes, tempests, and the like, and not accidents arising from the negligence or act of man. *Harmony Grove Tel. Co. v. Potts*, 24 Ga. App. 178, 100 S.E. 236 (1919).

"Act of God" includes unavoidable accidents. — For decisions holding that "act of God" includes unavoidable accidents, see *Fish v. Chapman & Ross*, 2 Ga. 349 (1847); *Central of Ga. Ry. v. Council Bros.*, 36 Ga. App. 573, 137 S.E. 569, cert. denied, 36 Ga. App. 825, S.E. (1927).

Carrier utilizing act of God exception. — In order for carrier to avail oneself of act of God exception, the carrier must establish not only that the act of God ultimately occasioned the loss, but that the carrier's

own negligence did not contribute thereto. *Loo-Mac Freight Lines v. American Type Founders, Inc.*, 100 Ga. App. 203, 110 S.E.2d 566 (1959).

Carrier as Insurer

Conditions precedent to common carrier's liability. — The liability of the common carrier in case of loss, for which there is no excuse unless the loss was occasioned by the act of God or the public enemies of the state, exists only, in the absence of an express or implied contract to the contrary, when the carrier is in complete possession and control of the goods for immediate shipment with nothing remaining to be done by the shipper to complete the consignment to the shipper for the purpose of carriage, and only until the goods are delivered to their destination and notice given to the consignee. *Bell v. Fitz*, 78 Ga. App. 28, 50 S.E.2d 241 (1948).

Point at which common carrier's responsibility as insurer commences. — Responsibility of common carrier as insurer under former Code 1933, § 18-102 (see O.C.G.A. § 46-9-1) commenced where there has been a complete delivery for the purpose of immediate transportation. *Bell v. Fitz*, 78 Ga. App. 28, 50 S.E.2d 241 (1948).

Liability of carrier where shipper requests delay of shipment. — If shipment is delayed by request of shipper, liability of carrier is only that of warehouseman during such delay, and carrier cannot be charged with the loss of the goods if, while they were in the carrier's custody pending instruction from the shipper, the carrier exercised ordinary care. *Bell v. Fitz*, 78 Ga. App. 28, 50 S.E.2d 241 (1948).

Carrier liable only as warehouseman where goods stored only to accommodate shipper. — If a common carrier receives goods into the carrier's own warehouse for the accommodation of oneself and one's customers, so that the deposit there is a mere accessory to the carriage and for the purpose of facilitating it, the carrier's liability as a carrier will commence with the receipt of the goods; but, on the contrary, if the goods when so deposited are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage to the place of destination until something further is done, or some further

direction is given or communication made concerning them by the owner, or consignor, the deposit must be considered to be in the meantime for the carrier's convenience and accommodation, and the receiver, until some change takes place, will be responsible only as a warehouseman. *Bell v. Fitz*, 78 Ga. App. 28, 50 S.E.2d 241 (1948).

Shipper seeking damages must show carelessness or negligence by carrier. — Shipper seeking to recover damages of common carrier must show some injury which cannot be the result of inherent nature or defects of goods shipped, or some carelessness or negligence on the part of the carrier likely to cause the injury, before the burden is cast on the carrier to show that the carrier is not in fault. *Hussey v. Saragossa*, 12 F. Cas. 1066 (S.D. Ga. 1876).

To make out case for damage to goods, the shipper need only show the delivery in good condition and the receipt in damaged condition; the carrier, to make good the carrier's defense must then show that the damage arose from causes unmixed with any negligence on the carrier's part. *Loo-Mac Freight Lines v. American Type Founders, Inc.*, 100 Ga. App. 203, 110 S.E.2d 566 (1959); *Empire Aluminum Corp. v. SS Korendijk*, 391 F. Supp. 402 (S.D. Ga. 1973).

Establishing prima facie case against delivering carrier. — Prima facie case against delivering carrier is shown by alleging the delivery of the goods or merchandise shipped in good order to the initial carrier and receipt at the destination from the terminal carrier of the goods in a damaged condition. *Empire Aluminum Corp. v. SS Korendijk*, 391 F. Supp. 402 (S.D. Ga. 1973).

Proof of receipt in good order and delivery in damaged condition shifts burden to carrier. — Proof of receipt in good order and delivery in damaged condition casts burden on common carrier of establishing an affirmative defense. *Empire Aluminum Corp. v. SS Korendijk*, 391 F. Supp. 402 (S.D. Ga. 1973).

Shipper must show receipt in good order where condition of goods not apparent. — Where real condition of goods is not apparent, carrier is not liable except upon a showing by shipper that they were in fact in good order when delivered. *Empire Aluminum Corp. v. SS Korendijk*, 391 F. Supp. 402 (S.D. Ga. 1973).

Carrier as Insurer (Cont'd)

Presumption that goods received in good order. — Where it does not appear carrier received goods in bad order, presumption is that they were in good order. *Empire Aluminum Corp. v. SS Korendijk*, 391 F. Supp. 402 (S.D. Ga. 1973).

Presumption that goods received back by shipper are in good order. — There is presumption that goods received are received back by shipper in good order when the contrary does not affirmatively appear. *Loo-Mac Freight Lines v. American Type Founders, Inc.*, 100 Ga. App. 203, 110 S.E.2d 566 (1959).

Carrier not liable for theft of goods still in customers' exclusive control. — Where customers' jewelry was never delivered to defendant, a moving company, for transportation, but remained in the exclusive control of the customers until the time of its theft, allegedly by the defendant's employee, the carrier did not owe its customers a duty of extraordinary diligence to protect the jewelry and is not absolutely liable to them for the alleged theft. *Effort Enters., Inc. v. Crosta*, 194 Ga. App. 666, 391 S.E.2d 477 (1990).

Last carrier presumed responsible for damage absent evidence to contrary. — In the absence of evidence locating the place of damage to goods in transit over several connecting lines, the presumption is that where goods are delivered to an initial carrier in good condition and are delivered by the terminal carrier in a damaged condition, that they were injured on the line of the last carrier, and the burden of proof is on the terminal carrier, when sued, to show that the damage was not done on its line. *Empire Aluminum Corp. v. SS Korendijk*, 391 F. Supp. 402 (S.D. Ga. 1973).

Contributory negligence of shipper. — The presumption of liability raised by former Civil Code 1895, §§ 2263 and 2264 (see O.C.G.A. § 46-9-1) may be rebutted, if it appeared that the injury was caused by the plaintiff personally, whether the act which caused the injury be due to negligence or design. In other words, the provisions of that section have no reference to a case where the loss was attributable, either in whole or in part, to the act of the shipper personally. *Southern Ry. v. Morrison*, 105 Ga. 543, 31

S.E. 564 (1898); *Coweta County v. Central of Ga. Ry.*, 4 Ga. App. 94, 60 S.E. 1018 (1908).

Procedure and Pleadings

Distinction between intrastate and interstate shipments necessary for application of Code section. — In applying former Code 1933, § 18-102 (see O.C.G.A. § 46-9-1), distinction must be made between shipments intrastate and those interstate, in which latter case federal law superseded state law and fixed the provisions of the uniform bill of lading as the contract. *Seaboard Air Line R.R. v. Henry Chanin Corp.*, 84 Ga. App. 442, 66 S.E.2d 113 (1951).

Carrier claiming negligence by shipper must show the carrier's own lack of fault. — If a common carrier relies upon the defense that the loss was occasioned by the fault of the shipper or the shipper's agent, the carrier must bring oneself within the defense by negating contributing fault on the carrier's own part. *Bugg v. Perry & Faircloth*, 42 Ga. App. 523, 156 S.E. 708 (1931).

Where it appears that the injury resulted solely from the fault of the shipper in improperly packing the merchandise the rule is that if the defendant defends on the ground that the shipper is guilty of negligence in improper packing, the burden is on the carrier not only to show that the loss was occasioned by such fault on the part of the shipper but the carrier must negative any contributing fault on the carrier's own part. *Loo-Mac Freight Lines v. American Type Founders, Inc.*, 100 Ga. App. 203, 110 S.E.2d 566 (1959).

Carriers not liable for damages due to intrinsic qualities of goods carried. — Injury from inherent qualities is somewhat in nature of damages resulting from act of God; and in the more recent development of the rules as to the liability of carriers it has been held that they are not liable for loss or damage due to the intrinsic qualities of the goods carried. *Forrester v. Georgia R.R. & Banking*, 92 Ga. 699, 19 S.E. 811 (1893); *Susong v. Florida C. & P.R.R.*, 115 Ga. 361, 41 S.E. 566 (1902); *Ohlen v. Atlanta & W.P.R.R.*, 2 Ga. App. 323, 58 S.E. 511 (1907); *Capital City Oil Co. v. Central of Ga. Ry.*, 16 Ga. App. 750, 86 S.E. 57 (1915).

Carrier may assert defense of inherent defects in goods. — The carrier's right of defense for a failure to deliver goods of a

perishable nature entrusted to the carrier's care, or where the carrier delivered them in a damaged condition, has been so enlarged that the carrier may show that the damage was occasioned by an inherent vice or natural deterioration in the goods. *Bugg v. Perry & Faircloth*, 42 Ga. App. 523, 156 S.E. 708 (1931).

Carrier must show lack of negligence where inherent defect claimed as defense. — When goods, though perishable or liable to rapidly deteriorate from internal causes, are damaged while in the hands of the carrier, the burden of proof is upon the carrier to show either that the carrier was free from negligence, or that notwithstanding the carrier's negligence the damage occurred without the carrier's fault; that is, that the carrier's negligence did not contribute to the damage. *Central R.R. v. Hasselkus & Stewart*, 91 Ga. 382, 17 S.E. 838, 44 Am. St. R. 37 (1892); *Southern Express Co. v. Bailey*, 7 Ga. App. 331, 66 S.E. 960 (1910).

There is a defense of inherent vice but the burden of establishing it is on the defendant and the defendant must affirmatively show that the damage resulted from such inherent vice unmixed with defendant's own negligence. *Loo-Mac Freight Lines v. American Type Founders, Inc.*, 100 Ga. App. 203, 110 S.E.2d 566 (1959).

There is a defense of inherent vice but the burden of establishing it is on the defendant and defendant must affirmatively show that the damage resulted from such inherent vice unmixed with defendant's own negligence. *Loo-Mac Freight Lines v. American Type Founders, Inc.*, 100 Ga. App. 203, 110 S.E.2d 566 (1959).

Carrier's duty to show bad condition of

goods delivered. — It is carrier's duty to show that goods were in bad condition when delivered to the carrier. *Empire Aluminum Corp. v. SS Korendijk*, 391 F. Supp. 402 (S.D. Ga. 1973).

Carrier's duty to advise shipper as to transportation delays. — Carrier has duty to advise shipper as to any cause likely to delay transportation of which it knows or has reason to know, and if it fails in its duty in this respect, a delay in the transportation of the goods will not be excused, and that too irrespective of the nature of the cause. *Atlantic Coast Line R.R. v. South Ga. Milling Co.*, 44 Ga. App. 316, 161 S.E. 282 (1931).

Presumptions and burden of proof. — In case of loss the presumption was against the carrier under former Civil Code 1895, §§ 2263 and 2264 (see O.C.G.A. § 46-9-1). The burden, however, is on the plaintiff to show the loss; but for the purposes of a prima facie case this may be done by showing such circumstances as would create the inference against the defendant that the goods were lost; as, for instance, they were bailed to the carrier a sufficient length of time to be transported to destination and have not arrived there. *Southern Ry. v. Montag*, 1 Ga. App. 649, 57 S.E. 933 (1907).

Extraordinary negligence presents jury question. — In determining what very prudent and thoughtful persons would do under certain circumstances, the situation and surrounding facts, including the existence of an emergency, if there was one, are to be considered by the jury. *Richmond & D.R.R. v. White & Co.*, 88 Ga. 805, 15 S.E. 802 (1892); *Atlanta & W.P.R.R. v. Jacobs' Pharmacy Co.*, 135 Ga. 113, 68 S.E. 1039 (1910).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 390 et seq.

C.J.S. — 13 C.J.S., Carriers, §§ 76, 77, 678.

ALR. — Liability of carrier for injury due to casual or temporary condition of station or its approaches, 10 ALR 259.

Car shortage as affecting liability of carrier for failure to furnish cars, 10 ALR 342.

Liability of carrier for loss of, or damage to, freight by acts of mob or strikers, 20 ALR 262.

Duty and liability of carrier of passengers

for hire by automobile, 20 ALR 914; 45 ALR 297; 69 ALR 980; 96 ALR 727; 152 ALR 1160.

State of weather as affecting liability for injury to one struck by train or street car, 20 ALR 1064.

Res ipsa loquitur as applicable to injury to passenger in a collision where one of the vehicles is not within carrier's control, 25 ALR 690; 83 ALR 1163; 161 ALR 1113.

Liability of carrier for injury to passenger by car door, 25 ALR 1061, 41 ALR 1089.

Duty of carrier to render special service to

protect goods en route, as affected by the fact that it is not provided for by the published tariff, 32 ALR 111.

Carrier's liability for injury to passenger due to rushing or crowding of passengers, 32 ALR 1315; 155 ALR 634.

Duty and liability of carrier as to money collected on c.o.d. shipment, 36 ALR 464.

Liability of carrier for injury to passenger while passing through turnstile, door, or gate, 40 ALR 828.

Liability of carrier for injury to passenger due to construction of floor of car or vessel on different levels, 48 ALR 1424.

Wholesale or retail price as measure of damages against carrier for loss of goods, 50 ALR 1467; 67 ALR 1427.

Stipulation limiting amount of carrier's liability as applicable where goods are stolen by its employee, 52 ALR 1073.

Duty and liability of carrier as to assisting passenger to board or alight from car or train, 55 ALR 389; 59 ALR 940.

Liability of street railway company for injury to passenger or pedestrian as result of overhang of car in rounding curve, 55 ALR 479.

Duty and liability of carrier with respect to heating freight car, 55 ALR 905.

Duty and liability of carrier to passenger attempting to leave moving street car, 56 ALR 981.

Liability of proprietor or operator of private railroad for injury to one other than employee riding thereon, 57 ALR 818.

Carrier's liability for injury to passenger by heating apparatus, 58 ALR 692.

Liability of carrier by water for injury to passenger while embarking or disembarking, 59 ALR 1355.

Duty and liability to passenger temporarily leaving train, 61 ALR 403.

Status of, and liability of street railway company to, person approaching to board street car, 75 ALR 285.

Liability of carrier operating in street to passenger struck by other vehicle while on platform, step, or running board of car, 77 ALR 429.

Carrier's liability as affected by improper packing or preparation of goods for shipment, 81 ALR 811.

Ferry operator's duty as regards automobiles or their occupants, 82 ALR 798.

Assumption of risk and contributory neg-

ligence in connection with injuries arising from improper manner of loading or fastening load on freight car, 106 ALR 1140.

Presumption and burden of proof as to carrier's responsibility for goods received in good condition and delivered to consignee in bad condition, 106 ALR 1156.

Changed conditions as affecting duty, or enforcement of duty, as to train service or maintenance of stations imposed upon railroad by charter or statute, 111 ALR 57.

Person or corporation transporting goods on the public highways as a common carrier, or private or contract carrier, as regards liability for loss of or damage to goods, 112 ALR 89.

Liability of railroad company for injury to trespassers or licensees other than employees or passengers struck by object projecting, or thrown, from passing train, 112 ALR 850.

Liability of carrier for injury to passenger as result of ice, snow, or rain on exposed or interior portions of car or vessel, 117 ALR 522.

Liability of carrier responsible for passenger leaving train or car at station other than his destination for subsequent injury to or illness or death of passenger, 118 ALR 1327.

Liability of motor carrier for personal injuries to or death of passenger due to structural conditions of interior of conveyance, 126 ALR 461.

Liability of common carrier by motorbus or taxicab for personal injury to or death of passenger where condition of highway was the cause or a contributing factor, 126 ALR 1084.

Liability of railroad for injury to or death of one other than its employee due to defective condition of car received from another railroad which he was unloading or loading, 126 ALR 1095.

Carrier's liability for conduct of passenger (other than assault) causing injury to other passenger, 140 ALR 1194.

Status, rights, and obligations of freight forwarders, 141 ALR 919.

Liability of motorbus carrier for death of or injury to discharged passenger struck by vehicle not within its control, 145 ALR 1206.

Carrier's liability for damage to goods during loading or unloading as affected by participation by consignor or consignee or their employees, 149 ALR 644.

Liability of railroad company for negligence in extricating animal caught in tracks or trestle, 159 ALR 152.

Ejection of passenger as ground of motorbus carrier's liability for subsequent injury or death, 165 ALR 545.

Initial carrier's liability as that of carrier or of warehouseman in respect of goods while in its warehouse awaiting delivery to connecting carrier, 172 ALR 802.

Carrier's liability to person in street or highway for purpose of boarding its vehicle, 7 ALR2d 549.

Liability of carrier for injury to passenger due to improper lighting of vehicle, 8 ALR2d 233.

Duty and liability of carrier to intoxicated passenger while en route, 17 ALR2d 1085.

Contributory negligence of physically handicapped or intoxicated person in boarding or alighting from standing train or car, 30 ALR2d 334.

Railroad carrier's liability for loss of baggage or effects accompanying passenger, 32 ALR2d 630.

Carrier's liability to passenger injured by landslide, or the like, 34 ALR2d 831.

Liability of carrier to one injured by article thrown from conveyance by passenger, 35 ALR2d 788.

Carrier's duty and liability to its passenger injured on platform and the like of station or terminal owned by another company, 41 ALR2d 1286.

Liability of motor carrier for injury to passenger's hand in vehicle door, 42 ALR2d 1190.

Liability of carrier by land or air for damage to goods shipped resulting from improper loading, 44 ALR2d 993.

Liability of carrier to passenger injured by hurling of object through window by a third person, 46 ALR2d 1098.

Carrier's liability to passenger injured while using washroom or lavatory facilities on conveyance, 50 ALR2d 1071.

Employer's liability for assault by taxicab or motorbus driver, 53 ALR2d 720.

Motor carrier's liability for injury to passenger by sudden stopping, starting, or lurching of conveyance, 57 ALR2d 5.

Liability of air carrier to passenger injured while boarding or alighting, 61 ALR2d 1113.

Liability to patron of scenic railway, roller coaster, or miniature railway, 66 ALR2d 689.

Liability of carrier by air for injury or death of passenger due to downdraft, updraft, or turbulence, 73 ALR2d 379.

Liability of motor carrier for loss of passenger's baggage or packages, 68 ALR2d 1350.

Railroad's liability for injury or death of one other than employee because of alleged unsafe or defective condition of its own freight car which he was loading or unloading, 99 ALR2d 176.

Shipper's misdescription of goods as affecting carrier's liability for loss or damage, 1 ALR3d 736.

Railroad carrier's liability where goods were allegedly damaged by failure to properly refrigerate, 4 ALR3d 994.

Liability of carrier by land for damage to goods resulting from improper packing by carrier, 7 ALR3d 723.

Liability for damage to highway or bridge caused by size or weight of motor vehicle or load, 53 ALR3d 1035; 31 ALR5th 171.

Carrier's liability for injury or death of infant passenger as affected by fact that child was in custody of parent or other adult, 74 ALR3d 1171.

Carrier's liability based on serving intoxicants to passenger, 76 ALR3d 1218.

Liability of taxicab carrier to passenger injured while alighting from taxi, 98 ALR3d 822.

Liability of common carrier for personal injury or death of passenger occasioned by inhalation of gases or fumes from exhaust, 99 ALR3d 751.

Liability for injury on, or in connection with, escalator, 1 ALR4th 144.

Liability of motorbus carrier to passenger injured through fall while alighting at place other than regular bus stop, 7 ALR4th 1031.

Liability of land carrier to passenger who becomes victim of third party's assault on or about carrier's vehicle or premises, 34 ALR4th 1054.

Liability of land carrier to passenger who becomes victim of another passenger's assault, 43 ALR4th 189.

Liability of operator of ambulance service for personal injuries to person being transported, 68 ALR4th 14.

Incidental provision of transportation services, by party not primarily in that business, as common carriage subject to state regulatory control, 87 ALR4th 638.

Release of one joint tortfeasor as discharging liability of others under Uniform Contribution Among Tortfeasors Act and other statutes expressly governing effect of release, 6 ALR5th 883.

Liability of motorbus carrier or driver for death of, or injury to, discharged passenger struck by other vehicle, 16 ALR5th 1.

Liability of owner or operator of shopping center, or business housed therein, for injury to patron on premises from criminal attack by third party, 31 ALR5th 550.

Limitation of liability of air carrier for personal injury or death, 91 ALR Fed. 547.

46-9-2. Power of common carrier to limit liability.

A common carrier may not limit his legal liability by any notice given either by publication or by entry on receipts given or tickets sold, provided that a common carrier may limit his liability by means of an express contract; provided, however, that a motor common carrier of household goods and office furnishings may require a shipper to declare a lump sum value for the shipment prior to loading or accept the per pound released value as provided in the terms of the bill of lading contract for the purpose of limiting its liability. (Orig. Code 1863, § 2041; Code 1868, § 2042; Code 1873, § 2068; Code 1882, § 2068; Civil Code 1895, § 2276; Civil Code 1910, § 2726; Code 1933, § 18-104; Ga. L. 1984, p. 693, § 1.)

Cross references. — Limitation of carrier's liability by express provision in document of title, § 11-7-309. Unenforceability of

indemnification contracts holding indemnitee harmless from liability for its own negligence, § 13-8-2(b).

JUDICIAL DECISIONS

Section not applicable to carrier of passengers. — A carrier of passengers cannot limit the carrier's obligation to exercise extraordinary diligence for the care of the carrier's passengers by a notice or publication, nor can the carrier do so even by an express contract, because such a contract would be void, as being against public policy. *Central of Ga. Ry. v. Lippman*, 110 Ga. 665, 36 S.E. 202, 50 L.R.A. 673 (1900); *Southern Ry. v. Watson*, 110 Ga. 681, 36 S.E. 209 (1900); *Hearn v. Central of Ga. Ry.*, 22 Ga. App. 1, 95 S.E. 368 (1918).

Limitation of liability by carrier in general. — Carrier in proper case may limit its liability. *Brown-Rogers-Dixon Co. v. Southern Ry.*, 79 Ga. App. 449, 53 S.E.2d 702 (1949).

Special contract limiting liability enforced if reasonable. — A special contract between a railroad company and the shipper as to the liability of the company for the loss of goods shipped will, if legal and reasonable, be enforced. *Brown-Rogers-Dixon Co. v. Southern Ry.*, 79 Ga. App. 449, 53 S.E.2d 702 (1949).

Parties governed by terms of express contract where one exists. — When a common carrier makes an express contract, the contract is the rule by which the parties are governed, and not the general law as to the liability of common carriers, and the intent of the parties to the contract is to measure their rights and liabilities, and not the law which governs common carriers. *Central R.R. v. Bryant*, 73 Ga. 722 (1884).

Liability under contract only in event of gross negligence. — A carrier may by special contract so limit its liability for loss or damage that it will be liable only in the event that it is guilty of gross negligence. *Central of Ga. Ry. v. Hall*, 124 Ga. 322, 52 S.E. 679, 110 Am. St. R. 170, 4 L.R.A. (n.s.) 898, 4 Ann. Cas. 128 (1905); *Georgia S. & F. Ry. v. Greer*, 2 Ga. App. 516, 58 S.E. 782 (1907).

Meaning of "except for its negligence" in contract. — The use of the words "except for its negligence," in a contract, meant the negligence contemplated by former Civil Code 1910, § 2726 (see O.C.G.A. § 46-9-2), which was the failure to exercise extraordi-

nary care. *Atlantic Coast Line R.R. v. McLemore*, 45 Ga. App. 154, 164 S.E. 464 (1932).

Usage or course of dealing may imply duty of safe-keeping. — Contract imposing upon carrier exclusive duty of safe-keeping may be implied by usage or a particular course of dealing between the parties; but the implication that the carrier assumes the duty of immediate transportation and so responsibility as an insurer, without knowing to what place and to whom goods are to be shipped, must be clear. *Bell v. Fitz*, 78 Ga. App. 28, 50 S.E.2d 241 (1948).

Reduced rate as consideration for special contract. — A contract for carriage, limiting the liability of a carrier in consideration of a reduced rate, is valid and binding. *Western & A.R.R. v. Waldrip*, 18 Ga. App. 263, 89 S.E. 346 (1916).

Carrier may not contract exemption from liability due to own negligence. — Common carrier cannot, by special contract, exempt oneself from liability for loss occasioned by the carrier's own negligence. *Berry v. Cooper & Boykin*, 28 Ga. 543 (1859); *Purcell v. Southern Express Co.*, 34 Ga. 315 (1866); *Georgia R.R. v. Gann & Reaves*, 68 Ga. 350 (1882).

While a common carrier may by special contract based upon a sufficient consideration modify or limit the carrier's common-law liability in the transportation of freight, the carrier cannot make a valid contract exempting oneself altogether from negligence. *Bugg v. Perry & Faircloth*, 42 Ga. App. 523, 156 S.E. 708 (1931).

A railroad company was under the duty, as a common carrier, of exercising diligence in transporting goods; and although it may relieve itself from its liability as an insurer of such goods, it was well established that it may not, by special contract under former Civil Code 1895, § 2276 (see O.C.G.A. § 46-9-2), limit or procure release from its liability for negligence in so doing. *Evans v. Josephine Mills*, 124 Ga. 318, 52 S.E. 538 (1905); *Hearn v. Central of Ga. Ry.*, 22 Ga. App. 1, 95 S.E. 368 (1918).

An express contract entered into by the carrier and the passenger, under the terms of which the carrier is released from all liability to the passenger for personal injuries received while a passenger on a freight train, is in effect a contract by which the

carrier undertakes to relieve itself from the consequences of the negligence of itself and servants, and cannot be enforced. *Central of Ga. Ry. v. Lippman*, 110 Ga. 665, 36 S.E. 202, 50 L.R.A. 673 (1900).

Arbitrary limitation as to amount recoverable impermissible. — While a bona fide agreement may be made as to the value of property to be transported, as a basis for fixing the charges, and may be valid, yet a common carrier cannot, even by express contract, put an arbitrary limitation upon its liability for damages. Such a contract is contrary to public policy. *Central of Ga. Ry. v. Hall*, 124 Ga. 322, 52 S.E. 679, 110 Am. St. R. 170, 4 L.R.A. (n.s.) 898, 4 Ann. Cas. 128 (1905); *Southern Express Co. v. Hanaw*, 134 Ga. 445, 67 S.E. 944, 137 Am. St. R. 227 (1910).

Value of goods stipulated in carrier's receipt not binding upon owner. — Stipulation in receipt given by carrier as to value of goods is not binding upon the owner unless expressly agreed to by the owner; and in the event of a breach of the contract of carriage by the carrier, the owner is entitled to recover full damages as shown by the evidence, regardless of such statement as to the value of the goods. *Southern Express Co. v. Briggs*, 1 Ga. App. 294, 57 S.E. 1066 (1907).

Contract must be independent of receipt. — The express contract made with the shipper of the goods, limiting the legal liability of the common carrier under former Code 1868, § 2042 (see O.C.G.A. § 46-9-2), must be made independently of the receipt given for the goods, and be proved independently thereof, as any other contract was proved, when entered into by two or more parties to it. *Southern Express Co. v. Purcell*, 37 Ga. 103, 92 Am. Dec. 53 (1867).

Stipulation of limitation in receipt insufficient. — The mere insertion, in a printed form of receipt used by an express company, of terms limiting its liability, and the delivery of such a receipt to a shipper, without more, will not under former Civil Code 1910, § 2726 (see O.C.G.A. § 46-9-2) suffice to make an express contract for the purpose of limiting its liability as a common carrier. *Southern Express Co. v. Hanaw*, 134 Ga. 445, 67 S.E. 944, 137 Am. St. R. 227 (1910).

The carrier cannot limit liability by entry on receipts given, though the carrier may make an express contract. Former Code

1863, § 2041 (see O.C.G.A § 46-9-2) was intended to require the assent of the shipper to be given to any modification of the common law contract of common carriers. *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783 (1867).

A stipulation in a receipt, not known to the shipper, given to the shipper by an agent of an express company, does not limit the company's liability as a common carrier. *Mosher & Co. v. Southern Express Co.*, 38 Ga. 37 (1868).

Reference in receipt to provision in bill of lading. — The inclusion in a receipt given by a compress company to the owner of cotton of a provision that it was "subject to all the conditions of bill of lading of the carrier, which may be issued in exchange for this receipt," and the existence in the printed conditions on the back of the bill of lading of a statement that "No carrier or party in possession of all or any of the cotton hereby described shall be liable for any loss therefor or damage thereto by ... fire," did not constitute such an express contract between the shipper and carrier as to relieve the latter from liability for loss occurring by fire. *Atlantic Compress Co. v. Central of Ga. Ry.*, 135 Ga. 140, 68 S.E. 1028 (1910); *Seaboard Air-Line Ry. v. Atlantic Compress Co.*, 135 Ga. 413, 69 S.E. 566 (1910).

Carrier cannot limit liability by notice of special acceptance. — Carrier cannot vary the carrier's responsibility by notice or special acceptance, such being void as contravening the policy of the law. *Fish v. Chapman & Ross*, 2 Ga. 349, 46 Am. Dec. 393 (1847).

Liability of carrier cannot be limited by mere notice in bill of lading; but if a special contract be incorporated in the bill of lading, and signed by both parties, it is sufficient. *Georgia R.R. v. Spears*, 66 Ga. 485, 42 Am. R. 81 (1881); *Georgia R.R. v. Gann & Reaves*, 68 Ga. 350 (1882).

Under former Code 1882, § 2068 (see O.C.G.A § 46-9-2), a carrier could not limit its liability by inserting in a bill of lading a provision that, for all loss or damage occurring in the transit, the legal remedy should be sought and held only against the particular carrier in whose custody the cotton might be at the time thereof, there being no express contract to that effect, the bill of lading being signed only by the agent of the company, and not having been agreed to by

the shipper. *Central R.R. v. Dwight Mfg. Co.*, 75 Ga. 609 (1885).

Assent of shipper necessary to limitation placed in bill of lading. — A stipulation in a bill of lading which exempted the carrier from liability unless notice was given of the damage within a specified time, was one of the matters forbidden by former Code 1882, § 2068 (see O.C.G.A § 46-9-2), and was not effectual without proof of assent thereto by the shipper. *Central R.R. v. Hasselkus & Stewart*, 91 Ga. 382, 17 S.E. 838, 44 Am. St. R. 37 (1892); *McElveen & Hardage v. Southern Ry.*, 109 Ga. 249, 34 S.E. 281, 77 Am. St. R. 371 (1899). See also *Albany & N. Ry. v. Merchants & Farmers Bank*, 137 Ga. 391, 73 S.E. 637 (1912).

Signature of shipper. — Under former Civil Code 1895, § 2276 (see O.C.G.A § 46-9-2) a provision of the bill of lading that the railroad should only be liable for the safe delivery of the goods to its connecting carrier was without effect to relieve it from liability for damage to the goods while in the possession of the connecting carrier, unless such bill of lading was signed by the shipper. *Central of Ga. Ry. v. Kavanaugh*, 92 F. 56 (5th Cir. 1899).

Where bill of lading attached to the plaintiff's petition shows that it was signed by the carrier's agent alone, and not by the shipper, the plaintiff was not bound by any stipulation therein by which it was sought to limit the liability of the carrier. *Lamb v. McHan*, 17 Ga. App. 5, 86 S.E. 252 (1915).

Using entry on ticket for making of express contract. — Entry on ticket that it must be used within time specified did not make express contract under former Civil Code 1895, § 2276 (see O.C.G.A § 46-9-2), unless the purchaser at the time the ticket was delivered knew of the entry and assented to its terms. *Boyd v. Spencer*, 103 Ga. 828, 30 S.E. 841, 68 Am. St. R. 146 (1898).

Presumption against carrier. — Where there was a special contract shown, limiting the liability of the carrier of live stock, where the plaintiff proved that the stock was lost or injured while in the possession of the carrier, the law would raise a presumption of negligence against the carrier, which must be rebutted by proof showing the exercise of that degree of diligence required by the contract. *Georgia S. & F. Ry. v. Greer*, 2 Ga. App. 516, 58 S.E. 782 (1907).

Shipper's burden of proof as to liability.

— Where a shipper signed a contract under former Civil Code 1895, § 2276 (see O.C.G.A § 46-9-2) limiting the liability of the common carrier and reciting that it was made in consideration of a reduced rate of freight, such recital was prima facie true, and the burden was upon the shipper to prove the contrary. *Georgia S. & F. Ry. v. Greer*, 2 Ga. App. 516, 58 S.E. 782 (1907).

Admissibility of parol evidence to show special contract. — Parol evidence was admissible to show special contract between a shipper and a common carrier under former Code 1863, § 2041 (see O.C.G.A § 46-9-2), notwithstanding the carrier's clerk had given a receipt, specifying the terms on which the freight was received. *Purcell v. Southern Express Co.*, 34 Ga. 315 (1866).

Limitation of liability of livestock carrier by special contract. — Common carrier of livestock may limit the carrier's liability by special contract, as recognized in former Code 1873, § 2068 (see O.C.G.A § 46-9-2). *Georgia R.R. v. Beatie*, 66 Ga. 438, 42 Am. R. 75 (1881); *Georgia R.R. v. Spears*, 66 Ga. 485, 42 Am. R. 81 (1881).

Baggage. — Where the evidence showed that the plaintiff had entered into an express contract in which it was agreed that the defendant would not be liable for loss of baggage beyond its own line, and that the baggage alleged to have been lost was delivered by the defendant to the connecting line, and not returned to the defendant, a recovery for the plaintiff was unwarranted. *Southern Ry. v. White*, 108 Ga. 201, 33 S.E. 952 (1899).

Agent delivering property to carrier. — If the agent delivers the property in the agent's own name and the principal is undisclosed, the latter is bound by any special contract, but if the company receives the goods as those of the principal, and, without the knowledge or consent of the latter, the carrier attempts to make a special contract with the agent, the principal is not bound thereby, unless the principal does some act from which the law infers a ratification. *Wellborn v. Southern Ry.*, 6 Ga. App. 151, 64 S.E. 491 (1909).

Liability of carrier not insurer under contract. — Where carrier was not insurer under contract, it was only bound to exercise ordinary diligence in regard thereto and it was not required to exercise extraordinary care and diligence to prevent the car of cream and milk from spoiling. *Brown-Rogers-Dixson Co. v. Southern Ry.*, 79 Ga. App. 449, 53 S.E.2d 702 (1949).

Cited in *Central R.R. v. Combs*, 70 Ga. 533, 48 Am. R. 582 (1883); *Phillips v. Georgia R.R. & Banking*, 93 Ga. 356, 20 S.E. 247 (1893); *Southern Ry. v. Adams*, 115 Ga. 705, 42 S.E. 35 (1902); *Ragsdale, Harper & Weathers v. Southern Ry.*, 119 Ga. 627, 46 S.E. 832 (1904); *Central of Ga. Ry. v. City Mills Co.*, 128 Ga. 841, 58 S.E. 197 (1907); *Atlantic Compress Co. v. Central of Ga. Ry.*, 135 Ga. 140, 68 S.E. 1028 (1910); *Hearn v. Central of Ga. Ry.*, 22 Ga. App. 1, 95 S.E. 368 (1918); *Bloomberg-Michael Furn. Co. v. Urquhart*, 38 Ga. App. 304, 143 S.E. 789 (1928).

RESEARCH REFERENCES

ALR. — Stipulation releasing carrier from liability for injury to free passenger as affecting liability for gross negligence or willful or wanton injury, 9 ALR 501.

Stipulation limiting amount of carrier's liability as applicable where goods are stolen by its employee, 52 ALR 1073.

Refusal on grounds of public policy of forum to enforce stipulation in carrier's contract limiting its liability, valid according to the proper law of the contract, 57 ALR 175.

Provision in telegraph or carrier's contract regarding amount of recovery or dam-

ages as provision for liquidated damages (or valuation of right) or a mere limitation of liability, 128 ALR 632.

Limitation of amount of interstate carrier's liability on basis of reduced rate as dependent on shipper's opportunity to choose, or knowledge of, alternative rate, 165 ALR 1005.

Limitation of liability for personal injury by air carrier, 13 ALR2d 337.

Validity and construction of stipulation exempting carrier from liability for loss or damage to property at nonagency station, 16 ALR3d 1111.

Limitation of liability of air carrier for personal injury or death, 91 ALR Fed. 547.

46-9-3. Showings required by common carrier as prerequisite to use of exceptions under Code Sections 46-9-1 and 46-9-2.

In order for a common carrier to avail himself of the act of God exception under Code Section 46-9-1 or the contractual exception under Code Section 46-9-2, he must establish not only that the act of God or the contractually excepted fact ultimately occasioned the loss but that his own negligence did not contribute thereto. (Civil Code 1895, § 2265; Civil Code 1910, § 2713; Code 1933, § 18-103.)

JUDICIAL DECISIONS

Cited in Bugg v. Perry & Faircloth, 42 Ga. App. 523, 156 S.E. 708 (1931); Atlantic C.L.R.R. v. Fugazzi, 45 Ga. App. 750, 165 S.E. 840 (1932); Georgia Power Co. v. Braswell, 48 Ga. App. 654, 173 S.E. 763 (1934);

Brown-Rogers-Dixson Co. v. Southern Ry., 79 Ga. App. 449, 53 S.E.2d 702 (1949); Empire Aluminum Corp. v. SS Korendijk, 391 F. Supp. 402 (S.D. Ga. 1973).

RESEARCH REFERENCES

C.J.S. — 13 C.J.S., Carriers, § 76.

ALR. — Res ipsa loquitur as applicable to injury to passenger in a collision where one of the vehicles is not within carrier's control, 25 ALR 690; 83 ALR 1163; 161 ALR 1113.

Liability of carrier for injury to passenger by car door, 25 ALR 1061; 41 ALR 1089.

Carrier's liability for injury to passenger due to rushing or crowding of passengers, 32 ALR 1315; 155 ALR 634.

Carrier's liability as affected by improper packing or preparation of goods for shipment, 81 ALR 811.

Carrier's liability to passenger injured by landslide, or the like, 34 ALR2d 831.

Liability of carrier to passenger injured by hurling of object through window by a third person, 46 ALR2d 1098.

Liability of air carrier to passenger injured while boarding or alighting, 61 ALR2d 1113.

Shipper's misdescription of goods as affecting carrier's liability for loss or damage, 1 ALR3d 736.

Liability for injury to or death of passenger from accident due to physical condition of carrier's employee, 53 ALR3d 669.

Liability of land carrier to passenger who becomes victim of third party's assault on or about carrier's vehicle or premises, 34 ALR4th 1054.

Liability of land carrier to passenger who becomes victim of another passenger's assault, 43 ALR4th 189.

46-9-4. Liability of common carrier corporation for acts committed outside of scope of charter.

In all cases where persons are injured or property is damaged by any corporation engaged as a common carrier in the transportation of freight or passengers, or both, either by land or by water, such corporation shall be liable to pay damages to anyone whose person or property may be so injured or damaged, notwithstanding the fact that such corporation was acting outside of the scope of its charter at the time of the injury or damage,

if such corporation would be liable for such damages if it had been acting within its chartered powers and authority. (Ga. L. 1884-85, p. 136, § 1; Civil Code 1895, § 2277; Civil Code 1910, § 2728; Code 1933, § 18-105.)

RESEARCH REFERENCES

C.J.S. — 13 C.J.S., Carriers, §§ 71, 418, 419.

ALR. — Liability of carrier for injury to own passenger on its line through negligence of another carrier permitted to use its tracks, 74 ALR 1178.

Losses beyond insured's own route or line as within coverage of carrier's insurance, 99 ALR 283.

Changed conditions as affecting duty, or enforcement of duty, as to train service or maintenance of stations imposed upon railroad by charter or statute, 111 ALR 57.

Liability or indemnity policy issued to

common carrier as covering vehicle while not immediately in use in regular carrier service, 141 ALR 628.

Territorial coverage of motor carrier's public liability policy required by statute or ordinance as coextensive with area of authorized operation, 154 ALR 520.

Initial carrier's liability as that of carrier or of warehouseman in respect of goods while in its warehouse awaiting delivery to connecting carrier, 172 ALR 802.

Liability of motorbus carrier to passenger injured through fall while alighting at place other than regular bus stop, 7 ALR4th 1031.

46-9-5. Limitation of actions by common carriers for recovery of charges.

All actions at law by common carriers operating in this state for the recovery of their charges or any part thereof, where such charges have accrued in connection with intrastate shipments, shall be initiated within three years after the time the cause of action accrues, and not thereafter. (Ga. L. 1933, p. 191, § 1; Code 1933, § 18-601; Ga. L. 1982, p. 3, § 46.)

Law reviews. — For article, "Statutes of Limitation: Counterproductive Complexities," see 37 Mercer L. Rev. 1 (1985).

RESEARCH REFERENCES

ALR. — Expiration of period prescribed by bill of lading or statute for shipper's claim or action against carrier as affecting his right to avail himself of claim by recoupment in

carrier's action against himself or claim by recoupment of carrier's action against him, 140 ALR 816.

46-9-6. Limitation of actions against carriers for recovery of overcharges; requirements regarding rates, charges, and claims for loss or damage.

(a) All actions at law against carriers operating in this state, which actions seek to recover overcharges accruing on intrastate shipments, shall be initiated within a period of three years after the time the cause of action accrues, and not thereafter, provided that, if a claim for the overcharge is presented in writing to the carrier within the three-year period of limitation, the period shall be extended to include six months from the time notice in

writing is given by the carrier to the claimant of disallowance of the claim or any part thereof.

(b) A motor carrier of property may, upon notice to the commission, elect to be subject to the following requirements regarding rates, charges, and claims for loss or damage:

(1) A motor carrier of property shall provide to the shipper, upon request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate agreed to between the shipper and carrier may have been based. When the applicability or reasonableness of the rates and related provisions billed by a carrier is challenged by the person paying the freight charges, the commission shall determine whether such rates and provisions are reasonable or applicable based on the record before it. In cases where a carrier other than a carrier providing transportation of household goods seeks to collect charges in addition to those billed and collected which are contested by the payor, the carrier may request that the commission determine whether any additional charges over those billed and collected must be paid. A carrier must issue any bill for charges in addition to those originally billed within 180 days of the original bill in order to have the right to collect such charges;

(2) If a shipper seeks to contest the charges originally billed by a motor carrier of property, the shipper may request that the commission determine whether the charges originally billed must be paid. A shipper must contest the original bill within 180 days in order to have the right to contest such charges; and

(3) Claims for loss of or damage to property for which any motor carrier of property may be liable must be filed within nine months after the delivery of the property, except that claims for failure to make delivery must be filed within nine months after a reasonable time for delivery has elapsed.

(c) The commission shall adopt rules regarding rates, charges, and claims for loss or damage applicable to carriers of household goods. (Ga. L. 1933, p. 191, § 2; Code 1933, § 18-602; Ga. L. 1984, p. 22, § 46; Ga. L. 1985, p. 149, § 46; Ga. L. 1996, p. 950, § 5.)

Cross references. — Authority of General Assembly regarding regulation of public utility rates, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Prohibition against rebates, Ga. Const. 1983, Art. III, Sec. VI, Para. V.

RESEARCH REFERENCES

C.J.S. — 13 C.J.S., Carriers, §§ 354, 490, recover back excessive freight charge, 13 ALR 289.

ALR. — Who may maintain action to

46-9-7. Time of accrual of actions under Code Sections 46-9-5 and 46-9-6.

For the purposes of Code Sections 46-9-5 and 46-9-6, the cause of action in respect of a shipment of property shall be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not thereafter. (Ga. L. 1933, p. 191, § 2; Code 1933, § 18-603.)

RESEARCH REFERENCES

ALR. — Who may maintain action to recover back excessive freight charge, 13 ALR 289.

Expiration of period prescribed by bill of

lading or statute for shipper's claim or action against carrier as affecting his right to avail himself of claim by recoupment in carrier's action against him, 140 ALR 816.

46-9-8. Requiring specific bonding company as surety.

(a) No common carrier authorized to do business in this state, when requiring of any employee that he give bond or undertaking of any nature whatsoever, shall require as surety thereon any specific or certain bonding company, provided that nothing in this Code section shall be construed to prevent any common carrier from specifying the form or wording of such bond.

(b) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1912, p. 159, § 1; Code 1933, §§ 103-601, 103-9901.)

46-9-9. Right of employee or surety to cancel bond; notice of cancellation.

(a) Any employee who gives any bond or undertaking pursuant to Code Section 46-9-8 shall, upon the breach of any of the conditions thereof by the other party thereto, have the power to cancel the same by giving the surety thereon and the common carrier for whose benefit the same has been given at least ten days' notice in writing, setting out in full the reasons for canceling same. Any such notice to a company, corporation, or association may be served by leaving the same with any person on whom service of legal process upon such company, corporation, or association may be had.

(b) Any surety on any such bond or undertaking shall, upon the breach of any of the conditions thereof by the employee for whom the bond or undertaking was made, have power to cancel the same by giving such employee at least ten days' notice in writing, setting out in full the reasons for canceling same, the notice to be signed by an agent or manager of such surety, provided that nothing in this Code section shall affect any right of action accruing to any person upon the breach of the contract.

(c) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1912, p. 159, § 2; Code 1933, §§ 103-602, 103-9901.)

ARTICLE 2

ESTABLISHMENT AND REVISION OF RATES FOR RAILROAD
TRANSPORTATION

Cross references. — Authority of General Assembly regarding regulation of public utility rates, Ga. Const. 1983, Art. III, Sec. VI,

Para. V. Prohibition against rebates, Ga. Const. 1983, Art. III, Sec. VI, Para. V.

46-9-20. Schedules of transportation rates for passengers and freight by railroad companies as evidence of just and reasonable nature of rates; commission to change and revise schedules periodically.

Any schedule of rates and charges established by the commission for the transportation of passengers and freight shall, in actions brought against any railroad company involving the rates charged by the company for the transportation of any passengers or freight, or cars, including actions involving unjust discrimination in relation to such rates, be deemed and taken in all courts as sufficient evidence that the rates therein fixed are just and reasonable rates or charges for the transportation of passengers and freight and cars upon the railroads. The commission shall, from time to time, and as often as the circumstances may require, change and revise such schedules. (Ga. L. 1878-79, p. 125, § 6; Code 1882, § 719f; Ga. L. 1888, p. 37, § 9; Ga. L. 1889, p. 131, § 1; Civil Code 1895, § 2190; Civil Code 1910, § 2631; Code 1933, § 93-310.)

Cross references. — Commission's power to determine just and reasonable rates and

charges for railroad transportation, § 46-8-20.

JUDICIAL DECISIONS

Legislative intent. — It was to meet conditions arising from emergency, no doubt, that the legislature provided in former Civil Code 1910, § 2631 (see O.C.G.A § 46-9-20), that the "commission shall, from time to time, and as often as the circumstances may require, change and revise such schedules" of rates. *City of Atlanta v. Atlanta Gas-Light Co.*, 149 Ga. 405, 100 S.E. 439 (1919).

Courts have no power to control and make rates. — Making and controlling utility rates is legislative function delegated to quasi-legislative body and the Georgia courts have no power to control and make such rates. *DeKalb County v. Southern Bell Tel. & Tel. Co.*, 358 F. Supp. 498 (N.D. Ga. 1972), aff'd, 478 F.2d 700 (5th Cir. 1973).

Rate-making power rests exclusively in Public Service Commission. — The power to make intrastate rates in Georgia has fre-

quently been held to be the exclusive prerogative of the Public Service Commission. *Seaboard Air Line Ry. v. Lumberman's Co.*, 168 Ga. 851, 149 S.E. 128 (1929).

Establishment of rate by commission carries weight of legislative act. — When commission establishes rate, such act is legislative in character, and binds all parties concerned in the same manner as if the rate had been fixed by an act of the General Assembly. *Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618 (1949).

Rates operate prospectively and cannot be applied retroactively. — Even if the commission, after fixing a rate or charge, subsequently determines that the rate was unreasonably high, it has no authority in the revision of the rate to require that refunds or reparations be made of collections under the rate which had been established. If, after

fixing a rate which the commission determines to be just and reasonable, it decides that the rate is unreasonable or unjust, it has the right under the law at any time to revise or amend its rulings or orders but, like legislation in general, these revised orders look to the future, and cannot be applied retroactively. *Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618 (1949).

Contracts fixing rates. — Shippers and common carriers cannot by contract between themselves fix the rates to be charged

on shipments of freight. *Wight v. Pelham & H.R.R.*, 18 Ga. App. 195, 89 S.E. 176 (1916).

Rates fixed by commission considered reasonable. — Rates within those fixed by commission are not unreasonable. *Sorrell & Nall v. Central R.R.*, 75 Ga. 509 (1885).

Cited in *Wadley S. Ry. v. State*, 137 Ga. 497, 73 S.E. 741 (1912); *Central of Ga. Ry. v. Milledgeville Ry.*, 138 Ga. 434, 75 S.E. 614 (1912); *Georgia Pub. Serv. Comm'n v. Atlanta & W.P.R.R.*, 164 Ga. 822, 139 S.E. 725 (1927); *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332 (N.D. Ga. 1975).

RESEARCH REFERENCES

ALR. — Power of federal government over intrastate rates, 14 ALR 454; 22 ALR 1100.

Consideration of body of rates in determining the reasonableness of carrier's rates for a particular commodity, 15 ALR 185.

Special services or facilities afforded by shipper as a factor in carrier's rates, 25 ALR 191.

Power of public service commission to increase franchise rates, 28 ALR 587; 29 ALR 356.

46-9-21. Giving notice of new and revised rate schedules; giving proof of authenticity of schedules.

(a) When any schedule has been made or revised as provided in Code Section 46-9-20, it shall be the duty of the commission to give notice of such new schedule or of any amendment or revision, by means of circulars, tariff publications, its annual reports, or in such other manner and form as it deems advisable or necessary. After such notice is given, it shall be the duty of all railroad companies affected by the new schedule to post at all of their respective stations, in a conspicuous place, a copy of the schedule for the information of the public, provided that the schedules thus prepared shall not be taken as evidence as provided in Code Section 46-9-20 until schedules have been prepared and published as provided in this Code section.

(b) All such schedules purporting to have been printed and published by the commission as provided in this Code section shall be received and held in all such actions as prima facie the schedules of the commission, without any further proof other than the production of the schedules desired to be used as evidence, together with a certificate of the commission that the same are true copies of the schedules prepared by it for the railroad company therein named and that the same have been duly published as required by law. (Ga. L. 1878-79, p. 125, § 6; Code 1882, § 719f; Ga. L. 1882-83, p. 133, § 1; Ga. L. 1888, p. 37, § 1; Ga. L. 1889, p. 138, § 1; Civil Code 1895, § 2191; Civil Code 1910, § 2632; Code 1933, § 93-311.)

JUDICIAL DECISIONS

Cited in Georgia Pub. Serv. Comm'n v. Tel. & Tel. Co., 358 F. Supp. 498 (N.D. Ga. Atlanta Gas Light Co., 205 Ga. 863, 55 S.E.2d 618 (1949); DeKalb County v. Southern Bell 1972).

46-9-22. Investigation by commission of through rates.

It shall be the duty of the commission to investigate thoroughly all through freight rates from points outside of Georgia to points within Georgia and from points within Georgia to points outside of Georgia. (Ga. L. 1890-91, p. 147, § 1; Civil Code 1895, § 2202; Civil Code 1910, § 2645; Code 1933, § 93-312.)

JUDICIAL DECISIONS

Cited in Gray v. McLendon, 134 Ga. 231, 67 S.E. 859 (1910); DeKalb County v. Southern Bell Tel. & Tel. Co., 358 F. Supp. 498 (N.D. Ga. 1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 36. 64 Am. Jur. 2d, Public Utilities, §§ 146, 147, 152.

46-9-23. Report by commission of excessive, unreasonable, or discriminatory through rates to proper state railroad officials.

Whenever the commission finds that a through rate, whether charged for transportation into or out of Georgia, is in its opinion excessive, unreasonable, or discriminatory, it shall bring this fact to the attention of the officers of the railroad company and urge upon them the propriety of changing such rate. (Ga. L. 1890-91, p. 147, § 2; Civil Code 1895, § 2203; Civil Code 1910, § 2646; Code 1933, § 93-313.)

JUDICIAL DECISIONS

Cited in DeKalb County v. Southern Bell Tel. & Tel. Co., 358 F. Supp. 498 (N.D. Ga. 1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, Public Utilities, §§ 146, 147, 152, §§ 186, 187, 194 et seq. 64 Am. Jur. 2d, **C.J.S.** — 13 C.J.S., Carriers, §§ 282, 314.

46-9-24. Report by commission of excessive, unreasonable, or discriminatory through rates to Interstate Commerce Commission.

Whenever rates are not changed according to the suggestion of the commission pursuant to Code Section 46-9-23, it shall be the duty of the commission to present the facts, whenever it can legally be done, to the Interstate Commerce Commission and to appeal to it for relief. (Ga. L. 1890-91, p. 147, § 3; Civil Code 1895, § 2204; Civil Code 1910, § 2647; Code 1933, § 93-314.)

JUDICIAL DECISIONS

Cited in DeKalb County v. Southern Bell Tel. & Tel. Co., 358 F. Supp. 498 (N.D. Ga. 1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 186, 187, 194 et seq.

46-9-25. Representation of commission by Attorney General.

In all work devolving upon the commission pursuant to Code Sections 46-9-22 through 46-9-24, the commission shall receive, upon application, the services of the Attorney General of this state; and he shall also represent the commission, whenever called upon to do so, before the Interstate Commerce Commission. (Ga. L. 1890-91, p. 147, § 4; Civil Code 1895, § 2205; Civil Code 1910, § 2648; Code 1933, § 93-315.)

JUDICIAL DECISIONS

Cited in DeKalb County v. Southern Bell Tel. & Tel. Co., 358 F. Supp. 498 (N.D. Ga. 1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 7 Am. Jur. 2d, Attorney General, § 33.

46-9-26. Commission to prescribe schedule of maximum rates and charges for freight storage by railroad companies.

The commission is required to fix and prescribe a schedule of maximum rates and charges for storage of freight to be made and charged by railroad companies doing business in this state, and to fix at what time after the receipt of freight at place of destination such charges for storage shall begin. The commission shall have the power to vary such rates and charges

according to the value and character of the freight stored, the nature of the place of destination, the residence of the consignee, and such other facts as in its judgment should be considered in fixing the same. All of the provisions of this title prescribing the procedure to be followed by the commission in fixing freight and passenger tariffs, hearing complaints of carriers and shippers, and altering and amending freight and passenger tariffs shall apply to the subject of fixing and amending rates and charges for storage. (Ga. L. 1890-91, p. 149, § 1; Civil Code 1895, §§ 2206, 2207; Civil Code 1910, §§ 2649, 2650; Code 1933, § 93-317.)

JUDICIAL DECISIONS

Courts have no power to control and make rates. — Making and controlling utility rates is legislative function delegated to quasi-legislative body and the Georgia courts have no power to control and make such rates. *DeKalb County v. Southern Bell Tel. &*

Tel. Co., 358 F. Supp. 498 (N.D. Ga. 1972), *aff'd*, 478 F.2d 700 (5th Cir. 1973).

Cited in *Dixon v. Central of Ga. Ry.*, 110 Ga. 173, 35 S.E. 369 (1900); *Gray v. McLendon*, 134 Ga. 224, 67 S.E. 859 (1910).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 164 et seq., 172. 64 Am. Jur. 2d, Public Utilities, § 166 et seq.

ARTICLE 3

TRANSPORTATION AND STORAGE OF FREIGHT AND LIVESTOCK

Cross references. — Requirement that hazardous wastes transported across, within, or through state be accompanied by manifest, § 12-8-67. Prohibition against payments

to labor organizations by carriers or shippers for transportation of motor vehicle, etc., by rail if such vehicle is also capable of being moved or propelled on highways, § 34-6-8.

PART 1

DUTIES AND LIABILITIES OF CARRIERS GENERALLY

46-9-40. Duty of common carriers to receive goods.

A person holding himself out to the public as a common carrier is bound to receive all goods offered to him that he is able and accustomed to carry, upon compliance with such reasonable regulations as he may adopt for his own safety and the benefit of the public. (Orig. Code 1863, § 2042; Code 1868, § 2043; Code 1873, § 2069; Code 1882, § 2069; Civil Code 1895, § 2278; Civil Code 1910, § 2729; Code 1933, § 18-301.)

JUDICIAL DECISIONS

Carrier's duty to receive ordinary merchandise at full liability and at reasonable rates. — Carrier was bound under former Civil Code 1895, § 2278 (see O.C.G.A. § 46-9-40) to receive ordinary merchandise for transportation with the full measure of liability and at reasonable rates on demand, and in case of its refusal to do so the shipper has a remedy in damages. *Inman & Co. v. Seaboard Air Line Ry.*, 159 F. 960 (S.D. Ga. 1908).

Carrier under duty to furnish cars for usual quantity of goods. — A railroad company is under a duty to provide sufficient cars for transporting, without reasonable delay, the usual and ordinary quantity of freight offered to it, or which might be ordinarily expected in its business. *Wadley S. Ry. v. Kent & Downs*, 145 Ga. 689, 89 S.E. 765 (1916).

Carrier not bound to anticipate unexpected increase of business. — It is the duty of a railroad company to provide facilities for the transportation of goods, but this duty is not an absolute one, the company must furnish cars sufficient to transport goods offered in the usual and ordinary course of business, but it is not bound to anticipate and prepare for an unexpected press of business. *Central of Ga. Ry. v. George P. Greene & Co.*, 41 Ga. App. 794, 154 S.E. 809 (1930).

Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier's line. But that is not an absolute right, and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made, and which it could not reasonably have been expected to meet in full. *Central of Ga. Ry. v. George P. Greene & Co.*, 41 Ga. App. 794, 154 S.E. 809 (1930).

Character of goods. — There may be things of such an unusual character that a railroad company is not bound, under its general duty as a common carrier, to provide cars or special facilities for their transportation. But if in the ordinary course of its business it is accustomed to receive lumber which requires cars 40 feet in length for transportation, or holds itself out as a com-

mon carrier thereof, the duty to furnish cars for that purpose arises. *Wadley S. Ry. v. Kent & Downs*, 145 Ga. 689, 89 S.E. 765 (1916).

Carrier's regulations must yield to state's regulations. — Power of common carrier to make reasonable regulations must yield where regulations are made by authority of state, unless they are invalid. *Railroad Comm'n v. Louisville & N.R.R.*, 140 Ga. 817, 80 S.E. 327, 1915E L.R.A. 902, 1915A Ann. Cas. 1018 (1913).

Regulation requiring knowledge of goods valid. — A carrier may adopt reasonable rules and regulations for the carrier's own safety and the benefit of the public, such as requiring the nature and value of the goods delivered to the carrier to be made known, and any fraudulent acts, sayings or concealments by the carrier's customers, will release the carrier from liability. *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783 (1867).

Regulation providing for nonstoppage at certain place valid. — If a railway company may under former Civil Code 1910, § 2729 (see O.C.G.A. § 46-9-40) make reasonable regulations in the conduct of its business, in the absence of a statute to the contrary a schedule which provided for the nonstoppage of a certain train at a particular place will not be considered unreasonable, where it appeared that other trains were scheduled to stop at such place, and it was not alleged that they did not afford adequate service. *Southern Ry. v. Bailey*, 143 Ga. 610, 85 S.E. 847, 1915E L.R.A. 1043 (1915).

Regulation permitting stopping only at designated places valid. — In the absence of statutory prohibition or regulation, a railroad company may adopt a rule under former Civil Code 1910, § 2729 (see O.C.G.A. § 46-9-40), that certain passenger trains, running regularly on its road, will stop only at designated places. *Southern Ry. v. Flanigan*, 10 Ga. App. 745, 74 S.E. 85 (1912).

Regulation requiring reservation of ship space valid. — Under former Civil Code 1910, § 2729 (see O.C.G.A. § 46-9-40) it was held that a rule that ship space must be reserved before lumber cars were switched from railroad yards to ship docks was reasonable. *Central of Ga. Ry. v. Dixon*, 141 Ga. 755, 82 S.E. 37 (1914).

Rule stipulating no responsibility until goods received with instructions valid. — A rule that no responsibility for freight would be assumed until received with proper shipping instructions and receipted for, was valid. *Central of Ga. Ry. v. Smith*, 31 Ga. App. 135, 120 S.E. 30 (1923).

Use of rules to relieve legal obligations impermissible. — The law will not sanction any practice of a common carrier, under the guise of regulating its business, that will relieve the carrier of its legal obligation. *Merchants & Miners Transp. Co. v. Granger & Lewis*, 132 Ga. 167, 63 S.E. 700 (1909).

Invalid ordinance impermissible as excuse for nonreception of goods. — A common carrier, able and accustomed to transport and deliver goods, cannot lawfully refuse to do so merely because of the passage of an invalid municipal ordinance regulating the transporting of the goods in question. *Southern Express Co. v. Rose Co.*, 124 Ga. 581, 53 S.E. 185, 5 L.R.A. (n.s.) 619 (1906).

Mandamus to enforce duty of carrier. — A private party may, by mandamus, enforce the performance of the public duty imposed by former Civil Code 1895, § 2278 (see O.C.G.A. § 46-9-40) by a common carrier as to matters in which such party had a special interest. *Southern Express Co. v. Rose Co.*, 124 Ga. 581, 53 S.E. 185, 5 L.R.A. (n.s.) 619 (1906).

Common carrier by sea may make bookings for transportation of goods. — The obligation of receiving goods without preference under former Civil Code 1895, § 2278 (see O.C.G.A. § 46-9-40) did not inhibit common carrier by sea from making bookings, that was, from making specific arrangements for the transportation of goods by a particular vessel in advance of its sailing day, provided this privilege was indifferently extended to all patrons, or if the grant of this privilege to shippers of one commodity did not interfere with the carrier's discharge of its duty to the shippers of other commodities with respect to the receipt and transportation of goods. *Ocean S.S. Co. v. Savannah Locomotive Works & Supply Co.*, 131 Ga. 831, 63 S.E. 577, 127 Am. St. R. 265, 20

L.R.A. (n.s.) 867, 15 Ann. Cas. 1044 (1909); *Merchants & Miners Transp. Co. v. Granger & Lewis*, 132 Ga. 167, 63 S.E. 700 (1909).

Liability of carrier for conversion. — Where a common carrier received goods offered under former Civil Code 1895, § 2278 (see O.C.G.A. § 46-9-40), the possession thereof by the person offering the same as freight being apparently rightful, though as a matter of fact it may not be actually so, the carrier will not be liable as for a conversion, in an action brought by the true owner, unless the latter intervened before the goods were delivered and demanded them or gave notice of the owner's right to the property in question and of the owner's intention to enforce it. *Shellnut v. Central of Ga. Ry.*, 131 Ga. 404, 62 S.E. 294, 18 L.R.A. (n.s.) 494 (1908).

Jury instructions. — The court having charged the jury in the language of former Civil Code 1910, § 2729 (see O.C.G.A. § 46-9-40), as to the duty of a common carrier generally, it was not error not to repeat the expression "which he is able and accustomed to carry" in other portions of the judge's charge dealing with the duty of a railroad company to furnish cars for transportation of freight without unreasonable delay. *Wadley S. Ry. v. Kent & Downs*, 145 Ga. 689, 89 S.E. 765 (1916).

Considerations for jury. — The condition of business, the demand for cars, whether usual and ordinary, or unusual and extraordinary, what the defendant had done with a view of providing facilities for the usual and ordinary demands of its business, and the ability or inability to get cars at the time in question, were facts for the consideration of the jury in determining whether the defendant had complied with its duty. *Wadley S. Ry. v. Kent & Downs*, 145 Ga. 689, 89 S.E. 765 (1916).

Cited in *Miller & Co. v. Georgia R.R. & Banking Co.*, 88 Ga. 563, 15 S.E. 316 (1891); *Southern Ry. v. Watson*, 110 Ga. 681, 36 S.E. 209 (1900); *Southern Ry. v. Moore*, 133 Ga. 806, 67 S.E. 85, 26 L.R.A. (n.s.) 851 (1910); *Beck & Gregg Hdwe. Co. v. Cook*, 210 Ga. 608, 82 S.E.2d 4 (1954).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 294, 300, 305, 313.

C.J.S. — 13 C.J.S., Carriers, § 386.

46-9-41. Duty of common carriers to transport and deliver goods safely and without unreasonable delay.

A common carrier shall have the duty of transporting and delivering goods safely and without unreasonable delay. (Laws 1847, Cobb's 1851 Digest, p. 398; Code 1863, § 2045; Code 1868, § 2047; Code 1873, § 2073; Code 1882, § 2073; Civil Code 1895, § 2282; Civil Code 1910, § 2736; Code 1933, § 18-311.)

JUDICIAL DECISIONS

Reasonable time implied. — Where the bills of lading are silent as to the time within which delivery was to be made, the law presumes it was to be done in a reasonable time, and parol evidence is not admissible to negative this presumption by showing that a definite and specific time was agreed upon either expressly or by implication. *Central R.R. v. Hasselkus & Stewart*, 91 Ga. 382, 17 S.E. 838, 44 Am. St. R. 37 (1892).

Extraordinary diligence not required as to time of transportation. — Where a common carrier receives goods for transportation and is sued for delay in delivering them, it is error to charge that the carrier is bound to extraordinary diligence as to the time of transportation. Ordinary and reasonable diligence is the rule. *Johnson & Shahan v. East Tenn., Va. & Ga. Ry.*, 90 Ga. 810, 17 S.E. 121 (1893).

Liability of connecting carrier. — Where a railroad company receives goods on a contract made with the owner or the owner's agent, to carry them to their destination beyond the terminus of that company's line, and while in the course of transportation they come into the hands of a connecting railroad company by whose negligence there is unreasonable delay in delivering them at destination, the latter is liable in an action of tort for the delay, although there be no contract relations between the two companies nor any contract between the owner of the goods and the company causing the damage. *Johnson & Shahan v. East Tenn., Va. & Ga. Ry.*, 90 Ga. 810, 17 S.E. 121 (1893).

Delivering carrier not liable to consignee for delays caused by consignor's instructions. — Where a car of tin cans and cartons is delivered to an initial carrier which routes the car either upon its own judgment or at the direction of the consignor, a delivering

carrier, other than the initial carrier, is not liable to the consignee for delay due to the routing of the car, even if the agent of the delivering carrier knew of the purpose for which the cans were needed by the consignee, and of the delay which would be caused by the routing of the car as it was routed, and even agreed with the consignee to route it so as not to cause delay. *Pollard v. Jeffers-Bonner Co.*, 66 Ga. App. 757, 19 S.E.2d 188 (1942).

Acceptance of portion of goods not waiver of claim for delay. — Mere acceptance of a portion of the goods shipped by railroad, on arrival at their destination, is not a waiver of all claim for loss resulting from delay. *Georgia R.R. v. Cole & Co.*, 68 Ga. 623 (1882).

Delay where goods retained for payment of freight. — There can be no recovery for damage to the goods sustained without fault or negligence of the carrier, while they were rightfully detained to await payment as preliminary to making a delivery to the consignee. *Georgia R.R. & Banking v. Murrah*, 85 Ga. 343, 11 S.E. 779 (1890).

Evidence to show what is reasonable time. — The law implies a reasonable time; but aliunde evidence must be invoked to show what is a reasonable time. *Rome R.R. v. Sullivan, Cabot & Co.*, 32 Ga. 400 (1861).

Determining reasonable time of delivery is jury question. — Whether goods shipped are delivered by carrier within reasonable time is question of fact for the jury, and depends on the facts of each case. *Columbus & W. Ry. v. Flournoy & Epping*, 75 Ga. 745 (1885); *Flowers v. Georgia N. Ry.*, 32 Ga. App. 52, 122 S.E. 647 (1924); *Central of Ga. Ry. v. Griner & Rustin*, 33 Ga. App. 705, 127 S.E. 878 (1925).

Cited in *Bryant & Lockett v. Southwestern R.R.*, 68 Ga. 805 (1882); *Southern Ry. v.*

Moore, 133 Ga. 806, 67 S.E. 85, 26 L.R.A. (n.s.) 851 (1910).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 408, 409, 412, 415, 416.

C.J.S. — 13 C.J.S., Carriers, § 454.

ALR. — Provision in carrier's contract requiring notice of damage or loss, as applicable to loss of market due to delay, 1 ALR 538.

What constitutes delivery of freight to carrier, 22 ALR 970; 113 ALR 1459.

Carrier's liability for delay, or damages incident to delay, in transportation, due to strike, 28 ALR 503; 45 ALR 919.

Demurrage as affected by notice by carrier to consignee, 37 ALR 1334.

Carrier's liability to passenger for failure to keep trains to schedule time, 52 ALR 1332.

Liability of carrier or other bailee because of misinformation as to time or place of arrival or storage of goods, 56 ALR 1382.

Deviation by carrier in transportation of property, 33 ALR2d 145.

46-9-42. Effect of strike by carrier's employees on carrier's duty to transport goods.

A carrier who receives freight for shipment is bound to forward the freight within a reasonable time, even though his employees strike or otherwise refuse to work, provided that if the strike is accompanied with violence and intimidation so as to render it unsafe to forward the freight, the carrier shall be relieved as to liability for delay in delivering the freight, if the violence and armed resistance are of such character as could not be overcome by the carrier or controlled by the civil authorities when called upon by him. (Civil Code 1895, § 2283; Civil Code 1910, § 2737; Code 1933, § 18-312.)

History of section. — The language of this section is derived in part from the decision

in *Haas v. Kansas City F.S. & G.R.R.*, 81 Ga. 792, 7 S.E. 629 (1888).

JUDICIAL DECISIONS

Section not applicable where delay due to carrier's failure to replace strikers. — Granting that the defendant railroad company could relieve itself from liability by showing that every possible effort was promptly made to secure other employees in lieu of those who had violated their obligations to their employer by striking, the proof offered fell far short of due diligence in this respect. If the company's engineers wrongfully refused to do their duty, certainly it was incumbent upon the railroad officials to discharge them and use every endeavor to secure new men who were competent and willing to perform the services they ought to have rendered. It did not appear that the officers

of the company made any attempt whatever to do this; and however great their embarrassment may have been, if they voluntarily elected, for any cause, to retain in the service of the company employees who openly and willfully refused to properly attend to the duties devolving upon them, the company must be held answerable for any loss to its patrons which they may have suffered in consequence. *Central R.R. & Banking Co. v. Georgia Fruit & Vegetable Exch.*, 91 Ga. 389, 17 S.E. 904 (1893) (decided under former law).

Where a railroad company receives freight for shipment, and its employees strike or cease to work for the company, it is still

bound to forward the freight within a reasonable time; but if the strike is accompanied with violence and intimidation, so as to render it unsafe to forward the freight, the company is thereby relieved from liability for delay, especially when the resistance made by the strikers is of such a character as could not be overcome by the company, or con-

trolled by the civil authorities when called upon by it. *Haas v. Kansas City & C. R.R. Co.*, 81 Ga. 792, 7 S.E. 629 (1888) (decided under former law).

Cited in *Southern Cotton-Oil Co. v. Louisville & N.R.R.*, 15 Ga. App. 751, 84 S.E. 198 (1915).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 420.

C.J.S. — 13 C.J.S., Carriers, §§ 387, 441.

ALR. — Liability of carrier for loss of, or damage to, freight by acts of mob or strikers, 20 ALR 262.

Strike as affecting obligation of carrier under contract to discharge vessel or unload cars, 26 ALR 309.

Carrier's liability for delay, or damages incident to delay, in transportation, due to strike, 28 ALR 503; 45 ALR 919.

46-943. Measure of damages for delay in delivery of goods by carrier.

If a carrier fails to deliver goods within a reasonable time, the measure of damages is the difference between the market value at the time and place they should have been delivered and the market value at the time of actual delivery. (Civil Code 1895, § 2319; Civil Code 1910, § 2773; Code 1933, § 18-313.)

History of section. — The language of this section is derived in part from the decisions in *Columbus & W. Ry. v. Flournoy & Epping*, 75 Ga. 745 (1885); *Atlanta & W.P.R.R. v.*

Texas Grate Co., 81 Ga. 602, 9 S.E. 600 (1888); and *East Tenn., V. & Ga. Ry. v. Johnson & Shahan*, 85 Ga. 497, 11 S.E. 809 (1890).

JUDICIAL DECISIONS

General rule stated. — The general rule is that the measure of damages for unreasonable delay by a common carrier in the delivery of goods shipped is the difference between their market value when they should have been delivered and their market value when they were delivered, with interest from the former date, less the freight, if unpaid. Mere unreasonable delay in transporting does not amount to conversion, so as to authorize the consignee, upon the arrival of the goods, to reject them and sue for their full value. The owner's remedy is to sue for the damages the owner has sustained by reason of the delay. *Atlanta Coast Line R.R. v. Tifton Produce Co.*, 179 Ga. 624, 176 S.E. 624 (1934), answer conformed to 50 Ga. App. 614, 179 S.E. 125 (1935).

The correct measure of damage is ordinarily the difference in the market value of

the fruit at the point of shipment at the time the cars should have been furnished, and at the time they were actually furnished. *Central of Ga. Ry. v. George P. Greene & Co.*, 41 Ga. App. 794, 154 S.E. 809 (1930).

Mitigation of damages. — Where at the time of trial shipper had recovered the goods, the measure of its damages would be that for failure of the carrier to deliver the goods within a reasonable time, i.e., the difference between the market value at the time and place they should have been delivered and the market value at the time of actual delivery. The fact that the shipment on which the carrier claimed a lien was eventually returned to the shipper by court order before trial, and that shipper was able to sell it, would be relevant only in mitigation of the damages. *Esquire Carpet Mills, Inc. v. Kennesaw Transp., Inc.*, 186 Ga. App.

367, 367 S.E.2d 569 (1988).

Damage rule not strictly applicable where goods destroyed. — The rule of damages under former Civil Code 1910, § 2773 (see O.C.G.A § 46-9-43) did not strictly apply to an action for the recovery of the value of potatoes that have been totally destroyed. *Louisville & N.R.R. v. Lovelace*, 26 Ga. App. 286, 106 S.E. 6 (1921).

Recovery for full value where carrier negligently delays delivery. — Where the evidence showed that at the time of the actual delivery the goods had been rendered valueless by the negligent delay of the carrier, under former Civil Code 1895, § 2319 (see O.C.G.A § 46-9-43), a recovery for the full value of the goods when and where they should have been delivered would be up-

held. *Southern Express Co. v. Briggs*, 1 Ga. App. 294, 57 S.E. 1066 (1907).

Contract contrary to section not valid. — A common carrier cannot by special contract relieve itself from the measure of damages under former Civil Code 1910, § 2773 (see O.C.G.A § 46-9-43), where the goods were damaged by reason of its negligence. *Seaboard Air-Line Ry. v. Pruitt*, 24 Ga. App. 748, 102 S.E. 182 (1920).

Cited in *Americus Grocery Co. v. Brackett & Co.*, 119 Ga. 489, 46 S.E. 657 (1904); *Western & A.R.R. v. Summerour*, 139 Ga. 545, 77 S.E. 802 (1913); *Southern Ry. v. Bloch*, 18 Ga. App. 767, 90 S.E. 656 (1916); *Southern Ry. v. Bunch*, 25 Ga. App. 45, 102 S.E. 462 (1920).

RESEARCH REFERENCES

ALR. — Provision in carrier's contract requiring notice of damage or loss, as applicable to loss of market due to delay, 1 ALR 538.

Measure and elements of damages for loss or delay in delivering baggage of traveling salesman, 25 ALR 76.

Carrier's liability for delay, or damages incident to delay, in transportation, due to strike, 28 ALR 503; 45 ALR 919.

Liability of carrier for loss of profits due to failure to deliver or delay in delivering goods to salesman, 42 ALR 711.

Measure of damages for carrier's conversion of goods, 56 ALR 1171.

Liability of carrier or other bailee because of misinformation as to time or place of arrival or storage of goods, 56 ALR 1382.

Wholesale or retail price as measure of damages against carrier for loss of goods, 67 ALR 1427.

Liability of carrier to punitive damages with respect to subject of interstate shipment, 107 ALR 1446.

When carrier put upon notice that delay in transportation or delivery will cause special damages, 166 ALR 1034.

Shipper's misdescription of goods as affecting carrier's liability for loss or damage, 1 ALR3d 736.

46-9-44. Estoppel of carrier to dispute title to goods delivered to him for shipment.

A carrier may not dispute the title of the person delivering goods to him by setting up adverse title in himself or a title in third persons which is not being enforced against him. (Orig. Code 1863, § 2048; Code 1868, § 2050; Code 1873, § 2076; Code 1882, § 2076; Civil Code 1895, § 2286; Civil Code 1910, § 2740; Code 1933, § 18-305.)

JUDICIAL DECISIONS

Section may allow bailee to dispute bailor's title. — Former Code 1868, § 2050 (see O.C.G.A § 46-9-44) qualified the general rule that a bailee cannot deny the title of a bailor, and that the recognition of a vendee

of the bailor as the owner, puts the bailee in the same position, as to the vendee, as the bailee was to the original bailor, so far as to permit the bailee to do this, if there is an outstanding title actually being enforced

against the bailee. *Patten v. Baggs*, 43 Ga. 167 (1871).

True owner must assert rights. — In accordance with the provisions of former Civil Code 1895, § 2286 (see O.C.G.A § 46-9-44), a common carrier was not liable to the true owner, in an action of conversion, unless the true owner has given notice or asserted the owner's rights before delivery. *Shellnut v. Central of Ga. Ry.*, 131 Ga. 404, 62 S.E. 294, 18 L.R.A. (n.s.) 494 (1908).

Defense of constructive delivery to true owner. — A carrier can excuse constructive delivery to a stranger only by showing in accordance with former Civil Code 1895, § 2286 (see O.C.G.A § 46-9-44) that the carrier was in fact the true owner of the freight and asserted the carrier's claim thereto before delivery could be made to the consignee for whom the shipment was in-

tended. *Atlantic & B. Ry. v. Howard Supply Co.*, 125 Ga. 478, 54 S.E. 530 (1906).

Right of action by agent of undisclosed principal. — Under former Civil Code 1895, § 2286 (see O.C.G.A § 46-9-44), it had been held that a person who, having in charge as agent the goods of another, made with a common carrier a contract to ship such goods, in which the agency was not disclosed, may maintain an action in the person's own name for a breach of such contract. *Carter v. Southern Ry.*, 111 Ga. 38, 36 S.E. 308, 50 L.R.A. 354 (1900).

Cited in *Wallace v. Mathews*, 39 Ga. 617, 99 Am. Dec. 473 (1869); *Inman & Co. v. Seaboard Air Line Ry.*, 159 F. 960 (S.D. Ga. 1908); *Central of Ga. Ry. v. Rabun*, 21 Ga. App. 402, 94 S.E. 598 (1917); *Central of Ga. Ry. v. George P. Greene & Co.*, 41 Ga. App. 794, 154 S.E. 809 (1930).

46-9-45. Commencement and termination of carrier's responsibility for goods.

The responsibility of a carrier shall commence with the delivery of the goods to him or to his agent or at the place where the carrier is accustomed or agrees to receive them. The carrier's responsibility shall cease with the delivery of the goods at destination according to the direction of the person sending the goods or according to the custom of the trade. (Orig. Code 1863, § 2043; Code 1868, § 2044; Code 1873, § 2070; Code 1882, § 2070; Civil Code 1895, § 2279; Civil Code 1910, § 2730; Code 1933, § 18-306.)

JUDICIAL DECISIONS

"Custom of trade" defined. — The custom of the trade refers to the custom "at destination." *Albany & N. Ry. v. Merchants & Farmers Bank*, 137 Ga. 391, 73 S.E. 637 (1912).

Point of which common carrier's responsibility as insurer commences. — Responsibility of common carrier as insurer of goods commences where there is complete delivery for the purpose of immediate transportation. *Bell v. Fitz*, 78 Ga. App. 28, 50 S.E.2d 241 (1948).

Carrier liable for delivery of goods within reasonable time. Reception of goods to be carried makes carrier liable for their safe custody and transportation within a reasonable time; if the carrier would relieve oneself from liability, the carrier should, by proof, show such facts as may be necessary for that

purpose. *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783 (1867).

Liability of the common carrier exists only, in the absence of an express or implied contract to the contrary, when the carrier is in complete possession and control of the goods for immediate shipment with nothing remaining to be done by the shipper to complete the consignment to the shipper for the purpose of carriage, and only until the goods are delivered to their destination and notice given to the consignee. *Bell v. Fitz*, 78 Ga. App. 28, 50 S.E.2d 241 (1948).

Status as carrier or warehouseman distinguished. — If a common carrier receives goods into the carrier's own warehouse for the accommodation of oneself and the carrier's customers, so that the deposit there is a mere accessory to the carriage and for the

purpose of facilitating it, the carrier's liability as a carrier will commence with the receipt of the goods; but, on the contrary, if the goods when so deposited are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage to the place of destination until something further is done, or some further direction is given or communication made concerning them by the owner, or consignor, the deposit must be considered to be in the meantime for the carrier's convenience and accommodation, and the receiver, until some change takes place, will be responsible only as a warehouseman. *Bell v. Fitz*, 78 Ga. App. 28, 50 S.E.2d 241 (1948).

The relation of shipper and carrier does not begin between the owner of goods and a railway company, though the former may have delivered the goods to the latter, if after such delivery anything required, either by law or the contract, remains to be done by the shipper, and in such case the rights and liability of the company are those only of a warehouseman. *Bell v. Fitz*, 78 Ga. App. 28, 50 S.E.2d 241 (1948).

Usage or course of dealing may imply duty of safe-keeping. — Contract imposing upon carrier exclusive duty of safekeeping may be implied by usage or a course of dealing between the parties; but the implication that the carrier assumes the duty of immediate transportation and so responsibility as an insurer, without knowing to what place and to whom goods are to be shipped, must be clear. *Bell v. Fitz*, 78 Ga. App. 28, 50 S.E.2d 241 (1948).

Shipping directions essential to complete delivery. — Giving of shipping directions, expressly or impliedly, is essential to complete delivery which causes the liability of the carrier as an insurer to arise. *Bell v. Fitz*, 78 Ga. App. 28, 50 S.E.2d 241 (1948).

Loading car on sidetrack as delivery. — Where a railroad company, in pursuance of an agreement with a warehouse company, places one of its cars on a sidetrack in front of the warehouse, for the purpose of having the car loaded with cotton stored in the warehouse, for immediate shipment, the railroad company to pay for the work of loading, and the cotton was loaded onto the car by employees of the warehouse company, properly marked as to destination, and with name of consignor and consignee, this was a

delivery under former Civil Code 1910, § 2730 (see O.C.G.A. § 46-9-45) to the railroad company as a common carrier of the cotton, and the railroad company would be responsible to the owner of the cotton for its destruction by fire while in its possession. *Central of Ga. Ry. v. Bird*, 10 Ga. App. 423, 73 S.E. 599 (1912).

Removing car from sidetrack. — There is nothing in the laws or public policy of this state which prevents a shipper and a railroad company from making a contract in relation to the use of a sidetrack, wherein it is agreed that, as to cars loaded by the shipper on the sidetrack, delivery to the carrier is understood to have taken place whenever the carrier removes the car from the sidetrack and places it in its freight train for shipment. *Bainbridge Grocery Co. v. Atlantic Coast Line R.R.*, 8 Ga. App. 677, 70 S.E. 154 (1911).

Reception of goods at depot. — If the agent of a carrier agreed to receive goods at the depot where they were at the time, the liability as a common carrier began under former Code 1863, § 2043 (see O.C.G.A. § 46-9-45). *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783 (1867).

Delivery to carrier must be proved. — Delivery of the goods must be proved in order to charge a common carrier for their loss. It is a fact for the jury to determine, and if there is any evidence of delivery, the case will go to the jury on that fact. *Dibble v. Brown & Harris*, 12 Ga. 217, 56 Am. Dec. 460 (1852).

Ending responsibility as carrier. — As a general rule a railroad company is responsible as common carrier only for the safe deposit of goods shipped by freight upon the platform or in the warehouse of the road at the end of their transit, there to await delivery to the consignee when the consignee should call for them; and from the time of such deposit, even without notice by the carrier to the consignee, the liability of the railway is usually changed from that of a common carrier to that of a warehouseman. *Georgia & A. Ry. v. Pound*, 111 Ga. 6, 36 S.E. 312 (1900).

Where goods were shipped by railway, and arrive at their destination within the usual time required for transportation, and were there deposited by the company in a place of safety and held by them ready to be deliv-

ered on demand, their liability as common carriers ceased under former Code 1868, § 2044 (see O.C.G.A § 46-9-45) (unless the custom of the trade was shown to be otherwise as to delivery), and that of warehouseman began. *Southwestern R.R. v. Felder*, 46 Ga. 433 (1872); *Kight v. Wrightsville & T.R.R.*, 127 Ga. 204, 56 S.E. 363 (1906); *Allen v. Southern Ry.*, 33 Ga. App. 209, 126 S.E. 722 (1924).

Delivery of loaded cars to consignee. — Under former Civil Code 1910, § 2730 (see O.C.G.A § 46-9-45), it was held that the carrier's relation as such ceased on delivery of loaded cars to the consignee, and until it retook possession of the cars after unloading. The railroad was not liable, therefore for a destruction of the cars by fire. *Central of Ga. Ry. v. Milledgeville Ry.*, 138 Ga. 434, 75 S.E. 614 (1912).

Notice to consignee. — The law nowhere imposes upon common carriers the obligation of notifying consignees of the arrival of their freight at the point of destination; provided, it has arrived in the due course of transportation. *Southwestern R.R. v. Felder*, 46 Ga. 433 (1872); *Georgia & A. Ry. v. Pound*, 111 Ga. 6, 36 S.E. 312 (1900).

If goods arrive out of time, and after they have been demanded by the consignee, it might require notice of their arrival to the consignee, and a reasonable time after, to relieve the company from the extraordinary liability imposed by law upon a common carrier. *Southwestern R.R. v. Felder*, 46 Ga. 433 (1872).

Delivery at destination to agent. — A delivery of goods to the duly authorized agent of the owner or assignee is a good delivery. *Southern Express Co. v. Everett*, 37 Ga. 688 (1868).

Goods remaining in car after verification at destination. — Where a railroad company has transported a carload of goods and notified the consignee of their arrival, the delivery is complete when the agent of the consignee verifies the goods in the car and gives a receipt for the same; and where the agent of the consignee removes most of the goods, but leaves some in the car on account of approaching night, and the car is broken open after having been closed and sealed by the agent of the railroad company, and some of the goods stolen therefrom, the railroad company, if liable at all, is liable only for

gross neglect, as a gratuitous bailee. *Allen v. Southern Ry.*, 33 Ga. App. 209, 126 S.E. 722 (1924).

Delivery beyond terminus. — Whether a railroad company is bound to carry or transport goods to a point of destination beyond the terminus of its road, depends upon the contract between the parties. *Savannah, F. & W. Ry. v. Collins*, 77 Ga. 376, 3 S.E. 416, 4 Am. St. R. 87 (1886).

Boat landing as destination. — If the owner of a boat directs cotton to be left at a particular landing on the river, agreeing to receive it there, a deposit of the cotton at that place constitutes a good delivery. *Fleming v. Hammond*, 19 Ga. 145 (1855).

Parol evidence of custom not admissible to vary contract. — Under former Civil Code 1910, § 2730 (see O.C.G.A § 46-9-45), parol evidence of usage and custom to vary the terms of a plain, unambiguous written contract was not admissible. *Albany & N. Ry. v. Merchants & Farmers Bank*, 137 Ga. 391, 73 S.E. 637 (1912).

Proving custom as to notice. — In order to show the existence of a custom varying the general rule as announced in former Civil Code 1895, § 2279 (see O.C.G.A § 46-9-45) at a particular place, by reason of the railroad company having observed a usage of notifying consignees of the arrival of goods, it must be affirmatively proved that this usage was of an established and general nature. *Georgia & A. Ry. v. Pound*, 111 Ga. 6, 36 S.E. 312 (1900); *Seaboard Air-Line Ry. v. Salios*, 14 Ga. App. 711, 82 S.E. 59 (1914).

Chartered car. — In the case of a chartered car, as in other cases of carriage of freight, the responsibility was that prescribed by former Code 1873, § 2070 (see O.C.G.A § 46-9-45). *Central R.R. & Banking Co. v. Anderson*, 58 Ga. 393 (1877).

Measure of damages. — When a common carrier fails to deliver goods according to the terms of the contract, the measure of damages is the value of the goods at the time and place at which it is agreed to deliver them, less the transportation charges. *Edward T. Taylor & Co. v. Collier*, 26 Ga. 122 (1858); *Albany & N. Ry. v. Merchants & Farmers Bank*, 137 Ga. 391, 73 S.E. 637 (1912); *Lamb v. McHan*, 17 Ga. App. 5, 86 S.E. 252 (1915).

Delivery presents jury question. — As to what constitutes a good delivery, under the facts of a case is a question for the jury.

Central R.R. & Banking Co. v. Hines, Perkins & Co., 19 Ga. 203 (1856).

Cited in Baugh v. McDaniel & Strong, 42 Ga. 641 (1871); Central of Ga. Ry. v. Leverette, 34 Ga. App. 304, 129 S.E. 292

(1925); Powell v. First Nat'l Bank, 58 Ga. App. 648, 199 S.E. 668 (1938); Washburn Storage Co. v. Elliott, 93 Ga. App. 456, 92 S.E.2d 28 (1956).

RESEARCH REFERENCES

ALR. — Duty of carrier to deliver goods on siding or private track of consignee, 1 ALR 1425.

Carrier: delivery of goods to one whose authority to act for consignee has ceased, 2 ALR 279.

Rights and duties of carrier and consignee as to freight unloaded from cars and left on right of way, 38 ALR 676.

Carrier's employees as agents of shipper or consignee in unloading or caring for livestock at destination, 62 ALR 525.

What constitutes delivery of freight to carrier, 113 ALR 1459.

Consignee's refusal to accept delivery at place specified in the contract, or carrier's

inability to make delivery at that place, as terminating liability as carrier, 149 ALR 1118.

Initial carrier's liability as that of carrier or of warehouseman in respect of goods while in its warehouse awaiting delivery to connecting carrier, 172 ALR 802.

Shipper's misdescription of goods as affecting carrier's liability for loss or damage, 1 ALR3d 736.

Liability of carrier by land for damage to goods resulting from improper packing by carrier, 7 ALR3d 723.

Liability of carrier for delivering goods sent C.O.D. without receiving cash payment, 27 ALR3d 1320.

46-9-46. Effect of delivery to consignee at intermediate point.

A common carrier may recover pro rata for the actual distance transported when the consignee voluntarily receives the goods at an intermediate point. (Orig. Code 1863, § 2049; Code 1868, § 2051; Code 1873, § 2077; Code 1882, § 2077; Civil Code 1895, § 2287; Civil Code 1910, § 2741; Code 1933, § 18-307.)

JUDICIAL DECISIONS

Origin of section. — Former Civil Code 1895, § 2287 did not have its origin in a statute of this state. It appears for the first time in the Code of 1863. It has, however, all the binding effect of an original act of the legislature, because of the adoption by the

legislature of the Codes wherein it appears. Central of Ga. Ry. v. State, 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518 (1898); Wilensky v. Central of Ga. Ry., 136 Ga. 889, 72 S.E. 418, 1912D Ann. Cas. 271 (1911).

RESEARCH REFERENCES

ALR. — Rights and duties of carrier and consignee as to freight unloaded from cars and left on right of way, 38 ALR 676.

46-9-47. Fraud on carrier as to nature and value of goods.

A carrier may require the nature and value of the goods delivered to him to be made known, and any fraudulent acts, sayings, or concealment by his

customers will release him from liability. (Orig. Code 1863, § 2051; Code 1868, § 2054; Code 1873, § 2080; Code 1882, § 2080; Civil Code 1895, § 2290; Civil Code 1910, § 2744; Code 1933, § 18-309.)

JUDICIAL DECISIONS

Carrier expected to require disclosure to nature and value of goods delivered. — Former Civil Code 1895, § 2290 (see O.C.G.A § 46-9-47) contemplated requirement by carrier, not a general duty on the part of the shipper to disclose, without such requirement. *Southern Express Co. v. Hanaw*, 134 Ga. 445, 67 S.E. 944, 137 Am. St. R. 227 (1910).

Method of packing articles as legal fraud. — Where the shipper resorts to any artifice, to give a box, containing a valuable diamond breast-pin, a mean appearance, thereby, to induce the carrier to think it of trifling value, it was a legal fraud upon the carrier, which under former Code 1863, § 2051 (see O.C.G.A § 46-9-47) would relieve the carrier from liability. *Southern Express Co. v. Everett*, 37 Ga. 688 (1868).

Value of article may require voluntary disclosure. — A shipper tendering to a carrier for transportation of an article of an unusual value, not apparent from a casual inspection of the package as tendered, is in duty bound to disclose to the carrier the

nature or the value of the article. Under former Civil Code 1895, § 2290 (see O.C.G.A § 46-9-47) a failure so to disclose, would absolve the carrier from liability for the loss of the property; and this is also true, under the interstate commerce law. *Southern Express Co. v. Pope*, 5 Ga. App. 689, 63 S.E. 809 (1909).

Jewelry and wearing apparel not properly characterized as household goods. — Where the statement was made that bundles contained household goods, but in fact a considerable portion of the articles delivered were jewelry or ornaments and wearing apparel, under former Code 1882, § 2080 (see O.C.G.A § 46-9-47) no recovery can be had for the latter articles if lost. *Charleston & S. Ry. v. Moore*, 80 Ga. 522, 5 S.E. 769 (1888).

Cited in *Fish v. Chapman & Ross*, 2 Ga. 349 (1847); *Southern Express Co. v. Newby*, 36 Ga. 635 (1867); *Georgia R.R. & Banking v. Keener*, 93 Ga. 808, 21 S.E. 287 (1894); *Wood v. Southern Express Co.*, 95 Ga. 451, 22 S.E. 535 (1895); *Central of Ga. Ry. v. Hall*, 124 Ga. 322, 52 S.E. 679 (1905).

RESEARCH REFERENCES

ALR. — Liability of carrier for misrepresenting subject or character of shipment, 38 ALR 1446.

46-9-48. Adjustment and payment by common carriers of claims for loss of property or overcharge for freight; effect of failure by common carrier to adjust and pay claim.

Every claim for loss of or damage to property, or for overcharge for freight, for which any common carrier of household goods may be liable shall be adjusted and paid by such common carrier within 90 days after such claim, duly verified by the claimant or his or her agent, has been filed with the agent of the initial carrier or with the agent of the carrier upon whose line the loss, damage, or overcharge actually occurred. If such claim is not adjusted and paid within the time prescribed in this Code section, the carrier shall be liable for interest thereon at the legal rate from the date of the filing of the claim until the payment thereof, and shall also be liable for a civil penalty of \$50.00 for every such failure to adjust and pay said claim,

to be recovered by the party damaged, provided that unless such claimant in such action recovers the full amount claimed, no penalty shall be recovered, but the recovery shall be limited to the actual loss or damage or overcharge, with interest thereon from the date of filing said claim. (Ga. L. 1889, p. 136, § 1; Civil Code 1895, § 2316; Ga. L. 1906, p. 102, § 2; Civil Code 1910, §§ 2770, 2778; Code 1933, § 18-319; Ga. L. 1996, p. 950, § 6.)

JUDICIAL DECISIONS

Constitutionality. — Former Civil Code 1910, §§ 2770 and 2778 (see O.C.G.A. § 46-9-48) was constitutional. *Southern Ry. v. Lowe*, 139 Ga. 362, 77 S.E. 44 (1913).

Carrier's liability to shipper for overcharge. — Independently of Ga. L. 1906, p. 102, § 2 (see O.C.G.A. § 46-9-48), carrier is liable to action by shipper for recovery of overcharge of freight which such shipper has paid, under protest, in order to obtain the shipper's goods and which the carrier refused to repay on demand. *Southern Ry. v. Schlittler*, 1 Ga. App. 20, 58 S.E. 59 (1907).

Verified claim must be filed for recovery of penalty. — It was condition precedent to recovery of penalty under former Code 1933, § 18-319 (see O.C.G.A. § 46-9-48) that verified claim be filed as provided, unless this requirement was waived by the carrier either expressly or impliedly. *Southern Ry. v. Turner*, 75 Ga. App. 219, 42 S.E.2d 790 (1947).

Waiver of contract notice provisions. — Where a contract of shipment requires the owner or shipper to give notice in writing of any damage to the shipment before it is unloaded, such stipulation may be waived. If the carrier's agent, without objection to the form of the notice, receives and acts upon an oral notice, a waiver of the requirement as to its being in writing results. *Southern Ry. v. Turner*, 75 Ga. App. 219, 42 S.E.2d 790 (1947).

A stipulation that a claim for loss or damage shall be made in writing to the agent at the point of delivery promptly after delivery, and that, if such claim should be delayed for more than 30 days thereafter, no carrier acting under the bill of lading should be liable in any event, may be waived by the carrier. *Southern Ry. v. Turner*, 75 Ga. App. 219, 42 S.E.2d 790 (1947).

Waiver may be by conduct. — A contract requiring notice in writing as a condition precedent to the recovery of damages for

loss or injury to a shipment of livestock may be waived by the conduct of the carrier. *Southern Ry. v. Turner*, 75 Ga. App. 219, 42 S.E.2d 790 (1947).

Penalty and claim recoverable in same action. — Although recovery of the penalty provided by former Civil Code 1910, §§ 2770 and 2778 (see O.C.G.A. § 46-9-48) for failure of a carrier to adjust and pay a claim within the time limit was absolutely dependent upon the establishment of a right to recover the full amount of the claim itself, both the damages and the penalty were recoverable in the same action. *Georgia F. & A. Ry. v. Anderson*, 12 Ga. App. 117, 76 S.E. 1056 (1913).

Statute of limitations. — A suit under Ga. L. 1906, p. 102, § 2 (see O.C.G.A. § 46-9-48) for the recovery of a penalty incurred by a railroad company by reason of its failure to refund an overpayment of freight was barred by former Civil Code 1895, § 3776 (see O.C.G.A. § 9-3-28) when not brought within one year from the time the company's liability therefor was discovered. *Central of Ga. Ry. v. Huson*, 5 Ga. App. 529, 63 S.E. 597 (1909).

Since former Code 1933, § 18-319 (see O.C.G.A. § 46-9-48) was penal in nature, no penalty was payable unless suit is brought within one year from the time carrier's liability was discovered or by reasonable diligence could have been discovered, as per former Code 1933, § 3-714 (see O.C.G.A. § 9-3-28). *City Express Serv., Inc. v. Rich's, Inc.*, 148 Ga. App. 123, 250 S.E.2d 867 (1978).

Pleading under section. — Allegation that the payment was made under protest, and that the carrier refused to deliver the owner's property except upon the owner's paying the overcharge are unnecessary under Ga. L. 1906, p. 102, § 2 (see O.C.G.A. § 46-9-48). *Southern Ry. v. Schlittler*, 1 Ga. App. 20, 58 S.E. 59 (1907).

Cited in *Stewart v. Comer*, 100 Ga. 754, 28 S.E. 461 (1897); *Southern Ry. v. Atlanta Stove Works*, 128 Ga. 207, 57 S.E. 429 (1907); *Southern Pac. Co. v. Crenshaw*, 5 Ga. App. 675, 63 S.E. 865 (1909); *Central of Ga. Ry. v. Butler Marble & Granite Co.*, 8 Ga. App. 1, 68 S.E. 775 (1910); *Lumberman's*

Co. v. Seaboard Air-Line Ry., 37 Ga. App. 176, 139 S.E. 116 (1927); *Seaboard Air Line Ry. v. Lumberman's Co.*, 168 Ga. 851, 149 S.E. 128 (1929); *Atlantic C.L.R.R. v. Hogrefe*, 43 Ga. App. 520, 159 S.E. 760 (1931); *Railway Express Agency, Inc. v. Southern Gas Co.*, 83 Ga. App. 808, 65 S.E.2d 61 (1951).

RESEARCH REFERENCES

ALR. — Provision in carrier's contract requiring notice of damage or loss, as applicable to loss of market due to delay, 1 ALR 538.

Carriers: sufficiency of compliance with stipulation requiring notice of claim for damages to shipment, 1 ALR 900; 175 ALR 1162.

Measure and elements of damages for loss or delay in delivering baggage of traveling salesman, 25 ALR 76.

Carriers: amount of liability under second Cummins Amendment where value not declared, 25 ALR 736.

Construction of provision of Interstate Commerce Act dispensing with notice or filing of claim, 44 ALR 1360.

Wholesale or retail price as measure of

damages against carrier for loss of goods, 50 ALR 1467; 67 ALR 1427.

Carrier's right or liability in respect of excess of lawful charge over charge understated where discrimination is forbidden, 83 ALR 245.

Liability of carrier to punitive damages with respect to subject of interstate shipment, 107 ALR 1446.

Joinder or representation of several claimants in action against carrier or utility to recover overcharge, 1 ALR2d 160.

Recovery of cumulative statutory penalties, 71 ALR2d 986.

Carrier's understatement of charges where discrimination is forbidden, 88 ALR2d 1375.

46-9-49. Duty of railroad or transportation company to furnish facilities for weighing freight; measure of damages for overcharges caused by overweights or false billing.

(a) Every railroad or transportation company in this state shall furnish suitable and adequate facilities for correctly weighing all freight offered for shipment in carload lots in this state at points where the volume of business offered is sufficient to warrant the expense.

(b) If any officer, agent, or employee of a railroad or transportation company, or person acting for or employed by such railroad or transportation company, shall, by reason of overweights or false billing, cause such railroad or transportation company to charge for any shipment more than the actual weight of such shipment, the said railroad or transportation company shall be liable to the owner of such shipment for damages in an amount equal to twice the charges on the excess weight so charged. (Ga. L. 1889, p. 134, § 4; Civil Code 1895, § 2308; Civil Code 1910, § 2762; Code 1933, § 18-320.)

RESEARCH REFERENCES

ALR. — Duty of railway company to install stock scales at station, 10 ALR 1339.

Rail or motor freight carrier's liability for

loss through weight deficiency of goods shipped, 39 ALR2d 325.

46-9-50. Weighing of railroad cars by certified public weighers; manner of weighing cars.

(a) Whenever any railroad company in this state weighs any cars loaded with freight to be shipped and charged for by the carload, such weighing shall be done by a certified public weigher, as provided for the weighing of cotton, rice, and other produce.

(b) When such cars are weighed singly, they shall be uncoupled at both ends and weighed one at a time, provided that when any railroad company transports timber, lumber, or other like articles of freight which, because of their length, overlap from one car to another, such company may cause a maximum of three such cars so loaded to be weighed together, after uncoupling them at both ends from other cars. In all such instances, the aggregate weight of the freight upon such cars shall be averaged so that each of the cars shall be charged with an equal amount of the total weight, and the shipper shall be made to pay freight as if each of the cars so weighed together did actually contain an equal portion of the whole load, provided that in such cases the shipper shall not pay less than the amount of freight due on full carloads.

(c) Any railroad company failing, refusing, or neglecting to comply with this Code section shall be held liable in an action for damages, to be brought in the county where such weighing is done, at the instance of any person aggrieved. A sum of not less than \$100.00 nor more than \$200.00 shall be recoverable for each offense. (Ga. L. 1882-83, p. 127, §§ 1-4; Civil Code 1895, §§ 2309, 2310, 2311, 2312; Civil Code 1910, §§ 2763, 2764, 2765, 2766; Code 1933, §§ 18-321, 18-322, 18-323.)

Cross references. — Certified public weighers generally, § 10-2-40 et seq.

RESEARCH REFERENCES

ALR. — Rail or motor freight carrier's liability for loss through weight deficiency of goods shipped, 39 ALR2d 325.

46-9-51. Written application for railroad cars as prerequisite for consignors' and shippers' taking advantage of penalties or forfeitures for failure of company to supply cars.

Whenever a shipper or consignor requires a railroad company to furnish a car to be used in carload shipments, in order for the consignor or shipper

to avail himself of the forfeitures or penalties prescribed by the rules and regulations of the commission, it must first appear that the consignor or shipper made written application to the railroad company for the car, provided that the commission shall, by reasonable rules and regulations, establish the time within which the car shall be furnished after being applied for and shall establish the penalty per day per car to be paid by the railroad company in the event the car is not furnished as ordered; provided, further, that in order for any shipper or consignor to avail himself of the penalties provided by the rules and regulations of the commission, such shipper or consignor shall likewise be subject, under proper rules to be fixed by the commission, to the orders, rules, and regulations of the commission. (Ga. L. 1905, p. 120, § 2; Civil Code 1910, § 2635; Code 1933, § 93-408.)

JUDICIAL DECISIONS

Constitutionality. — Georgia Laws 1905, p. 120 (see O.C.G.A. § 46-9-51), was not unconstitutional and void on the ground that the title was not sufficient to include the conferring of power in the body of the act upon the commission to impose "penalties," or on the ground that the title did not cover the provision in the body of the Act making regulations as to the placing of cars. *Southern Ry. v. Melton*, 133 Ga. 277, 65 S.E. 665 (1909).

Ga. L. 1905, p. 120, § 2 (see O.C.G.A. § 46-9-51) was merely cumulative and a shipper who may have sustained damages by reason of a breach of the common-law duty of a railroad company, as a common carrier, to furnish cars for the transportation of freight within a reasonable time was not prevented by that section from instituting a common-law action for damages, instead of pursuing the remedy provided by that section. *Southern Ry. v. Moore*, 133 Ga. 806, 67 S.E. 85, 26 L.R.A. (n.s.) 851 (1910).

When section applicable. — Ga. L. 1905,

p. 120, § 2 (see O.C.G.A. § 46-9-51) is applicable only where the gist of the plaintiff's claim is based on the violation of the carrier's public duty, irrespective of contract. *Georgia C. & P.R.R. v. Durrence & Sands*, 6 Ga. App. 615, 65 S.E. 583 (1909); *Southern Ry. v. Melton*, 133 Ga. 277, 65 S.E. 665 (1909); *Georgia N. Ry. v. Snellgrove & Bozeman*, 16 Ga. App. 344, 85 S.E. 790 (1915).

Section not applicable to failure to perform under contract. — Where the gist of the plaintiff's claim as set out in plaintiff's petition was based on the failure of the carrier to perform a specific contract, former Civil Code 1910, § 2635 (see O.C.G.A. § 46-9-51) was not applicable. *Georgia N. Ry. v. Snellgrove & Bozeman*, 16 Ga. App. 344, 85 S.E. 790 (1915).

Cited in *Southern Ry. v. Inman, Akers & Inman*, 11 Ga. App. 564, 75 S.E. 908 (1912); *Central of Ga. Ry. v. Rabun*, 21 Ga. App. 402, 94 S.E. 598 (1917).

46-9-52. Unjust discrimination in freight-transportation rates by common carriers generally.

(a) No person, including an officer or agent of any corporation, shall, either by payment of money or other thing of value, by solicitation, or otherwise, induce any common carrier of freight within this state, or any officers or agents of the common carrier, to discriminate unjustly in favor of that person or corporation as against any other consignor or consignee in the transportation of freight to and from points in this state; and no such person shall aid or abet any common carrier in any such unjust discrimination.

(b) Any person who violates this Code section shall be guilty of a misdemeanor. In addition, any such person shall, together with such common carrier, be liable jointly or severally in an action to be brought by any consignor or consignee discriminated against for all damages caused by or resulting from the discrimination. (Ga. L. 1889, p. 134, § 3; Civil Code 1895, § 2307; Penal Code 1895, § 684; Civil Code 1910, § 2761; Penal Code 1910, § 733; Code 1933, §§ 18-318, 18-9914.)

Cross references. — Authority of General Assembly regarding regulation of public utility rates, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Prohibition against rebates, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Compelling of witnesses to testify before commission as to discrimination in rates and charges

by common carriers, § 46-2-55. Prohibition against discrimination by railroad companies in freight-transportation rates or tariffs charged to connecting lines or routes, § 46-9-213. Overcharging by officers, agents, etc., of common carriers for transporting freight or passengers, § 46-9-252.

JUDICIAL DECISIONS

Cited in *Kates v. Atlanta Baggage & Cab Co.*, 107 Ga. 636, 34 S.E. 372 (1899).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 279.

C.J.S. — 13 C.J.S., Carriers, §§ 142, 195, 232, 233, 281, 336, 355, 368, 369, 370, 372.

ALR. — Discrimination by carrier between shippers as to use of right of way or wharf, 44 ALR 1526.

Carrier's right or liability in respect of excess of lawful charge over charge understated where discrimination is forbidden, 83 ALR 245.

Right to maintain action against carrier on

ground that rates which were filed and published by carrier pursuant to law were excessive, 97 ALR 406.

Liability of carrier to punitive damages with respect to subject of interstate shipment, 107 ALR 1446.

Waiver of rights by carrier under interstate shipments as constituting unlawful discrimination among shippers, 135 ALR 611.

Carrier's understatement of charges where discrimination is forbidden, 88 ALR2d 1375.

46-9-53. Discrimination by railroad companies in applying freight-storage charges.

In applying freight-storage charges fixed by the commission, no railroad company shall discriminate between persons, either directly or indirectly, by means of rebate or any other device. (Ga. L. 1890-91, p. 149, § 3; Civil Code 1895, § 2208; Civil Code 1910, § 2651; Code 1933, § 93-403.)

Cross references. — Limitation on authority of General Assembly regarding regulation

of public utility rates, Ga. Const. 1983, Art. III, Sec. VI, Para. V.

JUDICIAL DECISIONS

Cited in *Sipple v. Seaboard Air-Line Ry.*, 28 Ga. App. 16, 110 S.E. 39 (1921); *Georgia*

Pub. Serv. Comm'n v. Atlanta Gas Light Co., 205 Ga. 863, 55 S.E.2d 618 (1949).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 169.

C.J.S. — 13 C.J.S., Carriers, §§ 195, 370.

ALR. — Franchise provisions for free or reduced rates of public service corporations as within constitutional or statutory provision prohibiting discrimination, 10 ALR 504; 15 ALR 1200.

Discrimination by public utility company in respect of extension of credit, 12 ALR 964.

Liability of carrier for overcharging passenger, 56 ALR 771.

46-9-54. Making and retaining freight-storage charges in accordance with rates fixed by commission.

No railroad company shall make or retain, either directly or indirectly, any charge for storage of freight greater than that fixed by the commission for each particular storage. (Ga. L. 1890-91, p. 149, § 3; Civil Code 1895, § 2208; Civil Code 1910, § 2651; Code 1933, § 93-404.)

Cross references. — Authority of General Assembly regarding regulation of public utility rates, Ga. Const. 1983, Art. III, Sec. VI,

Para. V. Prohibition against rebates, Ga. Const. 1983, Art. III, Sec. VI, Para. V.

JUDICIAL DECISIONS

Cited in Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co., 205 Ga. 863, 55 S.E.2d 618 (1949).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 185, 186, 188.

46-9-55. Remedy for persons charged excessive freight-storage rates or subjected to discrimination in application of freight-storage rates.

If any railroad company violates Code Section 46-9-53 or Code Section 46-9-54, either by exceeding the rates of storage prescribed or by discriminating as to rates charged, the person paying such overcharge or subjected to such discrimination shall have the right to bring an action for the amount of the overcharge or the amount of the difference in the rates charged, in any court of this state having jurisdiction of the claim. Such person shall have all the remedies and be entitled to recover the same penalties and damages as are prescribed in Code Sections 46-2-90 and 46-2-92. (Ga. L. 1890-91, p. 149, § 4; Civil Code 1895, § 2209; Civil Code 1910, § 2652; Code 1933, § 93-405.)

Cross references. — Authority of General Assembly regarding regulation of public utility rates, Ga. Const. 1983, Art. III, Sec. VI,

Para. V. Prohibition against rebates, Ga. Const. 1983, Art. III, Sec. VI, Para. V.

JUDICIAL DECISIONS

Cited in Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co., 205 Ga. 863, 55 S.E.2d 618 (1949).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 185 et seq. **C.J.S.** — 13 C.J.S., Carriers, §§ 232, 233, 281, 354, 372.

46-9-56. False billing, false weighing, or false report of weight by common carriers.

Any common carrier of freight within the limits of this state or, if such common carrier is a corporation, any officer, agent, or employee thereof, who, by means of false billing, false classification, false weighing, false report of weight, or by any other device or means, knowingly and willfully assists or permits any person to obtain transportation for property from and to points within the limits of this state at less than the regular rates then established and in force on the line of transportation of such common carrier shall be guilty of a misdemeanor. (Ga. L. 1889, p. 134, § 1; Penal Code 1895, § 682; Penal Code 1910, § 731; Code 1933, § 18-9916.)

46-9-57. False billing or false weighing by a person who delivers property for transportation to a common carrier or for whom, as consignor or consignee, such carrier transports property.

Any person, including any officer or agent of any corporation, who delivers property to any common carrier of freights within this state for transportation within this state to any common carrier of freights within this state, or for whom, as consignor or consignee, any such carrier transports property, and who knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier or its agent, obtains transportation for such property at less than the regular rates then established and in force on the line of transportation shall be guilty of a misdemeanor. (Ga. L. 1889, p. 134, § 2; Penal Code 1895, § 683; Penal Code 1910, § 732; Code 1933, § 18-9917.)

PART 2

TRANSPORTATION OF LIVESTOCK AND DOMESTIC ANIMALS BY COMMON CARRIERS

Editor's notes. — This part consisted of was based on Ga. L. 1890-91, p. 167, §§ 1 Code Sections 46-9-70 through 46-9-72 and through 3; Civil Code 1895, §§ 2313 through

2315; Civil Code 1910, §§ 2767 through 2769; Code 1933, §§ 18-302 through 18-304.

46-9-70 through 46-9-72.

Reserved. Repealed by Ga. L. 1996, p. 950, § 7, effective April 15, 1996.

PART 3

FURNISHING OF REFRIGERATOR CARS BY RAILROAD COMPANIES

46-9-90. Duty of railroad companies to furnish refrigerator cars; filing of application for cars by shipper.

It shall be the duty of the railroad companies of this state to furnish any grower of peaches, apples, cantaloupes, watermelons, or other perishable products with suitable icing and refrigerator cars or other suitable cars for the transportation of such products, whenever application is made therefor in writing by the shipper 24 hours in advance of the time such cars are wanted for loading. Such application shall be filed with the nearest agent of the railroad company to the point from which shipment is to be made and shall state the time and place from which shipment is desired. (Ga. L. 1907, p. 84, § 1; Civil Code 1910, § 2774; Code 1933, § 18-314.)

JUDICIAL DECISIONS

Common law action by shipper permissible. — Former Civil Code 1910, § 2774 (see O.C.G.A. § 46-9-90) did not prevent shipper from bringing action at common law. *Thompson v. Atlantic Coast Line R.R.*, 26 Ga. App. 487, 106 S.E. 322 (1921).

Section not applicable to transportation of livestock. — Former Civil Code 1910, § 2774 (see O.C.G.A. § 46-9-90) had no application to matter of receiving livestock for transportation. *Youmans v. Georgia & F. Ry.*, 142 Ga. 781, 83 S.E. 784 (1914).

Duty to exercise care in providing refrigeration need not be express. — Duty to exercise care in providing necessary refrigeration is in no way dependent on express contract imposing it, and the carrier's liability is not affected by the fact that the bill of lading is silent on the subject. Unless such duty is voluntarily assumed by the shipper, if the class of goods shipped requires refrigeration for their preservation, it is the duty of the carrier to provide a supply of ice sufficient for the purpose, and it will be liable for damages resulting for nonperformance.

Powell v. Jerome, 73 Ga. App. 257, 36 S.E.2d 371 (1945).

Carrier's liability for insufficient icing where shipper discovers situation. — Carrier's liability for insufficient icing is not affected by shipper's discovery that cars were insufficiently iced if the shipper had no opportunity to remedy the situation, and it believed that the goods would reach their destination without injury, or if the shipper called the attention of the carrier's agent to the fact that the cars were insufficiently iced and was assured that sufficient ice would be furnished. *Powell v. Jerome*, 73 Ga. App. 257, 36 S.E.2d 371 (1945).

Larger crop does not necessarily absolve railroad's responsibility to provide refrigeration. — Railroad company cannot escape responsibility to furnish refrigerated cars upon ground that crop was unusually large, provided it was no larger than might reasonably have been expected from the acreage planted, knowledge of which the railroad company either possessed or had the means of obtaining. *Central of Ga. Ry. v. George P.*

Greene & Co., 41 Ga. App. 794, 154 S.E. 809 (1930).

Measure of damages in action under section. — Where a suit for failure to furnish cars was based on former Code 1933, §§ 18-314 and 18-315 (see O.C.G.A. §§ 46-9-90 and 46-9-91), the measure of damages prescribed therein being the sole and exclusive measure in any suit brought

under such statutes, the market value of the product was to be determined at "the market to which the shipper intended shipping" it. *Southwestern R.R. v. Davies*, 53 Ga. App. 712, 186 S.E. 899 (1936).

Cited in *Western & A.R.R. v. Meister*, 37 Ga. App. 570, 140 S.E. 905 (1927); *Southwestern R.R. v. Davies*, 53 Ga. App. 712, 186 S.E. 899 (1936).

RESEARCH REFERENCES

C.J.S. — 13 C.J.S., Carriers, §§ 35, 61.

ALR. — Validity, construction, and effect of provision of contract for carriage of live-

stock whereby shipper assumes responsibility for condition of car, 28 ALR 526.

46-9-91. Liability of company for failure to furnish cars; written claim for damages by shipper; time of payment by company; liquidated damages.

(a) Whenever any railroad company fails to furnish icing and refrigerator cars as required by Code Section 46-9-90 and the shipper places his product in carload lots or, in cases of less than carload lots, expresses to the agent of the railroad company his willingness to pay charges for carload lots, then such railroad company shall be liable for the market value of such product with interest thereon. The market value shall be determined by the market value of the product less the cost of carriage and the usual expense of selling in the market to which the shipper intended shipping the same, on the day such product would have arrived had the same been carried in the usual course of transportation on schedule time for such freight.

(b) In order to avail himself of the rule of damage expressed in subsection (a) of this Code section, the shipper must notify in writing the agent of the railroad company of the market to which he intended to ship his product. Payment shall be made by the railroad company for such product within 30 days after written claim has been filed with the company therefor.

(c) In the event such railroad company fails to make payment as provided in this Code section or fails to tender the correct amount thereof, it shall be liable for an additional fixed sum of \$50.00 for each car as liquidated damages. Such liquidated damages may be recovered in any action brought for the recovery of damages on the main claim, in the event recovery is had thereon. (Ga. L. 1907, p. 84, § 2; Civil Code 1910, § 2775; Code 1933, § 18-315.)

JUDICIAL DECISIONS

Measures of damages. — The correct measure of damage is ordinarily the differ-

ence in the market value of the fruit at the point of shipment at the time the cars should

have been furnished, and at the time they were actually furnished. *Central of Ga. Ry. v. George P. Greene & Co.*, 41 Ga. App. 794, 154 S.E. 809 (1930).

Where a suit for failure to furnish cars was based on former Code 1933, §§ 18-314 and 18-315 (see O.C.G.A. §§ 46-9-90 and 46-9-91), the measure of damages prescribed

therein being the sole and exclusive measure in any suit brought under such statutes, the market value of the product was to be determined at "the market to which the shipper intended shipping" it. *Southwestern R.R. v. Davies*, 53 Ga. App. 712, 186 S.E. 899 (1936).

Cited in *Southwestern R.R. v. Davies*, 53 Ga. App. 712, 186 S.E. 899 (1936).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 234 et seq.

C.J.S. — 13 C.J.S., Carriers, § 386.

ALR. — Railroad carrier's liability where goods were allegedly damaged by failure to properly refrigerate, 4 ALR3d 994.

46-9-92. Liability of shipper for failing or refusing to accept cars; liability of shipper for failure or refusal to pay damages upon written demand therefor.

In the event the shipper fails or refuses to accept any suitable cars furnished in a timely manner pursuant to Code Section 46-9-90, he shall be liable to the railroad company for the sum of \$10.00 per car and the cost of the first or initial icing in the event the same is iced. If the shipper fails or refuses to pay same within 30 days after written demand therefor, he shall be liable for \$20.00 per car, together with the cost of icing. (Ga. L. 1907, p. 84, § 3; Civil Code 1910, § 2776; Code 1933, § 18-316.)

PART 4

FREIGHT RECEIPTS, FREIGHT BILLS, AND FREIGHT LISTS

Cross references. — Warehouse receipts, § 11-7-101 et seq. Warehousemen generally, bills of lading, and other documents of title, Ch. 4, T. 10.

46-9-110. Issuance of receipts by common carriers to persons delivering goods for transportation; contents of receipts.

(a) Whenever any person delivers property of any description to a common carrier for transportation, the common carrier shall, upon demand, furnish the delivering party a valid receipt which shall specify the shipping marks and numbers thereon and the weight of the property thus delivered, whenever the value can be estimated by weight. In all cases where the value cannot be thus estimated, the receipt shall give a general description of the property and shall also specify as near as practicable the quantity or value thereof. In addition, any such receipt shall designate the place of destination of the property.

(b) Any agent or officer of any common carrier who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1865-66, p. 236, § 1; Code 1868, § 4514; Ga. L. 1870, p. 400, § 1; Code 1873, § 4604; Code 1882,

§ 4604; Penal Code 1895, § 602; Penal Code 1910, § 633; Code 1933, §§ 18-308, 18-9915.)

RESEARCH REFERENCES

C.J.S. — 13 C.J.S., Carriers, § 391.

as affecting carrier's liability for loss or dam-

ALR. — Shipper's misdescription of goods age, 1 ALR3d 736.

46-9-111. Issuance by railroad companies of duplicate freight receipts to shippers; contents of receipts; delivery of freight to consignee on presentation of railroad receipt.

All railroad companies in this state shall, on demand, issue duplicate freight receipts to shippers, which receipts shall state the class or classes of freight shipped, the freight charges over the road giving the receipt, and, so far as practicable, the freight charges over other roads that carry the freight. When the consignee presents the railroad receipt to the agent of the railroad that delivers such freight, the agent shall deliver the article shipped on payment of the rate charged for the class of freight mentioned in the receipt. (Ga. L. 1878-79, p. 125, § 13; Code 1882, § 719m; Civil Code 1895, § 2200; Civil Code 1910, § 2643; Code 1933, § 93-402.)

46-9-112. Contents of freight bills and freight lists.

All freight bills or freight lists charged against or to be collected from any person for whom a common carrier carries freight in this state shall, before they may be collectable, contain a certain and specific description of the items of freight charged in such bills or freight lists. (Ga. L. 1855-56, p. 155, § 1; Code 1868, § 2052; Code 1873, § 2078; Code 1882, § 2078; Civil Code 1895, § 2293; Civil Code 1910, § 2747; Code 1933, § 18-310.)

RESEARCH REFERENCES

ALR. — Liability for freight charge as affected by delivery without collecting

charge as stipulated or directed, 24 ALR 1163; 78 ALR 926; 129 ALR 213.

ARTICLE 4

TRANSPORTATION OF PASSENGERS

Cross references. — Sale of distilled spirits, wine, and malt beverages by railway passenger carriers, §§ 3-9-1, 3-9-2. Programs for transportation of public school students,

§§ 20-2-187, 20-2-1070 et seq. Equal access to public accommodations and facilities by blind and deaf persons, Ch. 4, T. 30.

PART I

TRANSPORTATION BY CARRIERS GENERALLY

46-9-130. Duty of common carrier to receive passengers generally.

A common carrier holding himself out to the public as such is bound to receive all passengers whom he is able and accustomed to carry, upon compliance with such reasonable regulations as he may adopt for his own safety and for the benefit of the public. (Orig. Code 1863, § 2042; Code 1868, § 2043; Code 1873, § 2069; Code 1882, § 2069; Civil Code 1895, § 2278; Civil Code 1910, § 2729; Code 1933, § 18-202.)

Cross references. — Equal protection, U.S. Const., Amend. 14 and Ga. Const. 1983, Art. I, Sec. I, Para. II.

JUDICIAL DECISIONS

Duty of carrier to receive and transport ticket purchaser. — It is legal duty of common carrier to receive and transport person who has purchased ticket over its lines, to the destination called for by the ticket, and should a carrier, in violation of the duty so imposed upon it, illegally expel a passenger from its bus and wrongfully refuse to carry the passenger to the passenger's destination, it would be liable to the passenger for damages proximately resulting therefrom. *Daigrepoint v. Teche Greyhound Lines*, 189 Ga. 601, 7 S.E.2d 174 (1940).

Duty to transport passenger dependent upon presentation of proper ticket. — While a person who has purchased a ticket for transportation over the lines of a common carrier has the right to use the facilities of the carrier to that end, it is a sine quo non to the exercise of that right that upon boarding the conveyance of the carrier, the passenger deliver to the person in charge thereof the ticket, and where the same is returned to the passenger, to produce it upon demand at reasonable times thereafter during the journey; unless the failure to produce the ticket is due to the fault of the carrier, the passenger may be ejected and further transporta-

tion refused in the absence of an offer to pay the passenger's fare. *Daigrepoint v. Teche Greyhound Lines*, 189 Ga. 601, 7 S.E.2d 174 (1940).

Carrier's duty ordinarily discharged when passenger safely deposited. — Ordinarily carrier of passengers discharges its legal duty when it deposits passenger at a usual and reasonably safe place for alighting and crossing the street, and is under no obligation to wait until approaching automobiles have stopped, or to warn the passengers of the usual dangers of traffic, which in the passenger's exercise of ordinary care would be avoidable. But a carrier is not permitted to deposit a passenger at a place which it knows will reasonably expose the passenger to unusual and unnecessary peril, and it may be held liable for a proximately resulting injury. *Locke v. Ford*, 54 Ga. App. 322, 187 S.E. 715 (1936).

Action for wrongful refusal to continue to transport. — To recover for wrongful refusal to continue to transport, it must be alleged and shown that the defendant was responsible for the situation causing such refusal. *Daigrepoint v. Teche Greyhound Lines*, 189 Ga. 601, 7 S.E.2d 174 (1940).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Carriers, §§ 815, 817 et seq.

ALR. — Duty and liability of carrier of passengers for hire by automobile, 31 ALR

1202; 45 ALR 297; 69 ALR 980; 96 ALR 727; 152 ALR 1160.

Loss or theft of passenger's ticket or other token of right to transportation as affecting rights and duties of carrier and passenger, 127 ALR 222.

Validity and construction of statute or ordinance specifically criminalizing passenger misconduct on public transportation, 78 ALR4th 1127.

46-9-131. Extent of right of carriers to refuse admittance to persons and to eject passengers.

Carriers of passengers may refuse to admit to, or may eject from, their conveyances all persons who refuse to comply with reasonable regulations of the carrier or who exhibit improper conduct. Carriers may also refuse to convey persons seeking to interfere with their business or interests. (Orig. Code 1863, § 2053; Code 1868, § 2056; Code 1873, § 2082; Code 1882, § 2082; Civil Code 1895, § 2296; Civil Code 1910, § 2750; Code 1933, § 18-203.)

Cross references. — Penalty for littering, playing radio on, obstructing operation of, etc., public transit bus, rapid rail car, etc.,

§ 16-12-120. Penalty for bus or rail hijacking, boarding with concealed weapon, etc., § 16-12-123.

JUDICIAL DECISIONS

Transportation of insane persons. — Common carriers cannot absolutely refuse by virtue of former Civil Code 1895, § 2296 (see O.C.G.A. § 46-9-131) to transport persons who were insane, but may in all cases insist that they be properly attended, safely guarded, and securely restrained. *Owens v. Macon & B. Ry.*, 119 Ga. 230, 46 S.E. 87 (1903).

Ejection of child. — A conductor has a right, under former Civil Code 1910, § 2750 (see O.C.G.A. § 46-9-131), to eject a child for non-payment of the child's fare. *Georgia Ry. & Power Co. v. Turner*, 33 Ga. App. 101, 125 S.E. 598 (1924).

Mistake of conductor immaterial. — It is no excuse for expulsion that the conductor made a negligent mistake as to the station indicated on the face of the ticket which the plaintiff had exhibited and surrendered to

the same conductor. *Georgia R.R. & Banking v. Eskew*, 86 Ga. 641, 12 S.E. 1061, 22 Am. St. R. 490 (1891).

State regulations preempt carrier's regulations unless invalid. — Power of common carrier to make reasonable regulations must yield where regulations have been made by authority of state, unless they are invalid. *Railroad Comm'n v. Louisville & N.R.R.*, 140 Ga. 817, 80 S.E. 327, 1915E L.R.A. 902, 1915A Ann. Cas. 1018 (1913).

Carrier's rule making authority in absence of state regulation. — In the absence of state regulation, making rules and regulations is left to common carrier, subject only to control by the courts of their reasonableness, or discriminatory character. *Hughes v. Georgia Power Co.*, 65 Ga. App. 163, 15 S.E.2d 466 (1941).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Carriers, §§ 827, 828.

C.J.S. — 13 C.J.S., Carriers, § 505.

ALR. — Carriers: attempt to have child

transported without paying fare, 1 ALR 1451.

Loss of contract or business opportunity as element of damages for wrongful ejection

from train or being carried past station, 25 ALR 916.

Carrier's liability to passenger for consequences of ejection or threatened ejection by one employee due to fault of another employee, 36 ALR 1018.

Dispute over payment of fare as justifying

arrest of passenger by carrier, 39 ALR 862.

Passenger's waiver of right to seat, 42 ALR 156.

Ejection of passenger as ground of motorbus carrier's liability for subsequent injury or death, 165 ALR 545.

46-9-132. Duty of carriers of passengers to exercise extraordinary diligence.

A carrier of passengers must exercise extraordinary diligence to protect the lives and persons of his passengers but is not liable for injuries to them after having used such diligence. (Orig. Code 1863, § 2040; Code 1868, § 2041; Code 1873, § 2067; Code 1882, § 2067; Civil Code 1895, § 2266; Civil Code 1910, § 2714; Code 1933, § 18-204.)

Cross references. — Duty of drivers of motor vehicles carrying passengers for hire to stop at railroad crossings, § 40-6-142.

Law reviews. — For note, "Tort Liability in Georgia for the Criminal Acts of Another," see 18 Ga. L. Rev. 361 (1984).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DISCHARGE OF PASSENGERS

JURY ISSUES AND INSTRUCTIONS

APPLICATION

General Consideration

Driver testing for employment not "passenger." — Driver of a bus, who was injured when the brakes failed while the driver was performing a test for employment as a bus driver, was not a "passenger" within the meaning of O.C.G.A. § 46-9-132. Kirby v. Spate, 214 Ga. App. 433, 448 S.E.2d 7 (1994).

"Extraordinary diligence" defined. — The "extraordinary diligence" due by railroad companies to passengers is that extreme care and caution which very prudent and thoughtful persons exercise under like circumstances. East Tenn., Va. & Ga. Ry. v. Miller, 95 Ga. 738, 22 S.E. 660 (1895).

Circumstances dictate degree of extraordinary care required. — What extraordinary care requires depends upon circumstances. One circumstance for consideration in dealing with a passenger is the condition of such passenger, known to the carrier or its agents,

or so apparent as to charge them with knowledge. Central of Ga. Ry. v. Madden, 135 Ga. 205, 69 S.E. 165, 31 L.R.A. (n.s.) 813, 21 Ann. Cas. 1077 (1910).

Where the standard is the diligence of very thoughtful persons, and where utmost diligence is greater than the standard, the diligence of every prudent and thoughtful person is, if anything, less than the standard, for it includes the degree of diligence of all prudent and thoughtful persons, whether or not they reach the comparative form of very prudent and thoughtful persons or the superlative of the most prudent and thoughtful persons. Andrews Taxi & U-Drive It Co. v. McEver, 101 Ga. App. 383, 114 S.E.2d 145 (1960).

Passenger carrier bound to exercise extraordinary care. — Carrier of passengers is bound to exercise extraordinary care and diligence for the safety of the carrier's passengers, and it matters not the kind of conveyance used or the nature of the motive

General Consideration (Cont'd)

power employed. *Sheffield v. Lovering*, 51 Ga. App. 353, 180 S.E. 523 (1935).

Carrier's duty to exercise extraordinary diligence is coextensive with relationship of passenger and carrier. *Delta Air Lines v. Millirons*, 87 Ga. App. 334, 73 S.E.2d 598 (1952).

Rule of extraordinary diligence applies only to receiving, keeping, carrying and discharging of passengers. *Central R.R. & Banking Co. v. Perry*, 58 Ga. 461 (1877); *Delta Air Lines v. Millirons*, 87 Ga. App. 334, 73 S.E.2d 598 (1952).

A common carrier of passengers is bound to exercise extraordinary diligence to prevent insult, injury, or harm to a passenger transported by it. *Hames v. Old S. Lines*, 52 Ga. App. 420, 183 S.E. 503 (1935).

A common carrier has the duty to exercise extraordinary care to protect passengers on its vehicle. *Atlanta Transit Sys. v. Allen*, 96 Ga. App. 622, 101 S.E.2d 134 (1957).

Slight neglect by carrier's agents and servants sufficient for liability for passenger injuries. — Under former Code 1873, § 2067 (see O.C.G.A. § 46-9-132), company would be liable to passengers for injuries unless extraordinary care and diligence was used, and slight neglect on the part of the agents and servants of the company will be sufficient evidence to fix its liability. *Crawford v. Georgia R.R.*, 62 Ga. 566 (1879).

Under former Code 1882, § 2067 (see O.C.G.A. § 46-9-132) there certainly can be no doubt that if a railroad company failed to exercise extraordinary diligence for the safety of its passengers, it would be liable for injuries occasioned because of such failure to a passenger who personally exercised the proper care for the passenger's own protection. *East Tenn., Va. & Ga. Ry. v. Miller*, 95 Ga. 738, 22 S.E. 660 (1895).

Duty of care attaches upon passenger boarding train and paying fare. — After a person becomes a passenger by boarding a train and paying cash fare, the carrier was bound to extraordinary diligence by former Civil Code 1895, § 2266 (see O.C.G.A. § 46-9-132). *Williamson v. Central of Ga. Ry.*, 127 Ga. 125, 56 S.E. 119 (1906).

Servants of railway company bound to extraordinary care for passenger's safety. — Extraordinary degree of care is imposed

upon servants of railway company to prevent and protect passengers from all injuries, and the railway company is responsible for any injury that the servant could have avoided by the exercise of such diligence. *Bennett v. Central of Ga. Ry.*, 6 Ga. App. 185, 64 S.E. 700 (1909).

Under former Civil Code 1910, § 2714 (see O.C.G.A. § 46-9-132) carrier was bound for extraordinary diligence on part of the carrier's agents, for the protection of the carrier's passengers. *Mason v. Nashville, C. & St. L. Ry.*, 135 Ga. 741, 70 S.E. 225, 33 L.R.A. (n.s.) 280 (1911).

A carrier of passengers is bound to exercise extraordinary diligence on behalf of the carrier and the carrier's agents to protect the lives and persons of his passengers, and if, after entering into the relation of carrier for hire and passenger, the servant of the carrier be guilty of any negligence resulting in a breach of duty owing to the passenger, the carrier will be liable for nominal damages at least. *Tennessee Coach Co. v. Snelling*, 51 Ga. App. 432, 180 S.E. 741 (1935).

A common carrier is liable whenever a passenger being transported by it suffers insult, mortification, or embarrassment resulting directly from the failure of its servants to perform their legal duty to such passenger or from their negligent and wrongful acts. *Hames v. Old S. Lines*, 52 Ga. App. 420, 183 S.E. 503 (1935).

If plaintiff suffered insult and was embarrassed and mortified by reason of any negligent acts of the defendant common carrier or its servants or their failure to perform their legal duty towards the person as a passenger, then the passenger would be entitled to recover. *Hames v. Old S. Lines*, 52 Ga. App. 420, 183 S.E. 503 (1935).

If plaintiff was a passenger in defendant's taxicab at the time plaintiff was raped by the driver of the cab, plaintiff would be entitled to recover, for plaintiff was entitled, by virtue of plaintiff's contract of passenger carriage, not only to be protected against the negligent acts of the company's agent resulting from the omission to perform its duties to its passengers, but plaintiff was likewise entitled to be protected against the wanton and willful acts of violence wrongfully committed on plaintiff's person by the servant of the company during the continuance of the

relation instituted by plaintiff's contract with the company. *Co-op Cab Co. v. Singleton*, 66 Ga. App. 874, 19 S.E.2d 541 (1942).

Liability for assault by servant not dependent upon scope of employment. — Liability of a common carrier for an assault by one of its employees on a passenger is not dependent on the question as to whether the employee was acting within the scope of employment or in the line of the employee's duty, but is based upon its broad duty as a common carrier to protect its passengers from assault. *Southeastern Greyhound Corp. v. Graham*, 69 Ga. App. 621, 26 S.E.2d 371 (1943).

Servant's duty toward passenger becoming ill in transit. — If a passenger on a railway train becomes ill in transit, and this is known to the servants of the carrier in charge of such train, or is so apparent that they are charged with knowledge of it, it is their duty to give the passenger such care and protection beyond that demanded under ordinary circumstances as is reasonably practicable with the facilities at hand, and consistent with the safe and proper conduct of the business and the safety and comfort of the other passengers. *Central of Ga. Ry. v. Madden*, 135 Ga. 205, 69 S.E. 165, 31 L.R.A. (n.s.) 813, 21 Ann. Cas. 1077 (1910).

Duty imposed by Code section cannot be waived or released by contract. — Duty imposed by former Civil Code 1895, § 2266 (see O.C.G.A. § 46-9-132) cannot be waived or released even by an express contract. Being one in which the public has an interest, public policy forbids such a waiver or release. *Central of Ga. Ry. v. Lippman*, 110 Ga. 665, 36 S.E. 202, 50 L.R.A. 673 (1900); *Hearn v. Central of Ga. Ry.*, 22 Ga. App. 1, 95 S.E. 368 (1918).

An express contract attempting waiver void. — An express contract entered into by the carrier and the passenger, under the terms of which the carrier is released from all liability to the passenger for personal injuries received while a passenger on such freight-train, is in effect a contract by which the carrier undertakes to relieve itself from the consequences of the negligence of itself and servants, and cannot be enforced. *Central of Ga. Ry. v. Lippman*, 110 Ga. 665, 36 S.E. 202, 50 L.R.A. 673 (1900).

Presumption of negligence. — Upon proof of injury to a passenger of a railroad

company by the running of its locomotive, cars, or other machinery, or by any person in its employment and service, the law raises a presumption that the injury was caused by the negligence of the company. *Douthitt v. Louisville & N.R.R.*, 136 Ga. 351, 71 S.E. 470 (1911). See also *Central R.R. v. Freeman*, 75 Ga. 331 (1885).

When a passenger is injured, a legal presumption that the carrier failed to exercise extraordinary care arises in the passenger's favor. The carrier can, of course, rebut this presumption by making it appear that extraordinary care and diligence was exercised. This is a jury question. *Eason v. Crews*, 88 Ga. App. 602, 77 S.E.2d 245 (1953); *Piller v. Hanger Cab. Co.*, 115 Ga. App. 260, 154 S.E.2d 420 (1967).

Rebuttal of presumption. — In an action by a passenger against a street-railway company on account of a personal injury, after a presumption of negligence arises from the evidence, in order to rebut it the defendant must make it appear from the evidence that its agents or servants exercised extraordinary care and diligence in connection with those things in which it was charged that its negligence consisted. *Brunswick & A.R.R. v. Gale*, 56 Ga. 322 (1876); *Georgia Ry. & Elec. Co. v. Gilleland*, 133 Ga. 621, 66 S.E. 944 (1909).

Where an injury to a passenger is proved to have been caused by a company's negligence, the presumption against the company will not be rebutted by the company showing that it exercised only ordinary care and diligence; as railroad companies are bound to use extraordinary care and diligence for the safety of passengers by reason of former Code 1882, § 2067 (see O.C.G.A. § 46-9-132). *East Tenn., Va. & Ga. Ry. v. Miller*, 95 Ga. 738, 22 S.E. 660 (1895); *Douthitt v. Louisville & N.R.R.*, 136 Ga. 351, 71 S.E. 470 (1911).

Cited in *Stiles v. Atlanta & W.P.R.R.*, 65 Ga. 370 (1880); *Central of Ga. Ry. v. Johnston*, 106 Ga. 130, 32 S.E. 78 (1898); *Savannah Elec. Co. v. Bennett*, 130 Ga. 597, 61 S.E. 529 (1909); *Bennett v. Central of Ga. Ry.*, 6 Ga. App. 185, 64 S.E. 700 (1909); *Turner v. City Elec. Ry.*, 134 Ga. 869, 68 S.E. 735 (1910); *Central of Ga. Ry. v. Deas*, 22 Ga. App. 425, 96 S.E. 267 (1918); *Georgia Ry. & Power Co. v. Gilbert*, 39 Ga. App. 56, 146 S.E. 33 (1928); *Southern Ry. v. Bartlett*, 44 Ga. App. 710, 162

General Consideration (Cont'd)

S.E. 831 (1932); Tennessee Coach Co. v. Snelling, 51 Ga. App. 432, 180 S.E. 741 (1935); Roberts v. Baker, 57 Ga. App. 733, 196 S.E. 104 (1938); Southern Ry. v. Skinner, 74 Ga. App. 57, 38 S.E.2d 756 (1946); Atlanta Transit Sys. v. Allen, 96 Ga. App. 622, 101 S.E.2d 134 (1957); Savannah Transit Co. v. Williams, 107 Ga. App. 212, 129 S.E.2d 417 (1963); Darlington Corp. v. Finch, 113 Ga. App. 825, 149 S.E.2d 861 (1966); Atlanta Transit Sys. v. Hines, 138 Ga. App. 746, 227 S.E.2d 489 (1976); Atlanta Transit Sys. v. Simpson, 139 Ga. App. 34, 228 S.E.2d 20 (1976); Harlan v. Six Flags Over Ga., Inc., 699 F.2d 521 (11th Cir. 1983); Bricks v. Metro Ambulance Serv., Inc., 177 Ga. App. 62, 338 S.E.2d 438 (1985); Tinnel v. Trailways Lines, 185 Ga. App. 534, 364 S.E.2d 904 (1988); Effort Enters., Inc. v. Crosta, 194 Ga. App. 666, 391 S.E.2d 477 (1990); Mattox v. Metropolitan Atlanta Rapid Transit Auth., 200 Ga. App. 697, 409 S.E.2d 267 (1991).

Discharge of Passengers

Helping passenger alight. — As a general rule, it is not the duty of the employees of a railway company in charge of a passenger train to physically assist passengers in alighting therefrom, but to furnish reasonable opportunity and facilities for leaving the train; but the duty of rendering assistance may arise from special circumstances. Central of Ga. Ry. v. Madden, 135 Ga. 205, 69 S.E. 165, 31 L.R.A. (n.s.) 813, 21 Ann. Cas. 1077 (1910).

Carrier's duty toward passenger continues until passenger safely deposited. — Where relation of carrier and passenger is once established, it continues until passenger is safely deposited at passenger's point of destination, and until the passenger has left or has had a reasonable time within which to leave the cab of the carrier; and if, during the continuance of this relation, the passenger suffers an injury in consequence of the negligent, wrongful or wanton tort of the carrier's driver, the carrier is liable. Co-op Cab Co. v. Singleton, 66 Ga. App. 874, 19 S.E.2d 541 (1942); Southeastern Greyhound Corp. v. Graham, 69 Ga. App. 621, 26 S.E.2d 371 (1943).

The relationship of carrier and passenger exists until the passenger's destination has

been reached and the passenger has either alighted from the means of conveyance in safety or has been afforded reasonable time and opportunity to do so. Delta Air Lines v. Millirons, 87 Ga. App. 334, 73 S.E.2d 598 (1952).

The relationship of carrier and passenger terminates when the passenger has been safely discharged and when the carrier is no longer bound to exercise extraordinary care for the passenger's safety, but is bound to use only the same degree of care for the passenger's safety as it would for the safety of any other member of the public upon its premises by invitation, express or implied. Delta Air Lines v. Millirons, 87 Ga. App. 334, 73 S.E.2d 598 (1952).

Carrier's duty to exercise extraordinary care for the safety of its passengers continues until the passenger has been conducted to a place where the passenger has some freedom of locomotion and can in a measure look out for the passenger's own safety. Delta Air Lines v. Millirons, 87 Ga. App. 334, 73 S.E.2d 598 (1952).

If a passenger is discharged at an unsafe place and is injured, it is immaterial that the passenger has alighted. The duty of the carrier continues until the passenger is out of such danger. Columbus Transp. Co. v. Curry, 104 Ga. App. 700, 122 S.E.2d 584 (1961).

Duties of train operators when entering or leaving stations. — Plaintiff, in a suit seeking damages for injuries which occurred when plaintiff was struck by a train at a station, failed to come forward with any evidence rebutting the affidavits of the train's operators showing that they did nothing to breach their duty of care, i.e., each operator averred that the operator had been trained "to be extremely alert and to maintain a constant visual check of conditions as far ahead as possible" when entering and leaving the station and "to visually scan the entire station area, including the platforms and the track itself," and that the operator had done so upon entering and leaving the station on the morning in question and had observed nothing unusual. Robertson v. Metropolitan Atl. Rapid Transit Auth., 199 Ga. App. 681, 405 S.E.2d 745 (1991).

Carrier's duty to discharge passenger at safe place. — The duty of the operator of a public carrier to exercise extraordinary care

and diligence in selecting a safe place to discharge passengers is met when the operator does in fact discharge them at a reasonably safe place. *Columbus Transp. Co. v. Curry*, 104 Ga. App. 700, 122 S.E.2d 584 (1961).

Ordinarily a common carrier of passengers by street car or other conveyance on city streets discharges its legal duty to a passenger when it deposits the passenger at a usual and reasonably safe place for alighting and crossing the street. *Locke v. Ford*, 54 Ga. App. 322, 187 S.E. 715 (1936); *Greeson v. Davis*, 62 Ga. App. 667, 9 S.E.2d 690 (1940); *Jordan v. Wiggins*, 66 Ga. App. 534, 18 S.E.2d 512 (1942); *Knight v. Atlanta Transit Sys.*, 137 Ga. App. 667, 224 S.E.2d 790 (1976).

Carrier liable for depositing passenger at unsafe location. — Carrier is not permitted to deposit passenger at place which it knows will reasonably expose the passenger to unusual peril, and it may be held liable for a proximately resulting injury. *Locke v. Ford*, 54 Ga. App. 322, 187 S.E. 715 (1936).

Carrier not liable to passenger for usual dangers of traffic. — A carrier is not under a duty to wait until approaching automobiles have stopped or to warn a passenger of the usual dangers of traffic which in the passenger's exercise of ordinary care would be avoidable. *Locke v. Ford*, 54 Ga. App. 322, 187 S.E. 715 (1936); *Greeson v. Davis*, 62 Ga. App. 667, 9 S.E.2d 690 (1940); *Jordan v. Wiggins*, 66 Ga. App. 534, 18 S.E.2d 512 (1942).

Rule of liability for failure to discharge at safe place. — The rule of liability against a carrier for negligence in discharging a passenger at an unsafe place is not that the carrier must show knowledge on the part of its operator that an unsafe condition exists, but only slight negligence in depositing the passenger at a place which will reasonably expose the passenger to peril. *Columbus Transp. Co. v. Curry*, 104 Ga. App. 700, 122 S.E.2d 584 (1961).

Duty of care when discharging child passenger. — In the case of a child of tender years diligence required of school bus driver to deposit passenger at a reasonably safe place must be exercised with a consideration of the limited abilities of the minor, and whether, with respect to the minor, a safe place has been selected is usually a question for the jury. *Greeson v. Davis*, 62 Ga. App.

667, 9 S.E.2d 690 (1940); *Jordan v. Wiggins*, 66 Ga. App. 534, 18 S.E.2d 512 (1942).

Where a child of the age of seven years is caused to alight in a place where danger to the child is apparent to the driver, or in the exercise of proper care should have been, a jury question, at least, if presented as to whether or not the driver was negligent. *Dishinger v. Suburban Coach Co.*, 84 Ga. App. 498, 66 S.E.2d 242 (1951).

Jury Issues and Instructions

Jury instructions. — Failure to instruct the jury that a cab driver could assume that the driver of the other car would obey the law of right of way was not error, as extraordinary diligence might, in the opinion of the jury, require that the driver should look out for law violators as one of the perils which might interfere with the driver's safe transit, and it was a question for the jury to determine what extraordinary diligence demanded. *Black & White Cab Co. v. Clark*, 67 Ga. App. 170, 19 S.E.2d 570 (1942).

In an action against a carrier for wrongful death of a passenger due to negligent operation of a bus, the judge should instruct the jury that the duty of the driver to exercise extraordinary care continued in all events, whether or not the jury believed that the driver was confronted with a sudden emergency, but that if they should conclude that a sudden emergency did arise, in deciding whether the driver continued to exercise extraordinary care they should take into consideration the fact that when one is confronted with a sudden emergency the driver is not to be held to the same accuracy of judgment as would be required of the driver if the driver had time for deliberation. *Scott v. Torrance*, 69 Ga. App. 309, 25 S.E.2d 120 (1943).

Failure to define the term "extraordinary diligence" in an instruction on the law pertaining to the duty a carrier owes to its passengers was not harmful error because the term is comprised of words of ordinary understanding and is self-explanatory. *Adams v. Metropolitan Atlanta Rapid Transit Auth.*, 246 Ga. App. 698, 542 S.E.2d 130 (2000).

Determining facts sufficient for extraordinary diligence is jury question. — What facts suffice to show exercise of extraordinary diligence is ordinarily question for jury.

Jury Issues and Instructions (Cont'd)

Modern Coach Corp. v. Faver, 87 Ga. App. 221, 73 S.E.2d 497 (1952).

It was ordinarily for the jury to determine whether the performance or nonperformance of a specific act was in compliance with the duty imposed on a carrier by the provisions of former Code 1933, § 18-204 (see O.C.G.A. § 46-9-132) as to the exercise by it of extraordinary care and diligence. *Modern Coach Corp. v. Faver*, 87 Ga. App. 221, 73 S.E.2d 497 (1952).

It is for the jury to say, under all the facts, whether the company was negligent in not providing a suitable conductor to preserve order, or whether the person in charge of the car as driver was negligent in the preservation of order thereof, and the safe carriage of the passengers to the place of destination. *Holly v. Atlanta S.R.R.*, 61 Ga. 215, 34 Am. R. 97 (1878).

Where decedent was run over by a bus after the driver let decedent off on the roadway approximately four feet from the curb and about 25 feet from the bus stop, the issues of decedent's negligence and the duty of care owed to decedent were questions for the jury. *Cuthbert v. Metropolitan Atlanta Rapid Transit Auth.*, 190 Ga. App. 550, 379 S.E.2d 413, cert. denied, 190 Ga. App. 897, 379 S.E.2d 443 (1989).

Plaintiff's lack of due care also jury question. — Whether there was a lack of due care on the part of the plaintiff who was injured when alighting from a bus which had stopped 35 feet from the regular stopping point was a question of fact for the jury. *Columbus Transp. Co. v. Curry*, 104 Ga. App. 700, 122 S.E.2d 584 (1961).

Application

Duty to exercise ordinary care in providing station facilities distinguished. — The carrier's duty of exercising ordinary care to furnish safe station facilities for those to be received or for those who have been discharged as passengers is not to be confused with the carrier's duty to use extraordinary care in receiving, transporting and discharging its passengers. *Delta Air Lines v. Millirons*, 87 Ga. App. 334, 73 S.E.2d 598 (1952).

Passenger who has not entered cars. — One who has a railroad ticket and is present

to take the train at the ordinary point of departure, is a passenger, though the passenger has not entered the cars. In duties toward the passenger, directly involving the passenger's safety, the company is bound to extraordinary diligence, and in those touching the passenger's convenience or accommodation, to ordinary diligence. *Central R.R. & Banking v. Perry*, 58 Ga. 461 (1877).

Passenger following passage through turnstile. — After a person paid their fare and went through the turnstile to await a train, the person became a "passenger" under O.C.G.A. § 46-9-132. *Walker v. Metropolitan Atlanta Rapid Transit Auth.*, 226 Ga. App. 793, 487 S.E.2d 498 (1997).

Injury through fault of passenger. — No person shall recover from a railroad company for an injury to oneself or the passenger's property, where the same is done by the passenger's consent, or is caused by the passenger's own negligence. If the plaintiff and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to plaintiff. *Central R.R. v. Brinson*, 70 Ga. 207 (1883).

Passenger not relieved of duty to exercise ordinary care for own safety. — The duty to exercise extraordinary care which was imposed upon common carriers as defendants did not abrogate the requirement which a tort plaintiff had under § 51-11-7 to exercise ordinary care for one's own safety to avoid the consequences caused by the defendant's negligence. *Knight v. Atlanta Transit Sys.*, 137 Ga. App. 667, 224 S.E.2d 790 (1976).

Notice of possible criminal activity. — Passenger's comments to bus company's ticket agent that police would probably be looking for the passenger and that the agent should not tell them where the passenger was were insufficient to put company on notice that the passenger would be a danger to other passengers. *Southeastern Stages, Inc. v. Stringer*, 263 Ga. 641, 437 S.E.2d 315 (1993).

When the event causing harm to a passenger is a criminal act by a third party, the duty of the carrier to exercise extraordinary diligence to prevent that act arises only if the carrier has reason to anticipate it. *Walker v. Metropolitan Atlanta Rapid Transit Auth.*, 226 Ga. App. 793, 487 S.E.2d 498 (1997).

Injury or humiliation caused by third persons. — A railroad company is bound to use extraordinary care and diligence to protect its passengers, while in transit, from violence, injury, or outrage and humiliation by third persons. This protection must be afforded by the conductor to the extent of all the power with which the conductor is clothed by the company or by the law, and the conductor's failure to afford it, when the conductor had knowledge that there was occasion for the conductor's interference, will subject the company to liability in damages. *Hillman v. Georgia R.R. & Banking*, 126 Ga. 814, 56 S.E. 68, 8 Ann. Cas. 222 (1906).

Bus company was not liable for injuries sustained by passenger while attempting to exit a bus which had broken down and the driver and passengers were awaiting the arrival of a replacement bus when an unidentified individual falsely exclaimed that the bus was on fire. *Paschal v. Ferguson Transp., Inc.*, 189 Ga. App. 447, 375 S.E.2d 901 (1988).

Legal principles applied equally to air and rail carriers. — The governing principles of law concerning the termination of the relation of carrier and passenger have been laid down in cases involving carriers by rail, and these principles are also controlling in an action against a carrier by air, since both types of carrier operate upon fixed schedules and over fixed routes, and ordinarily discharge their passengers at a station or terminal facility located at the passenger's destination. *Delta Air Lines v. Millirons*, 87 Ga. App. 334, 73 S.E.2d 598 (1952).

Liability of bus company to passenger. — Bus company owed to plaintiff passenger duty to exercise extraordinary diligence to protect plaintiff from injury in the operation of such bus. *Modern Coach Corp. v. Faver*, 87 Ga. App. 221, 73 S.E.2d 497 (1952).

Conductor's duty of care toward passengers. — Extraordinary diligence was measure of care which conductors must exercise toward passengers under former Code 1882, § 2067 (see O.C.G.A. § 46-9-132). *Georgia R.R. v. Homer*, 73 Ga. 251 (1884).

Elevator as carrier. — The owner of an office building, equipped with an elevator which is operated for conveying the owner's tenants and their employees and patrons to and from the various floors, was not a com-

mon carrier in the sense that the owner was bound to serve all the public; yet the owner's duty as to protecting passengers in the elevator was the same under former Civil Code 1910, § 2714 (see O.C.G.A. § 46-9-132) as that chargeable to carriers of passengers by other means. *Grant v. Allen*, 141 Ga. 106, 80 S.E. 279 (1913).

Owner of elevator in an office building owes duty of extraordinary diligence to elevator passengers and cannot delegate this duty to an independent contractor engaged in elevator repair; thus, the owner is liable for slight negligence. *Gaffney v. EQK Realty Investors*, 213 Ga. App. 653, 445 S.E.2d 771 (1994); *Lane v. Montgomery Elevator Co.*, 225 Ga. App. 523, 484 S.E.2d 249 (1997).

One who carries passengers on an elevator from floor to floor of a large office building, or of a hotel, constantly and continuously, is a carrier of passengers. No rational distinction in principle can be based on the fact that the passengers are carried vertically rather than horizontally; and the distance the passengers are carried is not material. *Helmly v. Savannah Office Bldg. Co.*, 13 Ga. App. 498, 79 S.E. 364 (1913).

Escalator owner's and servicer's duty. — The duty of extraordinary care was imposed on owner of the building because the escalator was operated and the servicer was employed by the owner. *Millar Elevator Serv. Co. v. O'Shields*, 222 Ga. App. 456, 475 S.E.2d 188 (1996).

An airport shuttle train or people mover providing free transportation inside the secured area of the airport has the same status of public transportation as escalators and elevators and requires the exercise of extraordinary diligence in the transportation of passengers. *Saltis v. A.B.B. Daimler-Benz Ad Tranz Atlanta, Inc.*, 243 Ga. App. 603, 533 S.E.2d 772 (2000).

Employee riding on free pass treated as passenger for hire. — Where one employed generally by a railroad is issued trip passes on trains to go to and from work, and is also permitted to ride without the payment of fare without using one's pass, and is not engaged in or within the scope of one's employment while so riding on a train, the employee occupies the status of a passenger for hire, and the railroad is liable to the employee for injuries inflicted by its negligence, while the employee is so riding, and if

Application (Cont'd)

the injury occurs at a time when the employee is using a pass a limitation therein relieving the railroad from liability on account of its negligence is void. *Fowler v. Western & A.R.R.*, 75 Ga. App. 156, 42 S.E.2d 499 (1947).

Receiving passenger on freight trains. — A carrier who receives a passenger on one of its freight trains is bound by the same standard of diligence as if the passenger were being transported on a regular passenger-train. *Central of Ga. Ry. v. Lippman*, 110 Ga. 665, 36 S.E. 202, 50 L.R.A. 673 (1900).

A passenger who voluntarily seeks to be transported on a freight-train takes the risk of the usual and necessary jolts and jars which occur in the operation of such train, but the carrier is not relieved from the use of extraordinary diligence to the passenger to prevent unusual and unnecessary jolts and jars. *Central of Ga. Ry. v. Lippman*, 110 Ga. 665, 36 S.E. 202, 50 L.R.A. 673 (1900).

School bus operator's duty of care to passengers. — Operator of school motorbus is carrier of passengers and is required to exercise extraordinary care and diligence for the safety of any one of such school children riding in the operator's bus. *Sheffield v. Lovering*, 51 Ga. App. 353, 180 S.E. 523 (1935); *Eason v. Crews*, 88 Ga. App. 602, 77 S.E.2d 245 (1953).

A school bus operator who used the operator's bus on nonschool days for special trips was a "carrier of passengers" within the meaning of former Code 1933, § 18-204 (see O.C.G.A. § 46-9-132). *Scott v. Torrance*, 69 Ga. App. 209, 25 S.E.2d 120 (1943).

Applicability of Code section to street railroads. — Rule of former Code 1873, § 2067 (see O.C.G.A. § 46-9-132) applied to street railway carriers. *Holly v. Atlanta S.R.R.*, 61 Ga. 215 (1878); *City & Sub. Ry. v. Findley*, 76 Ga. 311 (1886).

In the conduct of operating electric street cars as a common carrier it was bound to use extraordinary diligence under former Civil Code 1895, § 2266 (see O.C.G.A. § 46-9-132). *Savannah Elec. Co. v. Wheeler*, 128 Ga. 550, 58 S.E. 38, 10 L.R.A. (n.s.) 1176 (1907).

Taxicabs operator's duty of care to passengers. — Operators of taxicab business transporting general public are carriers of passengers, and amenable to the legal duty of exercising extraordinary diligence for their protection. *Locke v. Ford*, 54 Ga. App. 322, 187 S.E. 715 (1936).

Amusement park ride not "public conveyance". — Amusement ride known as "The Wheelie" was not a public conveyance; therefore, the standard of care owed by the proprietor, owner, and operator of "The Wheelie" was a duty of ordinary care to the passengers. *Harlan v. Six Flags Over Ga., Inc.*, 250 Ga. 352, 297 S.E.2d 468 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Carriers, § 832, 836.

ALR. — Liability of carrier for injury to passenger by articles belonging to carrier on the floor or in the aisles, 3 ALR 640; 12 ALR 1346.

Liability of street railway company to passenger on account of crowded condition of cars, 5 ALR 1257; 42 ALR 1329.

Carrier's duty to passenger while train is going through tunnel, 9 ALR 96.

Stipulation releasing carrier from liability for injury to free passenger as affecting liability for gross negligence or willful or wanton injury, 9 ALR 501.

Liability of carrier for injury due to casual or temporary condition of station or its approaches, 10 ALR 259.

Duty of carrier to other passengers respecting transportation of insane passenger, 12 ALR 242.

Liability of carrier for injury to passenger due to obstruction of aisle or platform by property of another passenger, 19 ALR 1372.

Duty and liability of carrier as to "step box" or other device to facilitate entering and leaving car, 20 ALR 914.

Res ipsa loquitur as applicable to injury to passenger in a collision where one of the vehicles is not within carrier's control, 25 ALR 690; 83 ALR 1163; 161 ALR 1113.

Loss of contract or business opportunity as element of damages for wrongful ejection from train or being carried past station, 25 ALR 916; 82 ALR 665; 97 ALR 588.

Liability of employer for acts or omissions

of independent contractor in respect of positive duties or former arising from or incidental to contractual relationships, 29 ALR 736.

Liability of carrier for injury to passenger by car window, 29 ALR 1262; 45 ALR 1541.

Carrier's liability for injury to passenger due to rushing or crowding of passengers, 32 ALR 1315; 155 ALR 634.

Responsibility of carrier to its passengers for conditions on roadway or at stations of another carrier over whose line it detours, 33 ALR 820.

Liability of carrier for injury to passenger by car door, 41 ALR 1089.

Liability of street railway company to passenger on account of crowded condition of car, 42 ALR 1329.

Liability of street railway company to passenger struck by vehicle not subject to its control, 44 ALR 162.

Liability of carrier for injury to passenger due to construction of floor of car or vessel on different levels, 48 ALR 1424.

Carrier's liability to passenger for failure to keep trains to schedule time, 52 ALR 1332.

Duty and liability of carrier as to assisting passenger to board or alight from car or train, 55 ALR 389; 59 ALR 940.

Liability of street railway company for injury to passenger or pedestrian as result of overhang of car in rounding curve, 55 ALR 479.

Duty and liability of carrier to passenger attempting to leave moving street car, 56 ALR 981.

Liability of proprietor or operator of private railroad for injury to one other than employee riding thereon, 57 ALR 818.

Liability of carrier by water for injury to passenger while embarking or disembarking, 59 ALR 1355.

Duty and liability to passenger temporarily leaving train, 61 ALR 403.

Status of, and liability of street railway company to, person approaching to board street car, 75 ALR 285.

Duty of Pullman Company to protect Pullman passenger against acts of train employees, 76 ALR 927.

Liability of carrier operating in street to passenger struck by other vehicle while on platform, step, or running board of car, 77 ALR 429.

Ferry operator's duty as regards automobiles or their occupants, 82 ALR 798.

Changed conditions as affecting duty, or enforcement of duty, as to train service or maintenance of stations imposed upon railroad by charter or statute, 111 ALR 57.

Liability of carrier for injury to passenger as result of ice, snow, or rain on exposed or interior portions of car or vessel, 117 ALR 522.

Duty of carrier to discover abnormal condition of passenger, 124 ALR 1428.

Carrier's liability for conduct of passenger (other than assault) causing injury to other passenger, 140 ALR 1194.

Carrier's liability to person in street or highway for purpose of boarding its vehicle, 7 ALR2d 549.

Liability of motorbus carrier to passenger injured through fall while alighting from vehicle, 9 ALR2d 938.

Duty and liability of carrier to intoxicated passenger while en route, 17 ALR2d 1085.

Liability for injury to customer or patron from defect in or fall of seat, 21 ALR2d 420.

Liability of operator of ambulance service for personal injuries to person being transported, 21 ALR2d 910.

Liability of carrier to passenger for injury due to crowded condition of motorbus, or pushing or crowding of passengers therein, 26 ALR2d 1219.

Attempt to board moving car or train as contributory negligence or assumption of risk, 31 ALR2d 931.

Duty of railroad to passengers to keep steps or vestibule of car free from debris or foreign substances other than snow or ice, 34 ALR2d 360.

Carrier's liability to passenger injured by landslide, or the like, 34 ALR2d 831.

Duty and liability of carrier with respect to allowing passenger sufficient time for change of vehicles, 40 ALR2d 809.

Liability of motor carrier for injury to passenger's hand in vehicle door, 42 ALR2d 1190.

Liability of carrier to passenger injured by hurling of object through window by a third person, 46 ALR2d 1098.

Carrier's liability to passenger injured while using washroom or lavatory facilities on conveyance, 50 ALR2d 1071.

Employer's liability for assault by taxicab or motorbus driver, 53 ALR2d 720.

Motor carrier's liability for injury to passenger by sudden stopping, starting, or lurching of conveyance, 57 ALR2d 5.

Liability of motor carrier for injury or death of passenger inflicted by the vehicle from which he has alighted, 58 ALR2d 932.

Liability of motor carrier for injury or death of passenger who has alighted, caused by conditions at place of alighting, 58 ALR2d 948.

Liability of air carrier to passenger injured while boarding or alighting, 61 ALR2d 1113.

Liability of carrier to passenger injured through fall of baggage or other object from overhead repository, 68 ALR2d 667.

Liability of motor carrier for loss of passenger's luggage or packages, 68 ALR2d 1350.

Carrier's duties to passenger who becomes sick or is injured en route, 92 ALR2d 656.

Duty and liability of carrier by motorbus to persons boarding bus, 93 ALR2d 237.

Liability for injury to or death of passenger from accident due to physical condition of carrier's employee, 53 ALR3d 669.

Liability of owner or operator for injury caused by door of automatic passenger elevator, 63 ALR3d 893.

Liability for injury caused by fall of person into shaft, or by abrupt drop, sudden movement, or stopping between floors, of automatic passenger elevator, 64 ALR3d 950.

Liability of air carrier for damage or injury sustained by passenger as result of hijacking, 72 ALR3d 1299.

Carrier's liability for injury or death of infant passenger as affected by fact that child was in custody of parent or other adult, 74 ALR3d 1171.

Application of *res ipsa loquitur* doctrine to accidents incurred by passenger while boarding or alighting from a carrier, 93 ALR3d 776.

Liability of taxicab carrier to passenger injured while alighting from taxi, 98 ALR3d 822.

Liability of common carrier for personal injury or death of passenger occasioned by inhalation of gases or fumes from exhaust, 99 ALR3d 751.

Motor carrier's liability for personal injury or death of passenger caused by debris, litter, or other foreign object on floor or seat of vehicle, 1 ALR4th 1249.

Width or design of lateral space between passenger loading platform and car entrance as affecting carrier's liability to passenger for injuries incurred from falling into space, 28 ALR4th 748.

Liability of land carrier to passenger who becomes victim of third party's assault on or about carrier's vehicle or premises, 34 ALR4th 1054.

Liability of land carrier to passenger who becomes victim of another passenger's assault, 43 ALR4th 189.

Liability of operator of ambulance service for personal injuries to person being transported, 68 ALR4th 14.

Right to contribution or indemnity on behalf of owner, operator, maintainer, repairer, or installer of automatic passenger elevator in action by elevator user, 100 ALR5th 409.

Limitation of liability of air carrier for personal injury or death, 91 ALR Fed. 547.

46-9-133. Duty of common carriers of passengers to furnish comfortable seats and to light and ventilate cars.

(a) Common carriers doing business in this state shall furnish to their passengers comfortable seats and shall have the railroad car or other vehicle well and sufficiently lighted and ventilated.

(b) Any common carrier which violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1863-64, p. 132, § 1; Code 1868, § 4498; Code 1873, § 4585; Code 1882, § 4585; Ga. L. 1890-91, p. 157, §§ 1, 4, 5, 7; Civil Code 1895, §§ 2269, 2272, 2273, 2275; Penal Code 1895, §§ 522, 526; Civil Code 1910, §§ 2717, 2720, 2721, 2723; Penal Code 1910, §§ 529, 534; Code 1933, §§ 18-206, 18-9903; Ga. L. 1979, p. 945, § 1.)

RESEARCH REFERENCES

ALR. — Passenger's waiver of right to seat, 42 ALR 156.

Liability for injury to customer or patron from defect in or fall of seat, 21 ALR2d 420.

Liability of common carrier for personal injury or death of passenger occasioned by inhalation of gases or fumes from exhaust, 99 ALR3d 751.

46-9-134. Duty of conductors or other railroad employees to assign passengers to cars and compartments; investing of conductors and railroad employees with police powers.

All conductors or other railroad employees in charge of passenger cars shall assign all passengers to their respective cars, or compartments of cars, provided by the railroad company. All conductors of street cars and buses shall assign all passengers to seats on the cars under their charge. All conductors and other employees of railroads and all conductors of street cars and buses shall have, and are invested with, police powers to carry out this Code section. (Ga. L. 1890-91, p. 157, § 2; Civil Code 1895, § 2270; Civil Code 1910, § 2718; Code 1933, § 18-207; Ga. L. 1979, p. 945, § 2.)

46-9-135. Duty of passengers to remain in assigned car, compartment, or seat; ejectment of passenger by conductor and railroad employees.

(a) No passenger shall remain in any car, compartment, or seat other than the one to which he has been assigned. The conductor and any and all employees on such cars shall have the power to eject from the train or car any passenger who refuses to remain in the car, compartment, or seat assigned to him.

(b) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1890-91, p. 157, § 3; Civil Code 1895, § 2271; Civil Code 1910, § 2719; Code 1933, §§ 18-208, 18-9904.)

JUDICIAL DECISIONS

Cited in Savannah Elec. Co. v. Lowe, 27 State, 105 Ga. App. 332, 124 S.E.2d 484 Ga. App. 350, 108 S.E. 313 (1921); Glover v. (1962).

RESEARCH REFERENCES

C.J.S. — 13 C.J.S., Carriers, § 588.

46-9-136. Carriage of baggage.

(a) A carrier of passengers may limit the value of the baggage which may be taken on board in proportion to the fare paid.

(b) A carrier of passengers shall be responsible for the value of lost baggage, regardless of whether an extra charge was demanded or paid for carriage of the baggage, provided that a carrier of passengers shall be responsible only for baggage placed in his custody; provided, further, that the liability of the carrier shall extend only to such articles as a traveler for business or pleasure would carry for his own use.

(c) A passenger shall not have the right to receive a reduction in fare by assuming custody of his own baggage. (Orig. Code 1863, §§ 2044, 2051; Code 1868, §§ 2045, 2048; Code 1873, §§ 2071, 2081; Code 1882, §§ 2071, 2081; Civil Code 1895, §§ 2280, 2288; Civil Code 1910, §§ 2731, 2742; Code 1933, §§ 18-220, 18-222.)

Cross references. — Penalty for unauthorized removal of baggage, freight, or other

item transported by bus or stored in terminal, § 16-12-124.

JUDICIAL DECISIONS

“Baggage” defined. — By baggage is understood such articles of necessity or personal convenience, as are usually carried by passengers, for their personal use. What articles are usually carried by passengers, is a question to be left to the jury. *Dibble v. Brown & Harris*, 12 Ga. 217, 56 Am. Dec. 460 (1852).

By baggage is meant the ordinary wearing apparel customarily carried by travelers, and such other articles as may be needed for the passenger's comfort or amusement. *Hutchings & Co. v. Western & A.R.R.*, 25 Ga. 61, 71 Am. Dec. 156 (1858).

Extra baggage. — If railroads receive extra baggage, to be carried for compensation, they are, as to such extra baggage, liable as common carriers. *Dibble v. Brown & Harris*, 12 Ga. 217, 56 Am. Dec. 460 (1852).

Money and merchandise not “baggage”. — Money, except for the payment of expenses, and merchandise are not included in the term baggage. *Dibble v. Brown & Harris*, 12 Ga. 217, 56 Am. Dec. 460 (1852); *Hutchings & Co. v. Western & A.R.R.*, 25 Ga. 61, 71 Am. Dec. 156 (1858).

Carrier of baggage liable as common carrier. — Those who carry passengers for hire, as regards the passengers' baggage, are like common carriers, liable for its loss, unless caused by the act of God or the public enemy. *Dibble v. Brown & Harris*, 12 Ga. 217, 56 Am. Dec. 460 (1852).

Excuse availing carrier for loss of baggage. — No excuse avails carrier for loss of

baggage except act of God, irresistible accident, or destruction by public enemy. *Southern Ry. v. Rosenheim & Sons*, 1 Ga. App. 766, 58 S.E. 81 (1907).

Detention of baggage. — During the time within which a railroad company may reasonably detain a passenger's baggage, the relation of carrier and passenger still exists between the parties, and the liability of the railroad company does not become that of a mere warehouseman. *Georgia R.R. & Banking v. Phillips*, 93 Ga. 801, 20 S.E. 646 (1894).

If the plaintiff demanded plaintiff's baggage of the company immediately after reaching her destination, and the railroad refused to deliver until morning, and before morning the baggage was destroyed by fire, then the railroad is liable as a common carrier. *Georgia R.R. & Banking v. Phillips*, 93 Ga. 801, 20 S.E. 646 (1894).

General limitation of liability not contract. — Under former Civil Code 1910, §§ 2731 and 2742 (see O.C.G.A. § 46-9-136), a carrier of passengers may bona fide agree with the purchaser of a ticket on the value of baggage; but a mere general limitation as to value, expressed in a printed form of contract, though signed by the carrier and the purchaser of the ticket, was not a bona fide agreement as to the value of the particular baggage. *Southern Ry. v. Dinkins & Davidson Hdwe. Co.*, 139 Ga. 332, 77 S.E. 147, 43 L.R.A. (n.s.) 806 (1913).

Carrier's liability not applicable where passenger leaves trunks in baggage room. —

One who, having been a passenger, arrives with one's baggage at destination, surrenders one's checks, opens up the trunks in the baggage room, and afterwards leaves the trunks in the baggage room by permission of the baggage clerk, upon a statement that one will be going off again next day and will then recheck them, cannot hold the railway company responsible, as a carrier of baggage, for the destruction of the trunks by fire during the night. *Southern Ry. v. Rosenheim & Sons*, 1 Ga. App. 766, 58 S.E. 81 (1907).

Through ticket. — Where a passenger with

a through ticket over a connecting line of railroads checks the passenger's baggage at the starting point through to passenger's destination, and upon arriving it is damaged or has been broken open and robbed, the passenger may sue the railroad which issued the check, or he may sue the railroad delivering the baggage in bad order. *Wolff v. Central R.R.*, 68 Ga. 653, 45 Am. R. 501 (1882).

Cited in *Central of Ga. Ry. v. Lippman*, 110 Ga. 665, 36 S.E. 202, 50 L.R.A. 673 (1900).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 269.

ALR. — Extra or excess baggage, 2 ALR 109.

Carrier's liability in respect to baggage checked in parcel room, 7 ALR 1234; 27 ALR 157; 37 ALR 762.

Regulation by public service commission as to checking and handling of baggage, 21 ALR 323.

Liability of carrier for baggage not accompanied by passenger, 23 ALR 1446.

Measure and elements of damages for loss or delay in delivering baggage of traveling salesman, 25 ALR 76.

Responsibility of carrier for acts or omissions of redcaps, or porters other than train employees, 59 ALR 126.

Discrimination by carrier between passengers as regards checking and handling of baggage, 59 ALR 329.

Liability of air carrier for loss of or damage to passengers' baggage or contents thereof, 25 ALR2d 1352.

Liability of motor carrier for loss of passenger's baggage or packages, 68 ALR2d 1350.

Liability of air carrier for injury to passenger caused by fall of object from overhead baggage compartment, 32 ALR5th 1.

46-9-137. Granting of passes by common carriers to former employees and their immediate family.

Common carriers may grant passes upon their transportation lines to any former employee of the company and his immediate family if such employee, owing to length of service or because of an injury suffered in the service of the company, has been retired from the company but is kept on the payroll under a system of pensioning or a similar system. Such passes shall be good only for intrastate passage. (Ga. L. 1909, p. 163, § 1; Civil Code 1910, § 2735; Code 1933, § 18-217.)

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 272.

C.J.S. — 13 C.J.S., Carriers, §§ 499, 502.

ALR. — Evidence of right to free transportation on public conveyance, 3 ALR 387.

Franchise provisions for free or reduced

rates of public service corporations as within constitutional or statutory provision prohibiting discrimination, 10 ALR 504; 15 ALR 1200.

Constitutionality of statute authorizing issuance of passes by carriers, 33 ALR 373.

Contractual exemption from or limitation of liability for injury to passenger traveling on pass as available to one other than the carrier issuing pass, 147 ALR 778.

Status of employee or his family traveling

on employer's interstate conveyance by means of pass issued pursuant to specific provision of employment or collective bargaining agreement, 55 ALR2d 766.

46-9-138. Granting of annual passes by common carriers to sheriffs and their deputies.

Common carriers operating in this state may issue annual passes to all sheriffs and their lawful deputies, provided that the term "sheriffs and their lawful deputies," as used in this Code section, means one sheriff and one lawful deputy for each county; provided, further, that whenever any sheriff or deputy travels on such free pass, such sheriff or deputy shall have no right to charge or collect, from any source, railroad fare covering such trip. (Ga. L. 1922, p. 173, § 1; Code 1933, § 18-218.)

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 272, 729.

C.J.S. — 13 C.J.S., Carriers, §§ 499, 502.

ALR. — Evidence of right to free transportation on public conveyance, 3 ALR 387.

Carriers: free passes to public officials or employees, 8 ALR 682.

Constitutionality of statute authorizing issuance of passes by carriers, 33 ALR 373.

Contractual exemption from or limitation of liability for injury to passenger traveling on pass as available to one other than the carrier issuing pass, 147 ALR 778.

46-9-139. Selling or dealing in passenger tickets by person other than authorized agent of common carrier issuing such tickets.

(a) It shall be unlawful for any person, other than the authorized agent of the common carrier issuing the same, to sell or otherwise deal in, or offer to sell, any passenger ticket which was issued and sold for less than the standard schedule rate under contract with the original purchaser and upon which ticket appears a statement, signed by the original purchaser, that the ticket is nontransferable and void in the hands of any person other than the original purchaser, provided that nothing in this Code section shall be construed as interfering with the right of the original purchaser of a transferable ticket to sell the same to a person who will in good faith personally use it to embark on a journey.

(b) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1904, p. 102, §§ 1, 3; Civil Code 1910, § 2733; Penal Code 1910, § 636; Code 1933, §§ 18-215, 18-9911.)

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Carriers, § 798.

C.J.S. — 13 C.J.S., Carriers, §§ 499, 502.

46-9-140. Duty of common carriers to redeem unused tickets and unused portions of tickets.

(a) It shall be the duty of every common carrier who has sold any tickets or other evidence of the purchaser's right to travel on its line or on any line of which it forms a part, if the whole of such ticket is unused, to redeem the same, paying the original purchaser thereof the actual amount for which the ticket was sold, or if any part of such ticket is unused, to redeem such unused part, paying the original purchaser thereof at a rate which shall be equal to the difference between the price paid for the whole ticket and the price of a ticket between the points for which the ticket was actually used, provided that such purchaser shall present such unused or partly used ticket for redemption, within six months after the date of its issuance, to the officer or agent who is authorized or designated by such common carrier to redeem unused or partly used tickets; and the officer shall, within 15 days after the receipt of such ticket, redeem the same as provided for in this Code section. Such redemption shall be made without cost of exchange or other expense to the purchaser of the ticket.

(b) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1904, p. 102, §§ 2, 3; Civil Code 1910, § 2734; Penal Code 1910, § 636; Code 1933, §§ 18-216, 18-9911.)

RESEARCH REFERENCES

C.J.S. — 13 C.J.S., Carriers, §§ 499, 502.

ALR. — Redemption of unused or partly used carrier's ticket, 53 ALR 1229.

PART 2**TRANSPORTATION BY RAILROAD COMPANIES**

Cross references. — Sale of distilled spirits, malt beverages, and wine by railway passenger carriers, §§ 3-9-1, 3-9-2.

46-9-150. Duty of railroad companies to furnish passengers with drinking water and lights.

(a) Railroad companies shall keep in each passenger car or in any car in which passengers are transported an adequate supply of good, pure drinking water at all hours during the day and night. Any railroad company which violates this subsection shall be guilty of a misdemeanor.

(b) Any conductor or agent of a railroad who, after being requested by a passenger to furnish a sufficient supply of water to the passenger in each car, or a light at night, passes any depot or station without so doing shall be guilty of a misdemeanor and may be prosecuted in any county through which the railroad of which he is agent or conductor runs. (Ga. L. 1863-64,

p. 132, §§ 1, 2; Code 1868, § 4498; Code 1873, § 4585; Code 1882, § 4585; Penal Code 1895, §§ 522, 523; Penal Code 1910, §§ 529, 530; Code 1933, §§ 18-211, 18-9907, 18-9908.)

RESEARCH REFERENCES

ALR. — Duty of carrier to heat car, 33 ALR 168.

46-9-151. Duty of railroad companies to telegraph and post bulletins of delayed trains.

Whenever any passenger train on any railroad in this state is more than one-half hour behind its schedule time when it passes a depot at which there is a telegraph operator during the hours such operator is required to be on duty, it shall be the duty of the railroad company to keep posted at every succeeding telegraph station along its line the time such train is behind its schedule, provided that such bulletin shall not be required to be posted at any station until one-half hour before the regularly scheduled time at which such train is to arrive at the station at which such bulletin is required to be kept. For every willful violation of this Code section, the railroad company shall be liable to pay to the state a civil penalty of \$20.00, which may be collected by an action in any court having competent jurisdiction. (Ga. L. 1884-85, p. 119, §§ 1, 2; Civil Code 1895, §§ 2235, 2236; Civil Code 1910, §§ 2688, 2689; Code 1933, § 18-214.)

RESEARCH REFERENCES

ALR. — Carrier's liability to passenger for failure to keep trains to schedule time, 52 ALR 1332. Recovery of cumulative statutory penalties, 71 ALR2d 986.

46-9-152. Duty of railroad companies to provide conductors and other employees with baggage checks; duty of conductors to check trunks and baggage.

(a) A railroad company shall have the duty of providing its conductors, agents, or employees with checks so as to check all trunks or separate baggage of passengers from station to station on its roads when required.

(b) It shall be the duty of the conductor of every passenger train to cause, upon application to him, all trunks and baggage to be checked from any station to any point of destination on its road or on any road running under the control of the company of which he is conductor.

(c) If any conductor fails or refuses, upon application, to comply with subsection (b) of this Code section, the railroad company employing that conductor shall be liable for a civil penalty of \$50.00 for every such failure or refusal, to be recovered in a court of competent jurisdiction of that

county where the demand for check was made. (Laws 1847, Cobb's 1851 Digest, p. 398; Ga. L. 1857, p. 65, § 1; Code 1868, § 2046; Code 1873, § 2072; Code 1882, § 2072; Civil Code 1895, § 2281; Civil Code 1910, § 2732; Code 1933, § 18-221.)

Law reviews. — For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution

of venue questions, see 9 Ga. St. B.J. 254 (1972).

JUDICIAL DECISIONS

Baggage check is in legal effect bill of lading for baggage. Lewis v. Ocean S.S. Co., 12 Ga. App. 191, 76 S.E. 1073 (1913).

RESEARCH REFERENCES

ALR. — Extra or excess baggage, 2 ALR 109.

Carrier's liability in respect to baggage checked in parcel room, 7 ALR 1234; 27 ALR 157; 37 ALR 762.

Liability of carrier for baggage not accompanied by passenger, 23 ALR 1446.

Discrimination by carrier between passen-

gers as regards checking and handling of baggage, 59 ALR 329.

Liability of motor carrier for loss of passenger's baggage or packages, 68 ALR2d 1350.

Recovery of cumulative statutory penalties, 71 ALR2d 986.

PART 3

ISSUANCE OR SALE OF TICKETS FOR PASSAGE ON VESSELS

46-9-170. Failure of person issuing or selling passenger tickets on board vessel to include country of registry on advertisement, circular, or other printed paper in regard to passage.

No person issuing, selling, or offering to sell any passenger ticket on board any vessel, including the owner or consignee of such vessel or his agents, servants, or employees, shall omit reference to the country of registry of such vessel from any advertisement, circular, circular letter, pamphlet, card, handbill, or other printed paper, or from any other notice, whether written or oral, in regard to such passage, ticket, or instrument of passage or voyage to which it entitles or purports to entitle its owner, purchaser, or holder or the line over which or the vessel for which such passage is sold or offered or as to his agency for such line or vessel. Such reference shall be no less prominently displayed than the balance of the material appearing on the printed paper or other notice. (Ga. L. 1966, p. 26, § 1.)

46-9-171. Contents of tickets, certificates, orders, or receipts issued as evidence of a right of passage on the high seas; required signatures on such tickets, certificates, orders, or receipts.

(a) A ticket or instrument issued as evidence of a right of passage on the high seas from any port in this state to any port of any other state or nation, every certificate or order issued for the purpose or under pretense of procuring such ticket or instrument, and every receipt for money paid for such ticket or instrument must state:

- (1) The name of the vessel on which the passage is to be made;
- (2) The name of the owners or consignees of such vessel;
- (3) The name of the company or line, if any, to which such vessel belongs;
- (4) Its country of registry;
- (5) The place from which such passage is to commence;
- (6) The place where such passage is to terminate;
- (7) The day of the month and year upon which the voyage is to commence; and
- (8) The name of the person purchasing such ticket or instrument or receiving such order, certificate, or receipt and the amount paid therefor.

(b) Any such ticket, instrument, order, certificate, or receipt, unless sold or issued by the owners or consignees of such vessel, must be signed by their authorized agent. (Ga. L. 1966, p. 26, § 2.)

46-9-172. Penalty.

Any person, partnership, association, firm, agency, or corporation violating any provision of this part shall be guilty of a misdemeanor, provided that no violator shall be fined less than \$500.00 for each violation. (Ga. L. 1966, p. 26, § 3.)

ARTICLE 5

CARRIERS' LIENS

Cross references. — Provisions of T. 11, Establishment of carriers' liens generally, the "Uniform Commercial Code," pertaining to liens of carriers, §§ 11-7-307, 11-7-308. § 44-14-320.

46-9-190. Lien of carrier for fare and baggage charges.

(a) A carrier of passengers shall have a lien on the passengers' baggage, not only for baggage charges but also for the passengers' fare. This lien may be foreclosed as described in subsection (b) of this Code section.

(b) Whenever baggage has been transported to destination by any common carrier and is uncalled for or refused by the holder of the baggage check issued therefor and remains uncalled for or refused for six months after its arrival at destination, the carrier may sell the same at public auction to the highest bidder at such place and time as may be designated by the carrier, provided that the carrier shall have published notice containing a general description of the baggage (that is, whether trunk, hand baggage, suitcase, box, bundle, etc.) and the time and place of sale once a week for two successive weeks in a newspaper of general circulation at the place of sale or at the nearest place thereto. (Orig. Code 1863, § 2050; Code 1868, § 2053; Code 1873, § 2079; Code 1882, § 2079; Civil Code 1895, § 2289; Civil Code 1910, § 2743; Code 1933, § 18-401; Ga. L. 1945, p. 235, § 1.)

JUDICIAL DECISIONS

Carrier liable where goods under lien are lost. — Where a railroad company retained the trunk of a passenger under its lien as provided by former Code 1873, § 2079 (see O.C.G.A. § 46-9-190) for the passenger's

fare, it was liable for any articles that may be taken therefrom while in its possession. *Southwestern R.R. v. Bently*, 51 Ga. 311 (1874).

RESEARCH REFERENCES

C.J.S. — 13 C.J.S., Carriers, §§ 484, 609, 610.

46-9-191. Lien of carrier for freight charges.

When a carrier has complied with his contract as to transportation, he shall have a lien on the goods for the freight charges and may retain possession until the lien is paid, unless this right is waived by special contract or actual delivery of the goods. If the goods are delivered, the carrier acquires a lien for the freight charges on and may until the lien is paid retain possession of other goods belonging to the debtor which come into the possession of the carrier. The immediately preceding sentence shall not apply to consumer goods which are used or bought for use for personal, family, or household purposes, except when a motor carrier of household goods and office furnishings may retain possession of such goods. (Orig. Code 1863, § 2049; Code 1868, § 2051; Code 1873, § 2077; Code 1882, § 2077; Civil Code 1895, § 2287; Civil Code 1910, § 2741; Code 1933, § 18-402; Ga. L. 1984, p. 693, § 2.)

JUDICIAL DECISIONS

Origin of section. — Former Code 1895, § 2287 (see O.C.G.A. § 46-9-191) did not have its origin in a statute of this state. It appears for the first time in the Code of 1863. It has, however, all the binding effect of an original act of the legislature, because of the adoption by the legislature of the codes wherein it appears. *Central of Ga. Ry. v. State*, 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518 (1898); *Wilensky v. Central of Ga. Ry.*, 136 Ga. 889, 72 S.E. 418, 1912D Ann. Cas. 271 (1911).

Compliance with contract as condition precedent. — The first sentence of O.C.G.A. § 46-9-191 clearly requires compliance with the contract for transportation of the goods as a condition precedent to acquiring a lien for unpaid freight charges, and thus carrier could not acquire a lien on goods which it refused to deliver. *Esquire Carpet Mills, Inc. v. Kennesaw Transp., Inc.*, 186 Ga. App. 367, 367 S.E.2d 569 (1988).

No lien where goods are lost. — No lien under former Civil Code 1895, § 2287 (see O.C.G.A. § 46-9-191) for freight could arise in favor of a carrier against the consignee for charges upon the goods which were lost. *Robinson v. Dover & S.R.R.*, 99 Ga. 480, 27 S.E. 713 (1896).

Right of carrier to prevent reshipment. — Where a carrier has a lien under former Code 1882, § 2077 (see O.C.G.A. § 46-9-191) on the property for freight charges, the consignor was under an obligation to settle with the company for the freight and storage charges before exercising the right to receive the shipment or to direct a reshipment of the property. *Pennsylvania Steel Co. v. Georgia R.R. & Banking*, 94 Ga. 636, 21 S.E. 577 (1894); *Southern Ry. v. Born Steel Range Co.*, 126 Ga. 527, 55 S.E. 173 (1906).

Lien by last carrier where mistake by initial carrier. — Where there was a mistake by the first carrier in directing the goods, under former Code 1882, § 2077 (see O.C.G.A. § 46-9-191), the last carrier will have a lien upon them for the freight earned by it,

unless the owner gave notice of the route and the lines of road over which the owner's goods were to be transported. *Bird v. Georgia R.R.*, 72 Ga. 655 (1884).

Lien as defense to contract action. — A shipper cannot maintain against a carrier an action *ex contractu* for the value of goods consigned to the carrier for shipment and not delivered, when the carrier tendered the goods at destination in a damaged condition but refused to deliver them unless the shipper pays the usual freight charges in accordance with former Civil Code 1910, § 2741 (see O.C.G.A. § 46-9-191), notwithstanding the damages to the goods amount to more than the freight charges, and the shipper demanded that the damages to the shipment be offset against the freight bill. *Wilensky v. Central of Ga. Ry.*, 136 Ga. 889, 72 S.E. 418, 1912D Ann. Cas. 271 (1911).

Lien as a defense to trover. — Under former Civil Code 1895, § 2287 (see O.C.G.A. § 46-9-191) it had been held that the consignee of goods transported by a railway company cannot, ordinarily, recover them in an action of trover against the carrier, unless the consignee has first paid or tendered the freight and storage charges which had accrued, according to the rates and rules of the railroad commission. *Seaboard Air-Line Ry. v. Shackelford*, 5 Ga. App. 395, 63 S.E. 252 (1908).

Waiver or modification. — Carrier's right to a lien for payment of the freight charges was clearly waived, or at least modified, by the special contract between the parties which provided that no payment was due until 15 days after loading, despite the fact that goods had been delivered prior to that time. Thus, unless the payment was due under the contract, no lien attached. *Esquire Carpet Mills, Inc. v. Kennesaw Transp., Inc.*, 186 Ga. App. 367, 367 S.E.2d 569 (1988).

Cited in *Ivey v. Knight & Boykin Poultry & Produce Co.*, 107 Ga. App. 634, 131 S.E.2d 147 (1963).

RESEARCH REFERENCES

C.J.S. — 13 C.J.S., Carriers, § 484.

ALR. — Liability for freight charge as affected by delivery without collecting charge as stipulated or directed, 24 ALR

1163; 78 ALR 926; 129 ALR 213.

Right of carrier to lien on goods shipped without owner's authority, 39 ALR 168.

Validity, construction, and application of

state statute giving carrier lien on goods for transportation and incidental charges, 45 ALR5th 227.

46-9-192. Priority of carriers' liens.

A carrier's liens for charges on the baggage of its passengers and on the goods and articles transported shall be superior to other liens, except liens for taxes, special liens of landlords for rent, liens of laborers, and all general liens of which the carrier had actual notice before the property claimed to be subject to lien came into their control. (Ga. L. 1873, p. 42, § 13; Code 1873, § 1986; Code 1882, § 1986; Civil Code 1895, § 2810; Civil Code 1910, § 3360; Code 1933, § 18-403.)

JUDICIAL DECISIONS

Cited in *Turner v. Priest*, 48 Ga. App. 109, 171 S.E. 881 (1933).

RESEARCH REFERENCES

C.J.S. — 13 C.J.S., Carriers, § 484.

ARTICLE 6

CONNECTING CARRIERS GENERALLY

46-9-210. Duty of railroad companies to put on sale and to sell tickets of connecting roads and to check baggage over such roads.

No railroad company having an office or agency within this state shall refuse to put on sale or refuse to sell any ticket of any other railroad company with which the same may be directly or indirectly connected, at the price or rate fixed by the commission, for passage over lines of such connecting roads, less such amount as may be directed to be deducted from such rate by any one or more of said connecting lines. It shall be unlawful, after the sale of such ticket, to refuse to issue checks for baggage over such connecting lines, to the extent that the baggage may be allowed to be checked under the ordinary rules and regulations of said companies. (Ga. L. 1890-91, p. 155, § 1; Civil Code 1895, § 2299; Civil Code 1910, § 2753; Code 1933, § 18-501.)

JUDICIAL DECISIONS

Former Civil Code 1910, § 2753 (see O.C.G.A. § 46-9-210) was constitutional. 75 S.E. 1041, 42 L.R.A. (n.s.) 541, 1913E Ann. Cas. 609 (1912).

Stephens v. Central of Ga. Ry., 138 Ga. 625,

Purpose of section. — The purpose of

former Civil Code 1895, §§ 2299, 2300 and 2301 (see O.C.G.A. §§ 46-9-210, 46-9-211 and 46-9-216) was solely for the protection of railroad companies against unlawful discriminations arising from the refusal of a railroad company to sell tickets good for passage over a connecting line. *Wimberly v. Georgia S. & F. Ry.*, 5 Ga. App. 263, 63 S.E. 29 (1908).

Statute of limitations. — The statute of limitations applicable to a suit against a railroad company under former Civil Code 1910, § 2753 et seq. (see O.C.G.A. § 46-9-210 et seq.), was provided by former Civil Code 1910, § 4370 (see O.C.G.A.

§ 9-3-28). *Atlanta & W.P.R.R. v. Coleman*, 142 Ga. 94, 82 S.E. 499 (1914).

Pleading. — Where the petition neither alleged that the defendant had been furnished tickets by a connecting carrier, nor that it has been tendered such tickets for sale and had refused to put them on sale, no cause of action is stated. *Jones v. Louisville & N.R.R.*, 132 Ga. 11, 63 S.E. 627 (1908).

Cited in *Bridwell v. Gate City Term. Co.*, 127 Ga. 520, 56 S.E. 624 (1907); *Southern Ry. v. Melton*, 133 Ga. 277, 65 S.E. 665 (1909); *Central of Ga. Ry. v. Stephens*, 141 Ga. 342, 80 S.E. 1044 (1914).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Carriers, § 665.

C.J.S. — 13 C.J.S., Carriers, §§ 499, 502, 596.

ALR. — Right of railroad to discriminate in respect of switching charges, 2 ALR 585.

46-9-211. Duty of railroad companies to place their tickets for sale with connecting roads; duty to accept such tickets and to receive and transport baggage checked upon such tickets; security for tickets.

(a) No railroad company operating or doing business wholly or partly within this state shall:

(1) Refuse to put on sale with the agents of any other railroad company with which it may be connected, whether directly or indirectly, tickets for any point upon its lines of road;

(2) Refuse to receive such tickets for passage over its lines; or

(3) Refuse to receive and transport baggage which may be checked upon said tickets so sold.

(b) Any company so placing its tickets on sale may demand reasonable security to secure the price of such tickets so placed on sale, and may demand, from time to time, such renewals of deposits or other security as will protect it from any loss from the sale of such tickets. (Ga. L. 1890-91, p. 155, § 2; Civil Code 1895, § 2300; Civil Code 1910, § 2754; Code 1933, § 18-502.)

RESEARCH REFERENCES

ALR. — Right of railroad to discriminate in respect of switching charges, 2 ALR 585.

46-9-212. Switching off and delivering to connecting roads all cars consigned to points over or beyond the connecting roads.

(a) All railroad companies in this state shall, at the terminus or at any intermediate point, be required to switch off and deliver to connecting roads, in the yard of such roads, all cars passing over their lines which cars contain goods or freights consigned, without rebate or deception, by any route, at the option of the shipper, according to customary or published rates, to any point over or beyond such connecting road.

(b) Any failure by a railroad company to switch off and deliver cars as required by subsection (a) of this Code section with reasonable diligence, according to the route by which such goods or freights were consigned, shall be deemed and taken as a conversion in law of such goods or freights, and shall give a right of action to the owner or consignee for the value of the goods or freights, with interest, and not less than 10 percent nor more than 25 percent for expenses and damages, provided that if the defendant in any action brought under this Code section or Code Section 46-9-213 asserts as a defense that the plaintiff has accepted a rebate or practiced fraud or deception in regard to the rate, it shall be a complete reply to such defense if the plaintiff can prove that the defendant or its agents have allowed a rebate or practiced fraud or deception in regard to the rate from the same competing point against the rival line. (Ga. L. 1874, p. 94, § 1; Code 1882, § 719q; Civil Code 1895, § 2212; Civil Code 1910, § 2655; Code 1933, § 93-409.)

JUDICIAL DECISIONS

What constitutes connecting line. — A connecting line, in the sense of former Code 1882, § 719q (see O.C.G.A. § 46-9-212), was where any railroad at its terminus, or any intermediate point along its line, joins another, or where two railroads have the same terminus. *Logan & Co. v. Central R.R.*, 74 Ga. 684 (1885); *Georgia R.R. & Banking v. Maddox*, 116 Ga. 64, 42 S.E. 315 (1902).

Furnishing cars without compensation not required. — A railroad company was not compelled to make a contract to forward goods beyond its own line; though if it should make such a contract and fail to carry it out, it would be liable in damages. Former Code 1882, § 712q (see O.C.G.A. § 46-9-212) meant that if the initial company

received cars from another line consigned to a point beyond its terminus, it shall deliver them to the connecting road running to that point; but there was no intention to compel one company to furnish its own cars to another without any compensation for their use. *Coles, Simkins & Co. v. Central R.R. & Banking Co.*, 86 Ga. 251, 12 S.E. 749 (1890); *State v. Wrightville & T.R.R.*, 104 Ga. 437, 30 S.E. 891 (1898); *Augusta Brokerage Co. v. Central of Ga. Ry.*, 121 Ga. 48, 48 S.E. 714 (1904); *Seaboard Air-Line Ry. v. Dixon*, 140 Ga. 804, 79 S.E. 1118 (1913).

Cited in *Central of Ga. Ry. v. Milledgeville Ry.*, 138 Ga. 434, 75 S.E. 614 (1912); *Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618 (1949).

RESEARCH REFERENCES

ALR. — Right of connecting carrier to benefit of stipulation in bill of lading limit-

ing time for bringing suit or giving notice of loss, 60 ALR 1250.

Changed conditions as affecting duty, or enforcement of duty, as to train service or maintenance of stations imposed upon railroad by charter or statute, 111 ALR 57.

46-9-213. Discrimination by railroad companies in freight-transportation rates charged to connecting lines and routes.

No railroad company shall discriminate in its rates or tariffs for freights in favor of any line or route connected with it as against any other line or route; nor, when a part of its own line is sought to be run in connection with any other route, shall such company discriminate against such connecting line or in favor of the balance of its own line. Rather, such company shall charge the same rates for all and shall afford the usual and customary facilities for interchange of freights to patrons of all routes or lines alike. Any refusal of the same shall afford a right of action similar to that provided in Code Section 46-9-212. (Ga. L. 1874, p. 94, § 3; Code 1882, § 719s; Civil Code 1895, § 2214; Civil Code 1910, § 2657; Code 1933, § 93-411.)

Cross references. — Prohibition against unjust discrimination in freight-transportation rates by common carriers, § 46-9-52.

JUDICIAL DECISIONS

Section not restricted to physical connections and appliances. — Former Civil Code 1910, § 2657 (see O.C.G.A. § 46-9-213) should not be restricted in its application only to physical connections and physical appliances. It applied to every facility necessary for the safety and convenience of passengers and for the prompt transportation of freight. *Wadley S. Ry. v. State*, 137 Ga. 497, 73 S.E. 741 (1912), *aff'd*, 235 U.S. 651, 35 S. Ct. 214, 59 L. Ed. 405 (1914).

Receiving freight without prepayment. — Under former Civil Code 1910, § 2657 (see O.C.G.A. § 46-9-213) it was competent for the commission to declare as an unlawful discrimination a course of conduct whereby a railroad company, connecting with other railroad companies at each of its termini, which converge to a common point, received from one of its connections freights destined to points on its own line without requiring prepayment of the earned charges of the favored carrier, and declined to receive from the connecting carrier at the other terminus freight destined to points on its own line without prepayment of the freight charges earned by that connecting carrier. *Wadley S. Ry. v. State*, 137 Ga. 497, 73 S.E. 741 (1912).

Who may bring action. — While a competing railroad might sue for damages to its general business, the shipper, who is damaged by the wrongful requirement of unshipping, draying and reshipping, and the consequent waste, delay, and injury, has a right of action against the railroad company causing the same. *Logan & Co. v. Central R.R.*, 74 Ga. 684 (1885).

Lessor as party. — Where suit was brought against a railroad company, which operated another railroad under lease, for a refusal to receive goods and transport them over the line so operated by it, there was no necessity to make the lessor a party defendant to the action under former Code 1882, § 719s (see O.C.G.A. § 46-9-213). *Central R.R. v. Logan & Co.*, 77 Ga. 804, 2 S.E. 465 (1886).

Penalty. — If a railroad company had not complied with the law as prescribed in former Code 1882, § 719s (see O.C.G.A. § 46-9-213), it was liable to the penalty prescribed in former Code 1882, § 719q (see O.C.G.A. § 46-9-212). *Central R.R. v. Logan & Co.*, 77 Ga. 804, 2 S.E. 465 (1886).

Under former Code 1882, §§ 712q and 719s (see O.C.G.A. §§ 46-9-212 and 46-9-213), upon a refusal to receive and transport goods brought over a connecting

line, when such facilities were afforded to other connecting roads, or to the patrons of other roads, or of its own road, damages were presumed up to ten percent of the value of the property, and in order to increase the recovery for damages and expenses from ten percent to the limit of 25 percent fixed by the statute, all the elements of real or actual damages which were admissible in other actions may be shown. *Central R.R. v. Logan & Co.*, 77 Ga. 804, 2 S.E. 465 (1886).

Cited in *Logan & Co. v. Central R.R.*, 74 Ga. 684 (1885); *Kates v. Atlanta Baggage & Cab Co.*, 107 Ga. 636, 34 S.E. 372, 46 L.R.A. 431 (1899); *Augusta Brokerage Co. v. Central of Ga. Ry. Co.*, 121 Ga. 48, 48 S.E. 714 (1904); *Wimberly v. Georgia S. & F. Ry.*, 5 Ga. App. 263, 63 S.E. 29 (1908); *Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618 (1949).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 169.

C.J.S. — 13 C.J.S., Carriers, §§ 195, 370.

ALR. — Franchise provisions for free or reduced rates of public service corporations as within constitutional or statutory provision prohibiting discrimination, 10 ALR 504; 15 ALR 1200.

Right of electrical company to discriminate against a concern which desires service for resale, 12 ALR 327; 112 ALR 773.

Discrimination by public utility company in respect of extension of credit, 12 ALR 964.

46-9-214. Applicability of Code Sections 46-9-212 and 46-9-213 to interstate shipments and consignments.

Code Sections 46-9-212 and 46-9-213 shall not apply to shipments or consignments of freights from points beyond the limits of this state, except such as come by sea. (Ga. L. 1874, p. 94, § 5; Code 1882, § 719u; Civil Code 1895, § 2216; Civil Code 1910, § 2659; Code 1933, § 93-412.)

RESEARCH REFERENCES

ALR. — Interstate Commerce Commission's exercise of authority under § 223 of Staggers Rail Act of 1980 (49 USCS

§ 11103(c)) to require rail carriers to enter into reciprocal switching agreement, 105 ALR Fed. 637.

46-9-215. Duty of railroad companies to receive freight cars from connecting roads; measure of damages for failure or refusal to receive cars.

All railroad companies in this state, at the terminus or at any intermediate point, shall receive from the connecting road all cars containing freight consigned to any point on the road to which the same is offered and shall transport the cars to their destination with reasonable diligence. Any failure or refusal to comply with this requirement shall give to the consignee, the shipper, or the owner of such goods and freight a right of action against the company so refusing; and the damages received in such action shall not be less than 10 percent nor more than 25 percent of the value of the goods so refused to be received. (Ga. L. 1882-83, p. 145, § 1; Civil Code 1895, § 2302; Civil Code 1910, § 2756; Code 1933, § 18-504.)

JUDICIAL DECISIONS

Construction with Code section 46-9-130. — Former Civil Code 1910, § 2756 (see O.C.G.A. § 46-9-215) should be construed in connection with former Civil Code 1910,

§ 2729 (see O.C.G.A. § 46-9-130). *Central of Ga. Ry. v. Dixon*, 141 Ga. 755, 82 S.E. 37 (1914).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 135, 138.

C.J.S. — 13 C.J.S., Carriers, §§ 460-462.

ALR. — Liability of carrier to punitive damages with respect to subject of interstate shipment, 107 ALR 1446.

46-9-216. Civil penalty.

For every violation of any of the provisions of Code Section 46-9-210 or 46-9-211, the railroad company shall be subject to a civil penalty of \$1,000.00, which may be recovered in any superior or city court of the county in which such violation may occur. An action may be brought by the railroad company whose road may be discriminated against or by the person offering to buy a ticket over such road. The penalty provided for in this Code section may be recovered by each of these parties; and recovery by one shall not be a bar to recovery by the other. (Ga. L. 1890-91, p. 155, § 3; Civil Code 1895, § 2301; Civil Code 1910, § 2755; Code 1933, § 18-503.)

JUDICIAL DECISIONS

When liability arises. — No liability for the penalty provided by former Civil Code 1895, § 2301 (see O.C.G.A. § 46-9-216) attached to a refusal to sell the tickets of a connecting railroad company where, for any reason, it did not desire its tickets sold by other than its own agents, or where it had not expressed a

desire that tickets to stations on its line shall be sold by another connecting therewith. *Wimberly v. Georgia, S. & F. Ry.*, 5 Ga. App. 263, 63 S.E. 29 (1908).

Cited in *Stephens v. Central of Ga. Ry.*, 138 Ga. 625, 75 S.E. 1041 (1912).

RESEARCH REFERENCES

ALR. — Recovery of cumulative statutory penalties, 71 ALR2d 986.

ARTICLE 7

EXPRESS COMPANIES

Cross references. — Secretary of State corporations generally, Ga. Const. 1983, Art. III, Sec. VI, Para. V and Ch. 4, T. 14.

46-9-230. Manner of incorporation of express companies.

If a group of at least five persons (1) files a petition with the Secretary of State setting forth that they desire to be incorporated as an express company, the name under which they desire to be incorporated, the amount of capital stock which the company proposes to have, the place where the principal office of the company shall be located, and the states, territories, and countries in which the company proposes to operate, and (2) pays to the Secretary of State a fee of \$100.00, to be deposited by the Secretary of State into the state treasury, then the Secretary of State shall issue to the petitioners the following certificate:

State of Georgia. To whom it may concern — Greetings:

_____ having filed their petition in terms of the statute in such case provided, they and their associates and successors are hereby created and declared a body corporate for the period of 30 years, under the name of _____, for the purpose of carrying on an express business in _____, with a capital stock of _____ dollars, with its principal place of business at _____, in the county of _____, Georgia, with the powers, duties, and liabilities as now or hereafter prescribed by the laws of this state.

Witness my official hand and seal of this state, this ____ day of _____, _____.

(Ga. L. 1893, p. 84, § 1; Civil Code 1895, § 2000; Civil Code 1910, § 2381; Code 1933, § 41-101; Ga. L. 1999, p. 81, § 46.)

RESEARCH REFERENCES

C.J.S. — 13 C.J.S., Carriers, §§ 2, 17.

46-9-231. Organization of express companies.

The petitioners shall be the first directors of the company. Upon receiving the prescribed certificate, the directors shall organize by electing one of their number president and shall elect such other corporate officers as may be necessary; and they shall open books of subscription to the capital stock of said company. When all the capital stock has been subscribed for and one-tenth of the amount actually paid in, notice of that fact shall be published at least three times in the newspaper in which the sheriff's notices are published in the county of the principal office of the company; whereupon, but not before, the company may begin the transaction of business. If the transaction of any business is commenced without complying with the requirements of this Code section, the incorporators and stockholders shall be personally liable for all obligations incurred prior to a full compliance with those requirements. (Ga. L. 1893, p. 84, § 2; Civil Code 1895, § 2001; Civil Code 1910, § 2382; Code 1933, § 41-102.)

46-9-232. Location of principal office.

All companies incorporated under this article shall have their principal offices in this state. (Ga. L. 1893, p. 84, § 4; Civil Code 1895, § 2003; Civil Code 1910, § 2384; Code 1933, § 41-103.)

46-9-233. Powers of express companies generally.

Any company incorporated under this article may:

- (1) Sue and be sued;
- (2) Have a corporate seal;
- (3) Contract and be contracted with;
- (4) Take bonds of indemnity with security from its agents and employees;
- (5) Acquire, by purchase, devise, or otherwise, and hold real and personal property of any value in the amount necessary and proper for the purpose for which the company is incorporated and sell, mortgage, or otherwise dispose of the same;
- (6) Appoint all necessary officers;
- (7) Make rules, regulations, bylaws, and ordinances for the control, direction, management, and operation of its affairs and business, not inconsistent with the laws of this state or of the United States; and
- (8) Have, enjoy, and exercise all the rights, powers, and privileges pertaining to corporate bodies and necessary for the purposes for which such corporation is created within this state and within all the states and territories of the United States and any foreign countries enumerated in the certificate of incorporation, that shall permit or suffer the exercise of said corporate powers within their limits. (Ga. L. 1893, p. 84, § 3; Civil Code 1895, § 2002; Civil Code 1910, § 2383; Code 1933, § 41-104.)

46-9-234. Venue; binding effect of judgment.

The superior court of the county where goods are received for shipment by an express company doing business in this state or the superior court of the county where goods are to be delivered by such a company, shall have jurisdiction over that company, and the judgment shall bind all the property of that company. (Ga. L. 1862-63, p. 162, § 2; Ga. L. 1865-66, p. 222, § 1; Code 1868, § 3333; Code 1873, § 3410; Code 1882, § 3410; Civil Code 1895, § 2004; Civil Code 1910, § 2385; Code 1933, § 41-201.)

Law reviews. — For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

JUDICIAL DECISIONS

Office, agent, or agency unnecessary. — Where a corporation is an express company with its principal official by its charter in Richmond County, Georgia, it may be sued in Bibb County, Georgia, though at the time of the suit it had no office, agent, or agency in Bibb County and was not transacting business there. *Ellis v. Southern Express Co.*, 157 Ga. 629, 122 S.E. 48 (1924).

Code section not applicable to mandamus. — Former Civil Code 1910, § 2385 (see O.C.G.A. § 46-9-234) did not apply to mandamus to compel a domestic express com-

pany to receive goods for transportation over its line; mandamus must be instituted in the county of the corporation's domicile. *Sprinkle Distilling Co. v. Southern Express Co.*, 141 Ga. 21, 80 S.E. 288 (1913).

Effect of charter provisions. — The rule of jurisdiction provided by former Civil Code 1895, § 2004 (see O.C.G.A. § 46-9-234) was not affected by charter provision as to where the company would be liable. *Southern Express Co. v. B.R. Elec. Co.*, 126 Ga. 472, 55 S.E. 254 (1906).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 39, 67.

C.J.S. — 13 C.J.S., Carriers, § 433.

46-9-235. Service of process; effect of judgment.

In all cases where its chief officer does not reside in this state, an express company may be served in any proceeding against it by serving a copy of the summons and complaint upon any agent of such company within this state. The judgment obtained in cases so commenced shall bind the property of the defendant as fully as though the summons and complaint had been served on the president or other chief officer. (Ga. L. 1862-63, p. 162, § 1; Ga. L. 1865-66, p. 222, § 1; Code 1868, § 3334; Code 1873, § 3411; Code 1882, § 3411; Civil Code 1895, § 2005; Civil Code 1910, § 2386; Code 1933, § 41-202.)

JUDICIAL DECISIONS

Cited in *Sprinkle Distilling Co. v. Southern Express Co.*, 141 Ga. 21, 80 S.E. 288 (1913).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 95. 14 Am. Jur. 2d, Carriers, § 608.

C.J.S. — 13 C.J.S., Carriers, § 433.

46-9-236. Posting of name of president or chief officer of express company.

When the president or other chief officer of any express company resides in this state, it shall be the duty of such company to post in a public and

conspicuous place, at each office where it transacts business, the name of its president or other chief officer on whom service may be perfected in this state; otherwise, service made as provided for in Code Section 46-9-235 shall be deemed sufficient and proper service. (Ga. L. 1865-66, p. 222, § 2; Code 1868, § 3335; Code 1873, § 3412; Code 1882, § 3412; Civil Code 1895, § 2006; Civil Code 1910, § 2387; Code 1933, § 41-203.)

JUDICIAL DECISIONS

Effect on service. — Construing Ga. L. 1865-66, p. 222, § 2 (see O.C.G.A. § 46-9-236) it has been held that service on an agent in the county where suit is instituted is incomplete where the president or chief officer resides in Georgia and the president's name has been posted as directed by that section. *Conner v. Southern Express Co.*, 37 Ga. 397 (1867).

It was only where the president of an express company resided in Georgia, that service of process was required to be made upon the president by former Code 1882, § 3412 (see O.C.G.A. § 46-9-236). Posting

the president's name in each office where the company transacts business was of no efficacy unless the president resided in Georgia whether the president's office was in Georgia or not. *Southern Express Co. v. Skipper*, 85 Ga. 565, 11 S.E. 871 (1890).

After judgment against the company upon a summons of garnishment served upon the local agent alone, the service will be held sufficient until the judgment is set aside, unless it affirmatively appears that the president resides in Georgia at the time of service. *Southern Express Co. v. Skipper*, 85 Ga. 565, 11 S.E. 871 (1890).

ARTICLE 8

MISCELLANEOUS OFFENSES

46-9-250. Demand or receipt by railroad companies of more than a fair and reasonable rate for transportation of passengers or freight or for transportation of railroad cars.

If any railroad company organized or doing business under the laws of this state charges, collects, demands, or receives more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track or any of the branches thereof, or upon any railroad within this state which it has the right, license, or permission to use, operate, or control, that company shall be deemed guilty of extortion, and, upon conviction thereof, shall be subject to the liabilities and penalties provided in Code Sections 46-2-90, 46-2-92, and 46-2-93. (Ga. L. 1878-79, p. 125, § 3; Code 1882, § 719c; Civil Code 1895, § 2187; Civil Code 1910, § 2628; Code 1933, § 93-406; Ga. L. 1982, p. 3, § 46.)

Cross references. — Authority of General Assembly regarding regulation of public utility rates, Ga. Const. 1983, Art. III, Sec. VI,

Para. V. Prohibition against rebates, Ga. Const. 1983, Art. III, Sec. VI, Para. V.

JUDICIAL DECISIONS

Cited in *Sorrell & Nall v. Central R.R.*, 75 Ga. 509 (1885); *Southern Bell Tel. & Tel. Co. v. Beach*, 8 Ga. App. 720, 70 S.E. 137 (1911);

Central of Ga. Ry. v. Milledgeville Ry., 138 Ga. 434, 75 S.E. 614 (1912).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, §§ 185, 186.

C.J.S. — 13 C.J.S., Carriers, § 489.

ALR. — Special services or facilities afforded by shipper as a factor in carrier's rates, 25 ALR 191.

46-9-251. Unjust discrimination by railroad companies as to rates or charges for transportation of passengers or freight and for use and transportation of railroad cars.

If any railroad company organized or doing business under the laws of this state makes any unjust discrimination in its rates or charges of toll or any compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its road or upon any of the branches thereof, or upon any railroad connected therewith which it has the right, license, or permission to operate, control, or use within this state, that corporation shall be deemed guilty of having violated the provisions of this title, and, upon conviction thereof, shall be subject to the liabilities and penalties provided in Code Sections 46-2-90, 46-2-92, and 46-2-93. (Ga. L. 1878-79, p. 125, § 4; Code 1882, § 719d; Civil Code 1895, § 2188; Civil Code 1910, § 2629; Code 1933, § 93-407.)

Cross references. — Authority of General Assembly regarding regulation of public utility rates, Ga. Const. 1983, Art. III, Sec. VI,

Para. V. Prohibition against rebates, Ga. Const. 1983, Art. III, Sec. VI, Para. V.

JUDICIAL DECISIONS

Intrastate rates. — Under former Civil Code 1910, §§ 2629 and 2630 (see O.C.G.A. §§ 46-8-20 and 46-9-251), prohibiting unjust discrimination in rates, the Railroad Commission (now Public Service Commission) cannot order an intrastate rate which would discriminate against other intrastate rates, and the fact that the rate ordered was originally established by the railroad to promote a new industry and subsequently withdrawn did not affect the rule. *Atlantic Coast Line R.R. v. Trammell*, 287 F. 741 (N.D. Ga. 1923).

The rates of freight fixed by the commission must be observed; and if a lower rate of freight than that allowed by the Railroad Commission (now Public Service Commission) is collected, an action to recover the remainder of the true amount is maintain-

able, even though the consignee accepted the freight and paid the smaller amount in good faith, and although in the consignee's dealings with the consignee's customers the consignee has conducted the consignee's business upon the basis of the rate of freight collected. *Georgia R.R. v. Creety*, 5 Ga. App. 424, 63 S.E. 528 (1909); *Central of Ga. Ry. v. Willingham*, 8 Ga. App. 817, 70 S.E. 199 (1911).

Passenger fares. — Under former Civil Code 1895, § 2188 (see O.C.G.A. § 46-9-251) a railroad company cannot lawfully demand of one passenger more fare for that passenger's transportation from one station to another upon its line than it is in the habit, under like conditions and circumstances, of charging others for the same

service. *Phillips v. Southern Ry.*, 114 Ga. 284, 40 S.E. 268 (1901).

Although a railroad company has a right to adopt and enforce a rule requiring passengers getting on its trains without tickets to pay more fare than it charges persons who purchase tickets, yet it cannot exact such higher rate from a passenger who has no ticket, unless it has afforded the passenger a reasonable opportunity to purchase one before entering the cars. *Phillips v. Southern Ry.*, 114 Ga. 284, 40 S.E. 268 (1901).

Carrying goods back for repair. — Former Civil Code 1910, § 2629 (see O.C.G.A. § 46-9-251) was not contravened by a contract of a carrier with a consignee of damaged goods to carry them back for repair. *Sipple v. Seaboard Air Line Ry.*, 154 Ga. 376, 114 S.E. 435 (1922).

Privileges of baggage transfer company. — A railway company does not violate any public duty or deprive any citizen of any

lawful right by granting to a single corporation or individual the exclusive right of entering its trains to solicit the transportation of passengers and baggage, or by renting to such corporation or individual a portion of its baggage room and conceding to it or the individual the privileges necessarily incident to the occupancy and use thereof, provided that so doing does not interfere with the exercise by any other person of any right which the individual may lawfully demand of the company as a common carrier. *Kates v. Atlanta Baggage & Cab Co.*, 107 Ga. 636, 34 S.E. 372, 46 L.R.A. 431 (1899).

Cited in *Wimberly v. Georgia S. & F. Ry.*, 5 Ga. App. 263, 63 S.E. 29 (1908); *Southern Bell Tel. & Tel. Co. v. Beach*, 8 Ga. App. 720, 70 S.E. 137 (1911); *Central of Ga. Ry. v. Milledgeville Ry.*, 138 Ga. 434, 75 S.E. 614 (1912); *Sipple v. Seaboard Air Line Ry.*, 154 Ga. 376, 114 S.E. 435 (1922).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 245. 64 Am. Jur. 2d, Public Utilities, § 77.

C.J.S. — 13 C.J.S., Carriers, §§ 195, 354, 370.

46-9-252. Overcharging by officers, agents, or other employees of common carriers.

Any officer, agent, or other employee of a common carrier who charges a rate for transporting freight or passengers which is in excess of the rates established by the commission shall be guilty of a misdemeanor. (Ga. L. 1865-66, p. 237, § 1; Code 1868, § 4513; Code 1873, § 4603; Code 1882, § 4603; Penal Code 1895, § 681; Penal Code 1910, § 730; Code 1933, § 18-9913.)

Cross references. — Authority of General Assembly regarding regulation of public utility rates, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Prohibition against rebates, Ga.

Const. 1983, Art. III, Sec. VI, Para. VI. General prohibition against unjust discrimination in freight-transportation rates by common carriers, § 46-9-52.

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 157.

C.J.S. — 13 C.J.S., Carriers, §§ 354, 355.

ALR. — Who may maintain action to recover back excessive freight charge, 13 ALR 289.

46-9-253. Transportation of gunpowder, dynamite, or other explosives.

Any person who causes more than five pounds of gunpowder, or any amount of dynamite or other dangerous explosive, to be transported upon water, by railroad, or otherwise shall have the word “Gunpowder,” “Dynamite,” or other name of the explosive marked in large letters upon each package so transported. Gunpowder, dynamite, or other dangerous explosive transported in violation of said provision shall be liable to seizure and forfeiture by any officer who may execute a criminal warrant, under warrant for that purpose, issued by any officer who may issue such first-named warrants, one-half of the same to go to the informer, the other half to go to the military fund of the state, after public sale by order of the officer issuing the warrant, or one of like authority. (Laws 1831; Cobb’s 1851 Digest, p. 850; Code 1863, §§ 1412, 1413; Code 1868, §§ 1469, 1470; Code 1873, §§ 1463, 1464; Code 1882, §§ 1463, 1464; Civil Code 1895, §§ 2291, 2292; Civil Code 1910, §§ 2745, 2746; Code 1933, § 18-317.)

Cross references. — Penalty for carrying explosives aboard public transit bus or rapid rail car, § 16-12-120. Transportation of motor fuel, § 48-9-9.

JUDICIAL DECISIONS

Cited in Simpson v. DuPont Powder Co., (1915); Northwestern Mut. Life Ins. Co. v. 143 Ga. 465, 85 S.E. 344, 1915E L.R.A. 430 Dean, 43 Ga. App. 67, 157 S.E. 878 (1931).

RESEARCH REFERENCES

Am. Jur. 2d. — 13 Am. Jur. 2d, Carriers, § 307.
ALR. — Liability for damages by explosives transported along highway, 31 ALR 725; 44 ALR 124.
Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding, 8 ALR3d 473.
Carrier’s “public duty” exception to absolute or strict liability arising out of carriage of hazardous substances, 31 ALR4th 658.

ARTICLE 9

GEORGIA RAIL PASSENGER AUTHORITY LAW

Cross references. — Georgia Rail Passenger Authority Overview Committee, T. 28, Ch. 10.

46-9-270. Short title.

This article shall be known and may be cited as the “Georgia Rail Passenger Authority Law.” (Code 1981, § 46-9-270, enacted by Ga. L. 1985, p. 1283, § 1.)

46-9-271. Legislative purpose.

There is created the Georgia Rail Passenger Authority for the purpose of construction, financing, operation, and development of rail passenger service and other public transportation projects within and without the State of Georgia. (Code 1981, § 46-9-271, enacted by Ga. L. 1985, p. 1283, § 1.)

46-9-272. Definitions.

As used in this article, the term:

(1) "Authority" means the public body corporate and politic created pursuant to this article.

(2) "Cost of the project" or "cost of any project" means and shall include: All costs of acquisition, by purchase or otherwise, construction, assembly, installation, modification, renovation, or rehabilitation incurred in connection with any project or any part of any project; all costs of real property, fixtures, or personal property used in or in connection with or necessary for any project or for any facilities related thereto including, but not limited to, the cost of all land, estates for years, easements, rights, improvements, water rights, connections for utility services, fees, franchises, permits, approvals, licenses, and certificates; the cost of securing any such franchises, permits, approvals, licenses, or certificates; and the cost of preparation of any application therefor and the cost of all fixtures, machinery, equipment, furniture, and other property used in or in connection with or necessary for any project; all financing charges and loan fees and all interest on revenue bonds, notes, or other obligations of an authority which accrues or is paid prior to and during the period of construction of a project and during such additional period as the authority may reasonably determine to be necessary to place such project in operation; all costs of engineering, surveying, architectural, and legal services and all expenses incurred by engineers, surveyors, architects, and attorneys in connection with any project; all expenses for inspection of any project; all fees of fiscal agents, paying agents, and trustees for bondholders under any trust agreement, trust indenture, or similar instrument or agreement; all expenses incurred by any such fiscal agents, paying agents, and trustees; all other costs and expenses incurred relative to the issuance of any revenue bonds, notes, or other obligations for any project; all fees of any type charged by an authority in connection with any project; all expenses of or incident to determining the feasibility or practicability of any project; all costs of plans and specifications for any project; all costs of title insurance and examinations of title with respect to any project; repayment of any loans made for the advance payment of any part of any of the foregoing costs, including interest thereon and any other expenses of such loans;

administrative expenses of the authority and such other expenses as may be necessary or incident to any project or the financing thereof or the placing of any project in operation; and a fund or funds for the creation of a debt service reserve, a renewal and replacement reserve, or such other funds or reserves as the authority may approve with respect to the financing and operation of any project and as may be authorized by any bond resolution, trust agreement, trust indenture, or similar instrument or agreement pursuant to the provisions of which the issuance of any revenue bonds, notes, or other obligations of the authority may be authorized. Any cost, obligation, or expense incurred for any of the foregoing purposes shall be a part of the cost of the project and may be paid or reimbursed as such out of proceeds of revenue bonds, notes, or obligations issued by the authority.

(3) “Governing body” means the elected or duly appointed officials constituting the governing authority of the State of Georgia.

(4) “Project” means the acquisition, construction, installation, operation, modification, renovation, or rehabilitation of any rail passenger facilities or any other public transportation facilities other than roads, either directly or through contract with another public or private agency, after approval by the State Transportation Board, pursuant to state or federal law as part of any regional or state-wide transportation plan. A project may also include any fixtures, machinery, or equipment used on, in, or in connection with any of the transportation facilities listed above. A project may be for any public passenger transportation purpose, provided that a majority of the members of the authority determines, by a resolution duly adopted, that the project will further the public purpose of this article.

(5) “Revenue bonds” and “bonds” means any bonds of an authority which are authorized to be issued under the Constitution and laws of the State of Georgia, including refunding bonds but not including notes or other obligations of an authority.

(6) “Service area” means the geographical area of operations of the authority and shall consist of the State of Georgia and, with the consent of the appropriate governing authorities thereof, nearby states. (Code 1981, § 46-9-272, enacted by Ga. L. 1985, p. 1283, § 1; Ga. L. 1997, p. 865, § 1.)

46-9-273. Powers of authority generally.

The authority shall have all of the powers necessary, proper, or convenient to carry out and effectuate the purposes and provisions of this article. The powers enumerated in this Code section are cumulative of and in addition to each other and other powers granted elsewhere in this article; and no such power limits or restricts any other power of the authority.

Without limiting the generality of the foregoing, the powers of the authority shall include the powers:

- (1) To sue and be sued;
- (2) To adopt and amend a corporate seal;
- (3) To make and execute contracts, agreements, and other instruments necessary, proper, or convenient to exercise the powers of the authority to further the public purpose for which the authority is created, including, but not limited to, contracts for construction of projects, leases of projects, contracts for operation of projects, contracts for sale of projects, agreements for loans to finance projects, and contracts with respect to the use of projects;
- (4) To acquire by purchase, lease, condemnation, or otherwise and to hold, lease, and dispose of real and personal property of every kind and character or any interest therein in furtherance of the public purpose of the authority;
- (5) To finance, by loan, grant, lease, or otherwise, and to construct, erect, assemble, purchase, acquire, own, repair, remodel, renovate, rehabilitate, modify, maintain, extend, improve, install, sell, equip, expand, add to, operate, or manage projects and to pay the cost of any project from the proceeds of revenue bonds, notes, or other obligations of the authority or any other funds of the authority, or from any contributions or loans by persons, corporations, partnerships, limited or general, or other entities, all of which the authority is empowered to receive and accept and use;
- (6) To borrow money to further or to carry out its public purpose and to execute revenue bonds, notes, other obligations, leases, trust indentures, trust agreements, agreements for the sale of its revenue bonds, notes, or other obligations, loan agreements, mortgages, deeds to secure debt, trust deeds, security agreements, assignments, and such other agreements or instruments as may be necessary or desirable, in the judgment of the authority, to evidence and to provide security for such borrowing;
- (7) To issue revenue bonds, notes, or other obligations of the authority and use the proceeds thereof for the purpose of paying or loaning the proceeds thereof to pay all or any part of the cost of any project and otherwise to further or carry out the public purpose of the authority and to pay all costs of the authority incident to, or necessary and appropriate to, furthering or carrying out such purpose;
- (8) To make application directly or indirectly to any federal, state, county, or municipal government or agency or to any other source, public or private, for loans, grants, guarantees, or other financial assistance in furtherance of the authority's public purpose and to accept and use the

same upon such terms and conditions as are prescribed by such federal, state, county, or municipal government or agency or other source;

(9) To enter into agreements with the federal government or any agency or corporation thereof to use the facilities of the federal government or agency or corporation thereof in order to further or carry out the public purposes of the authority;

(10) To contract for any period not exceeding 50 years with the State of Georgia, state institutions, or any city, town, municipality, or county of the state or public or private corporation for the use by the authority of any facilities or services of the state or any such state institution, city, town, municipality, or county or public or private corporation or for the use by any state institution or any city, town, municipality, or county of any facilities or services of the authority, provided such contracts shall deal with such activities and transactions as the authority and any such political subdivisions with which the authority contracts are by law authorized to undertake;

(11) To extend credit or make loans to any person, corporation, partnership, limited or general, or other entity for the costs of any project, which credit or loans may be evidenced or secured by loan agreements, notes, mortgages, deeds to secure debt, trust deeds, security agreements, assignments, or other instruments or by rentals, revenues, fees, or charges, upon such terms and conditions as the authority shall determine to be reasonable in connection with such extension of credit or loans, including provision for the establishment and maintenance of reserve funds, and, in the exercise of powers granted in connection with any project, the authority shall have the right and power to require the inclusion in any such loan agreement, note, mortgage, deed to secure debt, trust deed, security agreement, assignment, or other instrument of such provisions or requirements for guarantee of any obligations, insurance, construction, use, operation, maintenance, and financing of a project and such other terms and conditions as the authority may deem necessary or desirable;

(12) As security for repayment of any revenue bonds, notes, or other obligations of the authority, to pledge, mortgage, convey, assign, hypothecate, or otherwise encumber any property of the authority, including, but not limited to, real property, fixtures, personal property, and revenues or other funds; and to execute any lease, trust indenture, trust agreement, agreement for the sale of the authority's revenue bonds, notes, or other obligations, loan agreement, mortgage, deed to secure debt, trust deed, security agreement, assignment, or other agreement or instrument as may be necessary or desirable in the judgment of the authority to secure any such revenue bonds, notes, or other obligations, which instruments or agreements may provide for foreclosure or forced sale of any property of the authority upon default in any obligation of the

authority, either in payment of principal, premium, if any, or interest or in the performance of any term or condition contained in any such agreement or instrument. The State of Georgia on behalf of itself and each county, municipal corporation, political subdivision, or taxing district therein waives any right the state or such county, municipal corporation, political subdivision, or taxing district may have to prevent the forced sale or foreclosure of any property of the authority upon such default and agrees that any agreement or instrument encumbering such property may be foreclosed in accordance with law and the terms thereof;

(13) To receive and use the proceeds of any tax levied by the State of Georgia or any county or municipality thereof to pay the costs of any project or for any other purpose for which the authority may use its own funds pursuant to this article;

(14) To receive and administer gifts, grants, and devises of money and property of any kind and to administer trusts;

(15) To use any real property, personal property, or fixtures or any interest therein; or to rent or lease such property to or from others or make contracts with respect to the use thereof; or to sell, lease, exchange, transfer, assign, pledge, or otherwise dispose of or grant options for any such property in any manner as it deems to be to the best advantage of the authority and the public purpose thereof;

(16) To acquire, accept, or retain equitable interests, security interest, or other interests in any real property, personal property, or fixtures by loan agreement, note, mortgage, deed to secure debt, trust deed, security agreement, assignment, pledge, conveyance, contract, lien, loan agreement, or other consensual transfer in order to secure the repayment of any moneys loaned or credit extended by the authority;

(17) To appoint, select, and employ engineers, surveyors, architects, urban or city planners, fiscal agents, attorneys, and others and to fix their compensation and pay their expenses;

(18) To encourage and promote by means of rail passenger transportation and other public transportation projects the improvement and advancement of the state and the enhancement and profitability of tourism to the state and its citizens;

(19) To make, contract for, or otherwise cause to be made long-range plans or proposals for rail passenger transportation and other public transportation projects within the service area, in cooperation with those political subdivisions within which such projects are located;

(20) To adopt bylaws governing the conduct of business by the authority, the election and duties of officers of the authority, and other matters which the authority determines to deal with in its bylaws;

(21) To exercise any power granted by the laws of the State of Georgia to public or private corporations which is not in conflict with the public purpose of the authority; and

(22) To do all things necessary, proper, or convenient to carry out the powers conferred by this article. (Code 1981, § 46-9-273, enacted by Ga. L. 1985, p. 1283, § 1.)

46-9-274. Membership of authority; filling of vacancies; disclosure of pecuniary interests; election of officers; expense allowance and travel costs.

(a) The authority shall be composed of members appointed by the Governor. One member shall be appointed from and shall be a resident of each of the congressional districts and two members shall be appointed from the state at large. All members shall be appointed for terms of four years and until their successors are appointed and qualified. The Governor, in making appointments to the authority, shall consider obtaining reasonable representation thereon of persons from the tourism and hospitality industry, the manufacturing industry, the banking and finance industry, citizens and consumers, labor, and the transportation industry, but it is specifically provided that the appointments shall be at the discretion of the Governor. In the event of a vacancy on the authority, the Governor shall fill such vacancy for the unexpired term.

(b) If any member of the authority has any pecuniary interest in a project, the fact of such interest shall be disclosed by such member and recorded on the minutes of the authority. The member shall abstain from urging the approval of or voting on any project in which the member has a pecuniary interest.

(c) At its first meeting in each year, the members of the authority shall elect from among themselves a chairman and such other officers of the authority as may be required by the authority, for a term of one year.

(d) Each member of the authority shall receive an expense allowance and reimbursement for travel costs as provided in Code Section 45-7-21. A like sum shall be paid to a member of the authority who attends an approved meeting, event, or other function other than an authority meeting as an official representative of the authority. (Code 1981, § 46-9-274, enacted by Ga. L. 1985, p. 1283, § 1; Ga. L. 1990, p. 1903, § 11; Ga. L. 1995, p. 1041, § 3.)

46-9-275. Issuance of revenue bonds, notes, or other obligations; refunding bonds.

Revenue bonds, notes, or other obligations issued by an authority shall be paid solely from the property, including, but not limited to, real property,

fixtures, personal property, revenues, or other funds pledged, mortgaged, conveyed, assigned, hypothecated, or otherwise encumbered to secure or to pay such bonds, notes, or other obligations. All revenue bonds, notes, and other obligations shall be authorized by resolution of the authority, adopted by a majority vote of the members of the authority at a regular or special meeting. Such revenue bonds, notes, or other obligations shall bear such date or dates, shall mature at such time or times not more than 40 years from their respective date, shall bear interest at such rate or rates, which may be fixed or may fluctuate or otherwise change from time to time, shall be subject to redemption on such terms, and shall contain such other terms, provisions, covenants, assignments, and conditions as the resolution authorizing the issuance of such bonds, notes, or other obligations may permit or provide. The terms, provisions, covenants, assignments, and conditions contained in or provided or permitted by any resolution of the authority authorizing the issuance of such revenue bonds, notes, or other obligations shall bind the members of the authority then in office and their successors. The authority shall have power from time to time and whenever it deems refunding expedient to refund any bonds by the issuance of new bonds, whether the bonds to be refunded have or have not matured, and may issue bonds partly to refund bonds then outstanding and partly for any other purpose permitted under this article. The refunding bonds may be exchanged for the bonds to be refunded with such cash adjustments as may be agreed upon or may be sold and the proceeds applied to the purchase or redemption of the bonds to be refunded. There shall be no limitation upon the amount of revenue bonds, notes, or other obligations which any authority may issue. Any limitations with respect to interest rates or any maximum interest rate or rates found in the usury laws of the State of Georgia, or any other laws of the State of Georgia, shall not apply to revenue bonds, notes, or other obligations of an authority. (Code 1981, § 46-9-275, enacted by Ga. L. 1985, p. 1283, § 1.)

46-9-276. Authority to execute agreements or instruments; use of proceeds from sale of bonds and other obligations; issuance of subsequent obligations; bond anticipation notes; validation and form of bonds.

(a) Subject to the limitations and procedures provided by this Code section, the agreements or instruments executed by the authority may contain such provisions not inconsistent with law as shall be determined by the members of the authority.

(b) The proceeds derived from the sale of all bonds, notes, and other obligations issued by an authority shall be held and used for the ultimate purpose of paying, directly or indirectly as permitted in this article, all or part of the cost of any project or for the purpose of refunding any bonds, notes, or other obligations issued in accordance with the provisions of this article.

(c) Issuance by the authority of one or more series of bonds, notes, or other obligations for one or more purposes shall not preclude it from issuing other bonds, notes, or other obligations in connection with the same project or with any other projects, but the proceeding wherein any subsequent bonds, notes, or other obligations shall be issued shall recognize and protect any prior loan agreement, mortgage, deed to secure debt, trust deed, security agreement, or other agreement or instrument made for any prior issue of bonds, notes, or other obligations unless in the resolution authorizing such prior issue the right is expressly reserved to the authority to issue subsequent bonds, notes, or other obligations on a parity with such prior issue.

(d) The authority shall have the power and is authorized, whenever bonds of the authority shall have been validated as provided in this article, to issue from time to time its notes in anticipation of such bonds as validated and to renew from time to time any such notes by the issuance of new notes, whether the notes to be renewed have or have not matured. The authority may issue such bond anticipation notes only to provide funds which would otherwise be provided by the issuance of the bonds as validated. Such notes may be authorized, sold, executed, and delivered in the same manner as bonds. As with its bonds, the authority may sell such notes at public or private sale. Any resolution or resolutions authorizing notes of the authority or any issue thereof may contain any provisions which the authority is authorized to include in any resolution or resolutions authorizing bonds of the authority or any issue thereof, and the authority may include in any notes any terms, covenants, or conditions which the authority is authorized to include in any bonds. Validations of such bonds shall be a condition precedent to the issuance of such notes, but it shall not be required that such notes be judicially validated. Bond anticipation notes shall not be issued in an amount exceeding the par value of the bonds in anticipation of which they are to be issued.

(e) All bonds issued by the authority under this article shall be issued and validated under and in accordance with the "Revenue Bond Law," as heretofore and hereafter amended, except as provided in this article, provided that notes and other obligations of the authority may be, but shall not be required to be, so validated.

(f) Bonds issued by the authority may be in such form, either coupon or fully registered or both coupon and fully registered, and may be subject to exchangeability and transferability provisions as the bond resolution authorizing the issuance of such bonds or any indenture or trust agreement may provide.

(g) Bonds shall bear a certificate of validation. The signature of the clerk of the superior court of the judicial circuit in which the issuing authority is located may be made on the certificate of validation of such bonds by facsimile or by manual execution stating the date on which such bonds were

validated, and such entry shall be original evidence of the fact of judgment and shall be received as original evidence in any court in this state.

(h) In lieu of specifying the rate or rates of interest which bonds to be issued by an authority are to bear, the notice to the district attorney or Attorney General, the notice to the public of the time, place, and date of the validation hearing, and the petition and complaint for validation may state that the bonds when issued will bear interest at a rate not exceeding a maximum per annum rate of interest, which may be fixed or may fluctuate or otherwise change from time to time, specified in such notices and petition and complaint or that, in the event the bonds are to bear different rates of interest for different maturity dates, that note of such rates will exceed the maximum rate which may be fixed or may fluctuate or otherwise change from time to time so specified; provided, however, that nothing contained herein shall be construed as prohibiting or restricting the right of the authority to sell such bonds at a discount, even if in doing so the effective interest cost resulting therefrom would exceed the maximum per annum interest rate specified in such notices and in the petition and complaint.

(i) The terms "cost of the project" or "cost of any project" shall have the meaning prescribed in this article whenever referred to in bond resolutions of the authority, in bonds, notes, or other obligations of the authority, or in notices or proceedings to validate such bonds, notes, or other obligations of the authority.

(j) The issuance of any bond, revenue bond, note, or other obligation or the incurring of any debt by the authority must, prior to such, be approved by the Georgia State Financing and Investment Commission established by Article VII, Section IV, Paragraph VII of the Constitution of the State of Georgia of 1983 or its successor. (Code 1981, § 46-9-276, enacted by Ga. L. 1985, p. 1283, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1985 quotation marks were added around the words "Revenue Bond Law" in subsection (e).

46-9-277. Public purpose of article.

The implementation of rail passenger service and public transportation projects within the State of Georgia develops and promotes, for the public good and general welfare, trade, commerce, tourism, industry, and employment opportunities and promotes the general welfare of the state by creating a climate favorable to the location of new industry, trade, and commerce and the development of existing industry, trade, and commerce within the State of Georgia. Implementation of rail passenger service and public transportation projects within this state under the article will develop and promote, for the public good and general welfare, trade, commerce, tourism, industry, and employment opportunities and will promote the

general welfare of the state. It is therefore in the public interest and is vital to the public welfare of the people of Georgia, and it is declared to be the public purpose of this article to so develop public transportation projects within this state. No bonds, notes, or other obligations, except refunding bonds, shall be issued by the authority pursuant to this article unless its membership adopts a resolution finding that the project for which such bonds, notes, or other obligations are to be issued will promote the foregoing objectives. (Code 1981, § 46-9-277, enacted by Ga. L. 1985, p. 1283, § 1.)

46-9-278. Liberal construction to effect stated purpose.

The provisions of this article shall be liberally construed to effect its stated purpose. The offer, sale, or issuance of bonds, notes, or other obligations by the authority shall not be subject to regulation under the Georgia laws regulating the sale of securities, as heretofore and hereafter amended. No notice, proceeding, or publication except those required by this article shall be necessary to the performance of any act authorized by this article, nor shall any such act be subject to referendum. (Code 1981, § 46-9-278, enacted by Ga. L. 1985, p. 1283, § 1.)

46-9-279. Status of bonds and other obligations as constituting debt or obligation of state, county, or other political subdivisions.

No bonds, notes, or other obligations of and no indebtedness incurred by the authority shall constitute an indebtedness or obligation of the State of Georgia or any county, municipal corporation, or political subdivision thereof nor shall any act of the authority in any manner constitute or result in the creation of an indebtedness of the state or any such county, municipal corporation, or political subdivision. No holder or holders of any such bonds, notes, or other obligations shall ever have the right to compel any exercise of the taxing power of the state or any county, municipal corporation, or political subdivision thereof nor to enforce the payment thereof against the state or any such county, municipal corporation, or political subdivision. (Code 1981, § 46-9-279, enacted by Ga. L. 1985, p. 1283, § 1.)

46-9-280. Exemption of authority from taxes or assessments.

The authority is created for nonprofit and public purposes; and it is found, determined, and declared that the creation of the authority and the carrying out of its corporate purpose is in all respects for the benefit of the people of the state, that the authority is an institution of purely public charity and will be performing an essential governmental function in the exercise of the powers conferred upon it by this article, and for such reasons the state covenants with the holders from time to time of the bonds, notes,

and other obligations issued hereunder that the authority shall not be required to pay any taxes or assessments imposed by the state or any of its counties, municipal corporations, political subdivisions, or taxing districts upon any property acquired by the authority or under its jurisdiction, control, possession, or supervision or leased by it to others or upon its activities in the operation or maintenance of any such property or on any income derived by the authority in the form of fees, recording fees, rentals, charges, purchase price, installments, or otherwise, and that the bonds, notes, and other obligations of the authority, their transfer, and the income therefrom shall at all times be exempt from taxation within the state. (Code 1981, § 46-9-280, enacted by Ga. L. 1985, p. 1283, § 1.)

46-9-281. Effect of article on other authorities.

This article shall not affect any other authority now or hereafter existing under general or local constitutional amendment or general or local law. (Code 1981, § 46-9-281, enacted by Ga. L. 1985, p. 1283, § 1.)

ARTICLE 9A

RAILWAY PASSENGER SERVICE CORRIDOR SYSTEM

Cross references. — Railroad companies as motor common carriers, Ch. 7, T. 46. Railroad companies as motor common carriers, Ch. 8, T. 46.

Editor's notes. — Ga. L. 2000, p. 1699, § 1, not codified by the General Assembly, provides that: "The General Assembly finds and declares as follows: (1) The establishment of railway passenger service to the general public and connecting points within and throughout this state and to nearby states will develop and promote, for the public good and general welfare of this state, trade, commerce, tourism, industry, and employment opportunities while alleviating highway traffic congestion and related air pollu-

tion. (2) Any implementation of such railway passenger service which meets the needs and promotes the general welfare of this state as a whole while making the best and most efficient use of resources requires a system of railway passenger service corridors which is comprehensive and coordinated for purposes of state planning and development of service. (3) It is therefore in the public interest and is vital to the public welfare of the people of Georgia, and it is declared to be the public purpose of this Act, to establish such a system of railway passenger service corridors provided by Code Section 46-9-290 as enacted by this Act."

46-9-290. Designated Georgia Rail Passenger Corridors.

(a) For purposes of state planning and development of service there is created a comprehensive and coordinated state-wide system of railway passenger service corridors for providing railway passenger service to the general public and connecting points within and throughout this state and to nearby states, which shall be known as the Designated Georgia Rail Passenger Corridors and shall include the following:

- (1) Atlanta-Athens;
- (2) Atlanta-Hartsfield International Airport-Macon;

- (3) Macon-Jesup-Brunswick;
- (4) Macon-Americus-Albany;
- (5) Macon-Houston County-Valdosta;
- (6) Macon-Douglas-Waycross-Jacksonville, Florida;
- (7) Macon-Savannah;
- (8) Atlanta-Columbus;
- (9) Atlanta-Augusta;
- (10) Atlanta-Gainesville;
- (11) Atlanta-Bremen;
- (12) Atlanta-Canton;
- (13) Atlanta-Cartersville;
- (14) Jesup-Waycross-Jacksonville, Florida;
- (15) Gainesville-Greenville, South Carolina;
- (16) Albany-Tallahassee, Florida;
- (17) Bremen-Birmingham, Alabama; and
- (18) Atlanta-Chattanooga, Tennessee.

(b) (1) Nothing in this Code section shall preclude or delay state involvement in the planning and development of high speed rail for the Atlanta to Chattanooga, Tennessee, railway passenger service corridor, should federal or private funds be made available for such high speed rail.

(2) For the purposes of this subsection, “high speed rail” is defined as involving trains traveling at maximum speeds in excess of 110 miles per hour. (Code 1981, § 46-9-290, enacted by Ga. L. 2000, p. 1699, § 2.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2000, the subsection designations were added, paragraph designations were added in subsection (b), and “subsection” was substituted for “provision” in paragraph (b)(2).

46-9-291. Planning and development.

(a) Any and all railway passenger service plans or programs of any and all state departments, agencies, boards, bureaus, commissions, or authorities having responsibility for the same shall be conducted and coordinated so as to conform planning and development of service to the railway passenger service corridors of the program provided by this article. It is the intent of the General Assembly that planning and development of railway passenger service shall include every metropolitan statistical area of the state to the

extent that revenues of the state for such planning or development are made available from either dedicated revenue sources or the general fund.

(b) Any state department, agency, board, bureau, commission, or authority having responsibility for any railway passenger service planning or programming may recommend any additional railway passenger service corridor or corridors to the General Assembly for inclusion in the Designated Georgia Rail Passenger Corridors after completion of a feasibility study for such proposed additional railway passenger service corridor or corridors, but no additional railway passenger service corridor shall be studied for inclusion unless federal or state funding is made available for such study. No railway passenger service corridor shall be a part of the Designated Georgia Rail Passenger Corridors unless and until it is included in the list provided by Code Section 46-9-290. (Code 1981, § 46-9-291, enacted by Ga. L. 2000, p. 1699, § 2.)

ARTICLE 10

RAPID RAIL TRANSIT COMPACT

46-9-300. Authority of Governor to execute compact for a designated state; legislative approval of compact; text of compact.

The Governor, on behalf of this state, is authorized to execute a compact in substantially the following form with the States of Louisiana, Mississippi, and Alabama and the General Assembly, by this article, signifies in advance its approval of such compact, which compact is as follows:

MISSISSIPPI-LOUISIANA-ALABAMA-GEORGIA RAPID RAIL TRANSIT COMPACT

ARTICLE I

The purpose of this compact is to study the feasibility of rapid rail transit service between the States of Mississippi, Louisiana, Alabama, and Georgia and to establish a joint interstate commission to assist in this effort.

ARTICLE II

This compact shall become effective immediately as to the states ratifying it whenever the States of Mississippi, Louisiana, Alabama, and Georgia have ratified it and Congress has given consent thereto. Any state not mentioned in this article which is contiguous with any member state may become a party to this compact, subject to approval by the legislature of each of the member states.

ARTICLE III

The states which are parties to this compact, (referred to in this compact as "party states") do hereby establish and create a joint agency which shall

be known as the Mississippi-Louisiana-Alabama-Georgia Rapid Rail Transit Commission (referred to in this compact as the "commission"). The membership of such commission shall consist of the governor of each party state, one representative each from the Mississippi Energy and Transportation Board, or its successor, the Office of Aviation and Public Transportation of the Louisiana Department of Transportation and Development, or its successor, the Alabama Department of Energy, or its successor, and the Georgia State Board of Transportation, or its successor, and five other citizens of each party state, to be appointed by the governor thereof. The appointive members of the commission shall serve for terms of four years each. Vacancies on the commission shall be filled by appointment by the governor for the unexpired portion of the term. The members of the commission shall not be compensated for service on the commission, but each of the appointed members shall be entitled to actual and reasonable expenses incurred in attending meetings, or incurred otherwise in the performance of duties as a member of the commission. The members of the commission shall hold regular quarterly meetings and such special meetings as its business may require. They shall choose annually a chairman and vice chairman from among their members, and the chairmanship shall rotate each year among the party states in order of their acceptance of this compact. The commission shall adopt rules and regulations for the transaction of its business and a record shall be kept of all its business. It shall be the duty of the commission to study the feasibility of providing interstate rapid rail transit service between the party states. Toward this end, the commission shall have power to hold hearings; to conduct studies and surveys of all problems, benefits and other matters associated with such service, and to make reports thereon; to acquire, by gift, grant or otherwise, from local, state, federal or private sources such money or property as may be provided for the proper performance of their function, and to hold and dispose of same; to cooperate with other public or private groups, whether local, state, regional or national, having an interest in such service; to formulate and execute plans and policies for emphasizing the purpose of this compact before the Congress of the United States and other appropriate officers and agencies of the United States; and to exercise such other powers as may be appropriate to enable it to accomplish its functions and duties and to carry out the purposes of this compact.

ARTICLE IV

Each party state agrees that its legislature may, in its discretion, from time to time make available and pay over to the commission funds for the establishment and operation of the commission. The contribution of each party state shall be in equal amounts, if possible, but nothing in this article shall be construed as binding the legislature of either state to make an appropriation of a set amount of funds at any particular time.

ARTICLE V

Nothing in this compact shall be construed so as to conflict with any existing statute, or to limit the powers of any party state, or to repeal or prevent legislation, or to affect any existing or future cooperative arrangement or relationship between any federal agency and a party state.

ARTICLE VI

This compact shall continue in force and remain binding upon each party state until the legislature or governor of each or any state takes action to withdraw therefrom. However, any such withdrawal shall not become effective until six months after the date of the action taken by the legislature or governor. Notice of such action shall be given to the other party state or states by the secretary of state of the party state which takes such action.

There is granted to the governor, to the members of the commission for Mississippi, Louisiana, Alabama, and Georgia, and to the compact administrator all the powers provided for in the compact and in this section. All officers of the State of Georgia are authorized and directed to do all things falling within their respective jurisdictions which are necessary or incidental to carrying out the purpose of the compact. (Code 1981, § 46-9-300, enacted by Ga. L. 1985, p. 1283, § 1.)

ARTICLE 11

SOUTHWEST GEORGIA RAILROAD EXCURSION AUTHORITY

46-9-320. Short title.

This article shall be known and may be cited as the "Southwest Georgia Railroad Excursion Authority Law." (Code 1981, § 46-9-320, enacted by Ga. L. 2000, p. 1117, § 1.)

46-9-321. Creation; administrative assignment.

(a) There is created a body corporate and politic to be known as the Southwest Georgia Railroad Excursion Authority, which shall be deemed to be an instrumentality of the state and a public corporation, for the purposes of construction, financing, operation, and development of rail passenger excursion projects utilizing any state owned railway in Crisp and Sumter counties and any nearby county which may be included within the service area as provided by this article.

(b) The authority shall be assigned to the Department of Natural Resources for administrative purposes only. (Code 1981, § 46-9-321, enacted by Ga. L. 2000, p. 1117, § 1; Ga. L. 2002, p. 988, § 1.)

The 2002 amendment, effective July 1, 2002, substituted "Department of Natural Resources" for "Department of Transportation" in the middle of subsection (b).

46-9-322. Definitions.

As used in this article, the term:

(1) "Authority" means the public body corporate and politic created pursuant to this article.

(2) "Cost of the project" or "cost of any project" means and shall include: All costs of acquisition, by purchase or otherwise, construction, assembly, installation, modification, renovation, or rehabilitation incurred in connection with any project or any part of any project; all costs of real property, fixtures, or personal property used in or in connection with or necessary for any project or for any facilities related thereto including, but not limited to, the costs of all land, estates for years, easements, rights, improvements, water rights, connections for utility services, fees, franchises, permits, approvals, licenses, and certificates; the cost of securing any such franchises, permits, approvals, licenses, or certificates; and the cost of preparation of any application therefor and the costs of all fixtures, machinery, equipment, furniture, and other property used in or in connection with or necessary for any project; all financing charges and loan fees and all interest on revenue bonds, notes, or other obligations of the authority which accrues or is paid prior to and during the period of construction of a project and during such additional period as the authority may reasonably determine to be necessary to place such project in operation; all costs of engineering, surveying, architectural, and legal services and all expenses incurred by engineers, surveyors, architects, and attorneys in connection with any project; all expenses for inspection of any project; all fees of fiscal agents, paying agents, and trustees for bondholders under any trust agreement, trust indenture, or similar instrument or agreement; all expenses incurred by any such fiscal agents, paying agents, and trustees; all other costs and expenses incurred relative to the issuance of any revenue bonds, notes, or other obligations for any project; all fees of any type charged by an authority in connection with any project; all expenses of or incident to determining the feasibility or practicability of any project; all costs of plans and specifications for any project; all costs of title insurance and examinations of title with respect to any project; repayment of any loans made for the advance payment of any part of any of the foregoing costs, including interest thereon, and any other expenses of such loans; administrative expenses of the authority and such other expenses as may be necessary for or incident to any project or the financing thereof or the placing of any project in operation; and a fund or funds for the creation of a debt service reserve, a renewal and replacement reserve, or such other funds or reserves as the authority may approve with respect to the

financing and operation of any project and as may be authorized by any bond resolution, trust agreement, trust indenture, or similar instrument or agreement pursuant to the provisions of which the issuance of any revenue bonds, notes, or other obligations of the authority may be authorized. Any cost, obligation, or expense incurred for any of the foregoing purposes shall be a part of the cost of the project and may be paid or reimbursed as such out of proceeds of revenue bonds, notes, or obligations issued by the authority.

(3) "Project" means the acquisition, construction, installation, operation, modification, renovation, or rehabilitation of any rail passenger facilities in the service area either directly or through contract with another public or private agency. A project may also include any fixtures, machinery, or equipment used on, in, or in connection with any of the transportation facilities listed above. A project may be for any rail passenger excursion purpose, provided that a majority of the members of the authority determines, by a resolution duly adopted, that the project will further the public purpose of this article.

(4) "Revenue bonds" and "bonds" mean any bonds of an authority which are authorized to be issued under the Constitution and laws of the State of Georgia, including refunding bonds but not including notes or other obligations of an authority.

(5) "Service area" means the geographical area of operations of the authority and shall consist of the Counties of Crisp and Sumter and, with the consent of the appropriate governing authorities thereof, nearby counties, subject to the approval of the authority. (Code 1981, § 46-9-322, enacted by Ga. L. 2000, p. 1117, § 1.)

46-9-323. Powers.

The authority shall have all of the powers necessary, proper, and convenient to carry out and effectuate the purposes and provisions of this article. The powers enumerated in this Code section are cumulative of and in addition to each other and other powers granted elsewhere in this article; and no such power limits or restricts any other power of the authority. Without limiting the generality of the foregoing, the powers of the authority shall include the powers:

(1) To sue and be sued;

(2) To adopt and amend a corporate seal;

(3) To make and execute contracts, agreements, and other instruments necessary, proper, and convenient to exercise the powers of the authority to further the public purpose for which the authority is created, including, but not limited to, contracts for construction of projects, leases of projects, contracts for operation of projects, contracts for sale of

projects, agreements for loans to finance projects, and contracts with respect to the use of projects. Any and all persons, firms, and corporations and any and all political subdivisions, departments, institutions, or agencies of the state are authorized to enter into contracts, leases, or agreements with the authority upon such terms and for such purposes as they deem advisable; and, without limiting the generality of the foregoing, authority is specifically granted to municipal corporations, counties, and other political subdivisions and to the authority to enter into contracts, lease agreements, or other undertakings with each other relating to projects of the authority for a term not exceeding 50 years. Likewise, without limiting the generality of the above and foregoing, the same authority above granted to municipal corporations, counties, political subdivisions, and to the authority relative to entering into contracts, lease agreements, or other undertakings is authorized between the authority and private corporations, both inside and outside this state, and between the authority and public bodies, including counties and cities outside this state;

(4) To acquire by purchase, lease, condemnation, or otherwise and to hold, lease, and dispose of real and personal property of every kind and character or any interest therein in furtherance of the public purpose of the authority;

(5) To finance, by loan, grant, lease, or otherwise, and to construct, erect, assemble, purchase, acquire, own, repair, remodel, renovate, rehabilitate, modify, maintain, extend, improve, install, sell, equip, expand, add to, operate, or manage projects and to pay the cost of any project from the proceeds of revenue bonds, notes, or other obligations of the authority or any other funds of the authority, or from any contributions or loans by persons, corporations, partnerships, limited or general, or other entities, all of which the authority is empowered to receive and accept and use;

(6) To borrow money to further or to carry out its public purpose and to execute revenue bonds; notes; other obligations; leases; trust indentures; trust agreements; agreements for the sale of its revenue bonds, notes, or other obligations; loan agreements; mortgages; deeds to secure debt; trust deeds; security agreements; assignments; and such other agreements or instruments as may be necessary or desirable, in the judgment of the authority, to evidence and to provide security for such borrowing;

(7) To issue revenue bonds, notes, or other obligations of the authority and use the proceeds thereof for the purpose of paying or loaning the proceeds thereof to pay all or any part of the costs of any project and otherwise to further or carry out the public purpose of the authority and to pay all costs of the authority incident to, or necessary and appropriate to, furthering or carrying out such purpose;

(8) To make application directly or indirectly to any federal, state, county, or municipal government or agency or to any other source, public or private, for loans, grants, guarantees, or other financial assistance in furtherance of the authority's public purpose and to accept and use the same upon such terms and conditions as are prescribed by such federal, state, county, or municipal government or agency or other source;

(9) To enter into agreements with the federal government or any agency or corporation thereof to use the facilities of the federal government or agency or corporation thereof in order to further or carry out the public purposes of the authority;

(10) To extend credit or make loans to any person; corporation; partnership, limited or general; or other entity for the costs of any project, which credit or loans may be evidenced or secured by loan agreements, notes, mortgages, deeds to secure debt, trust deeds, security agreements, assignments, or other instruments or by rentals, revenues, fees, or charges, upon such terms and conditions as the authority shall determine to be reasonable in connection with such extension of credit or loans, including provision for the establishment and maintenance of reserve funds, and, in the exercise of powers granted in connection with any project, the authority shall have the right and power to require the inclusion in any such loan agreement, note, mortgage, deed to secure debt, trust deed, security agreement, assignment, or other instrument of such provisions or requirements for guarantee of any obligations, insurance, construction, use, operation, maintenance, and financing of a project and such other terms and conditions as the authority may deem necessary or desirable;

(11) As security for repayment of any revenue bonds, notes, or other obligations of the authority, to pledge, mortgage, convey, assign, hypothecate, or otherwise encumber any property of the authority, including, but not limited to, real property, fixtures, personal property, and revenues or other funds; and to execute any lease; trust indenture; trust agreement; agreement for the sale of the authority's revenue bonds, notes, or other obligations; loan agreement; mortgage; deed to secure debt; trust deed; security agreement; assignment; or other agreement or instrument as may be necessary or desirable in the judgment of the authority to secure any such revenue bonds, notes, or other obligations, which instruments or agreements may provide for foreclosure or forced sale of any property of the authority upon default in any obligation of the authority, either in payment of principal, premium, if any, or interest or in the performance of any term or condition contained in any such agreement or instrument. The State of Georgia on behalf of itself and each county, municipal corporation, political subdivision, or taxing district therein waives any right the state or such county, municipal corporation, political subdivision, or taxing district may have to prevent

the forced sale or foreclosure of any property of the authority upon such default and agrees that any agreement or instrument encumbering such property may be foreclosed in accordance with law and the terms thereof;

(12) To receive and use the proceeds of any tax levied by the State of Georgia or any county or municipality thereof to pay the costs of any project or for any other purpose for which the authority may use its own funds pursuant to this article;

(13) To receive and administer gifts, grants, and devises of money and property of any kind and to administer trusts;

(14) To use any real property, personal property, or fixtures or any interest therein; or to rent or lease such property to or from others or make contracts with respect to the use thereof; or to sell, lease, exchange, transfer, assign, pledge, or otherwise dispose of or grant options for any such property in any manner as it deems to be to the best advantage of the authority and the public purpose thereof;

(15) To acquire, accept, or retain equitable interests, security interests, or other interests in any real property, personal property, or fixtures by loan agreement, note, mortgage, deed to secure debt, trust deed, security agreement, assignment, pledge, conveyance, contract, lien, loan agreement, or other consensual transfer in order to secure the repayment of any moneys loaned or credit extended by the authority;

(16) To appoint, select, and employ engineers, surveyors, architects, planners, fiscal agents, attorneys, and others and to fix their compensation and pay their expenses;

(17) To encourage and promote by means of rail passenger excursion projects the improvement and advancement of the service area and the enhancement and profitability of tourism to the service area and its citizens;

(18) To make, contract for, or otherwise cause to be made long-range plans or proposals for rail passenger excursion projects within the service area, in cooperation with those political subdivisions within which such projects are located;

(19) To adopt bylaws governing the conduct of business by the authority, the election and duties of officers of the authority, and other matters which the authority determines to deal with in its bylaws;

(20) To exercise any power granted by the laws of the State of Georgia to public or private corporations which is not in conflict with the public purpose of the authority; and

(21) To do all things necessary, proper, and convenient to carry out the powers conferred by this article. (Code 1981, § 46-9-323, enacted by Ga. L. 2000, p. 1117, § 1.)

46-9-324. Membership; civil office; chairperson; conflicts of interest; compensation.

(a) The authority shall be composed of members appointed by governing authorities of counties and municipalities within the service area as provided by this subsection. The governing authorities of the Counties of Crisp and Sumter and the municipalities of Americus, Cordele, Leslie, and Plains shall each appoint two members. Two members each shall be appointed by the governing authority of any other county which is within the service area, or any municipality within such county, and in which such county or municipality a rail passenger service station or stop of the authority is located. Terms of members appointed by any county governing authority shall expire on December 31, 2002, and biennially thereafter. Terms of members appointed by the governing authority of any municipality shall expire on December 31, 2001, and biennially thereafter. Members shall serve until their successors are appointed and qualified; provided, however, that any member of the authority may be removed at any time, with or without cause, by the governing authority which appointed such member. Any member of the authority may be selected and appointed to succeed himself or herself. Any vacancy shall be filled for the unexpired term, and any appointment to fill a vacancy shall be made in the same manner as the original appointment.

(b)(1) Membership of the authority shall be a civil office for purposes of the eligibility requirements provided by Code Section 45-2-1, except that the residency requirement for any person appointed to the authority shall be residence in the jurisdiction of the appointing local governing authority for a period of at least 12 months prior to such person's appointment.

(2) A member of the appointing local governing authority may be appointed as a member of the authority, but his or her seat on the authority shall be vacant immediately upon his or her ceasing to be a member of the appointing local governing authority. Such person may be reappointed as a member of the authority to fill such vacancy.

(c) The members of the authority shall in January of each year elect one of their number as chairperson. Also, the members of the authority shall elect one of their number as vice chairperson, shall also elect one of their number as secretary, and may also elect one of their number as treasurer. The secretary may also serve as treasurer. Each of such officers shall serve for a period of one year and until their successors are duly elected and qualified. The chairperson of the authority shall be entitled to vote upon any issue, motion, or resolution.

(d) A majority of the members of the authority shall constitute a quorum. No vacancy on the authority shall impair the right of the quorum to exercise all of the rights and perform all of the duties of the authority.

(e) A vacancy on the authority shall exist in the office of any member of the authority who is convicted of a felony or who enters a plea of nolo contendere thereto; who is convicted of a crime involving moral turpitude or who enters a plea of nolo contendere thereto; who moves such person's residence from the jurisdiction of the appointing authority; who is convicted of any act of misfeasance, malfeasance, or nonfeasance of such person's duties as a member of the authority; who fails to attend at least three consecutive meetings of the authority without an excuse approved by a resolution of the authority; or who is ineligible for civil office for any other reason provided by Code Section 45-2-1.

(f) All meetings of the authority shall be open to the public as provided in Chapter 14 of Title 50. The authority may hold public hearings on its own initiative or at the request of residents of any area affected by the actions of the authority.

(g) No member or employee of the authority shall have, directly or indirectly, any financial interest, profit, or benefit in any contract, work, or business of the authority nor in the sale, lease, or purchase of any property to or from the authority.

(h) The members shall receive no compensation for their services, but all members shall be entitled to be reimbursed out of funds of the authority for actual expenses, including travel and any other expenses, incurred while in the performance of their duties. Employees of the authority shall receive reasonable compensation, to be determined by the members of the authority, for their services. Employees of the authority shall not be members of the Employees' Retirement System of Georgia. (Code 1981, § 46-9-324, enacted by Ga. L. 2000, p. 1117, § 1; Ga. L. 2001, p. 4, § 46.)

46-9-325. Members accountable as trustees; records.

The members of the authority shall be accountable in all respects as trustees. The authority shall keep suitable and proper books and records of all receipts, income, and expenditures of every kind and shall submit for inspection all of the books, together with a proper statement of the authority's financial position, once a year on or about June 30 to the state auditor. (Code 1981, § 46-9-325, enacted by Ga. L. 2000, p. 1117, § 1; Ga. L. 2002, p. 988, § 2.)

The 2002 amendment, effective July 1, 2002, substituted "June 30" for "December 31" near the end of the last sentence.

46-9-326. Revenue bonds, notes, and other obligations.

Revenue bonds, notes, or other obligations issued by the authority shall be paid solely from the property, including, but not limited to, real

property, fixtures, personal property, revenues, or other funds pledged, mortgaged, conveyed, assigned, hypothecated, or otherwise encumbered to secure or to pay such bonds, notes, or other obligations. All revenue bonds, notes, and other obligations shall be authorized by resolution of the authority, adopted by a majority vote of the members of the authority at a regular or special meeting. Such revenue bonds, notes, or other obligations shall bear such date or dates, shall mature at such time or times not more than 40 years from their respective date, shall bear interest at such rate or rates which may be fixed or may fluctuate or otherwise change from time to time, shall be subject to redemption on such terms, and shall contain such other terms, provisions, covenants, assignments, and conditions as the resolution authorizing the issuance of such bonds, notes, or other obligations may permit or provide. The terms, provisions, covenants, assignments, and conditions contained in or provided or permitted by any resolution of the authority authorizing the issuance of such revenue bonds, notes, or other obligations shall bind the members of the authority then in office and their successors. The authority shall have power from time to time and whenever it deems refunding expedient to refund any bonds by the issuance of new bonds, whether the bonds to be refunded have or have not matured, and may issue bonds partly to refund bonds then outstanding and partly for any other purpose permitted under this article. The refunding bonds may be exchanged for the bonds to be refunded with such cash adjustments as may be agreed upon or may be sold and the proceeds applied to the purchase or redemption of the bonds to be refunded. There shall be no limitation upon the amount of revenue bonds, notes, or other obligations which any authority may issue. Any limitation with respect to interest rates or any maximum interest rate or rates found in the usury laws of the State of Georgia, or any other laws of the State of Georgia, shall not apply to revenue bonds, notes, or other obligations of the authority. (Code 1981, § 46-9-326, enacted by Ga. L. 2000, p. 1117, § 1.)

46-9-327. Provisions of obligations; use of proceeds; form of bonds.

(a) Subject to the limitations and procedures provided by this Code section, the agreements or instruments executed by the authority may contain such provisions not inconsistent with law as shall be determined by the members of the authority.

(b) The proceeds derived from the sale of all bonds, notes, and other obligations issued by the authority shall be held and used for the ultimate purpose of paying, directly or indirectly as permitted in this article, all or part of the cost of any project or for the purpose of refunding any bonds, notes, or other obligations issued in accordance with the provisions of this article.

(c) Issuance by the authority of one or more series of bonds, notes, or other obligations for one or more purposes shall not preclude it from

issuing other bonds, notes, or other obligations in connection with the same project or with any other project, but the proceeding wherein any subsequent bonds, notes, or other obligations shall be issued shall recognize and protect any prior loan agreement, mortgage, deed to secure debt, trust deed, security agreement, or other agreement or instrument made for any prior issue of bonds, notes, or other obligations unless in the resolution authorizing such prior issue the right is expressly reserved to the authority to issue subsequent bonds, notes, or other obligations on a parity with such prior issue.

(d) The authority shall have the power and is authorized, whenever bonds of the authority shall have been validated as provided in this article, to issue from time to time its notes in anticipation of such bonds as validated and to renew from time to time any such notes by the issuance of new notes, whether the notes to be renewed have or have not matured. The authority may issue such bond anticipation notes only to provide funds which would otherwise be provided by the issuance of the bonds as validated. Such notes may be authorized, sold, executed, and delivered in the same manner as bonds. As with its bonds, the authority may sell such notes at public or private sale. Any resolution or resolutions authorizing notes of the authority or any issue thereof may contain any provisions which the authority is authorized to include in any resolution or resolutions authorizing bonds of the authority or any issue thereof, and the authority may include in any notes any terms, covenants, or conditions which the authority is authorized to include in any bonds. Validations of such bonds shall be a condition precedent to the issuance of such notes, but it shall not be required that such notes be judicially validated. Bond anticipation notes shall not be issued in an amount exceeding the par value of the bonds in anticipation of which they are to be issued.

(e) All bonds issued by the authority under this article shall be issued and validated under and in accordance with Article 3 of Chapter 82 of Title 36, the "Revenue Bond Law," as heretofore and hereafter amended, except as provided in this article, provided that notes and other obligations of the authority may be, but shall not be required to be, so validated.

(f) Bonds issued by the authority may be in such form, either coupon or fully registered or both coupon and fully registered, and may be subject to exchangeability and transferability provisions as the bond resolution authorizing the issuance of such bonds or any indenture or trust agreement may provide.

(g) Bonds shall bear a certificate of validation. The signature of the clerk of the superior court of the judicial circuit in which the issuing authority is located may be made on the certificate of validation of such bonds by facsimile or by manual execution stating the date on which such bonds were validated, and such entry shall be original evidence of the fact of judgment and shall be received as original evidence in any court in this state.

(h) In lieu of specifying the rate or rates of interest which bonds to be issued by an authority are to bear, the notice to the district attorney or Attorney General; the notice to the public of the time, place, and date of the validation hearing; and the petition and complaint for validation may state that the bonds when issued will bear interest at a rate not exceeding a maximum per annum rate of interest, which may be fixed or may fluctuate or otherwise change from time to time, specified in such notices and petition and complaint or that, in the event the bonds are to bear different rates of interest for different maturity dates, that note of such rates will exceed the maximum rate which may be fixed or may fluctuate or otherwise change from time to time so specified; provided, however, that nothing contained herein shall be construed as prohibiting or restricting the right of the authority to sell such bonds at a discount, even if in doing so the effective interest cost resulting therefrom would exceed the maximum per annum interest rate specified in such notices and in the petition and complaint.

(i) The terms “cost of the project” or “cost of any project” shall have the meaning prescribed in this article whenever referred to in bond resolutions of the authority; in bonds, notes, or other obligations of the authority; or in notices or proceedings to validate such bonds, notes, or other obligations of the authority.

(j) The issuance of any bond, revenue bond, note, or other obligation or the incurring of any debt by the authority must, prior to such, be approved by the Georgia State Financing and Investment Commission established by Article VII, Section IV, Paragraph VII of the Constitution of the State of Georgia of 1983 or its successor. (Code 1981, § 46-9-327, enacted by Ga. L. 2000, p. 1117, § 1.)

46-9-328. Implementation of rail passenger excursion projects.

The implementation of rail passenger excursion projects within the service area develops and promotes, for the public good and general welfare, trade, commerce, tourism, industry, and employment opportunities and promotes the general welfare of the state by creating a climate favorable to the location of new industry, trade, and commerce and the development of existing industry, trade, and commerce within the State of Georgia. Implementation of rail passenger excursion projects within the service area under this article will develop and promote, for the public good and general welfare, trade, commerce, tourism, industry, and employment opportunities and will promote the general welfare of the state. It is therefore in the public interest and is vital to the public welfare of the people of Georgia, and it is declared to be the public purpose of this article to so develop rail passenger excursion projects within the service area. No bonds, notes, or other obligations, except refunding bonds, shall be issued by the authority pursuant to this article unless its membership adopts a

resolution finding that the project for which such bonds, notes, or other obligations are to be issued will promote the foregoing objectives. (Code 1981, § 46-9-328, enacted by Ga. L. 2000, p. 1117, § 1.)

46-9-329. Liberal construction of provisions.

The provisions of this article shall be liberally construed to effect its stated purpose. The offer, sale, or issuance of bonds, notes, or other obligations by the authority shall not be subject to regulation under the Georgia laws regulating the sale of securities, as heretofore and hereafter amended. No notice, proceeding, or publication except those required by this article shall be necessary to the performance of any act authorized by this article, nor shall any such act be subject to referendum. (Code 1981, § 46-9-329, enacted by Ga. L. 2000, p. 1117, § 1.)

46-9-330. Indebtedness not obligation of state or political subdivision.

No bonds, notes, or other obligations of and no indebtedness incurred by the authority shall constitute an indebtedness or obligation of the State of Georgia or any county, municipal corporation, or political subdivision thereof nor shall any act of the authority in any manner constitute or result in the creation of an indebtedness of the state or any such county, municipal corporation, or political subdivision. No holder or holders of any such bonds, notes, or other obligations shall ever have the right to compel any exercise of the taxing power of the state or any county, municipal corporation, or political subdivision thereof nor to enforce the payment thereof against the state or any such county, municipal corporation, or political subdivision. (Code 1981, § 46-9-330, enacted by Ga. L. 2000, p. 1117, § 1.)

46-9-331. Purpose of authority's creation; tax exemption.

The authority is created for nonprofit and public purposes; and it is found, determined, and declared that the creation of the authority and the carrying out of its corporate purpose is in all respects for the benefit of the people of the state, that the authority is an institution of purely public charity and will be performing an essential governmental function in the exercise of the powers conferred upon it by this article, and for such reasons the state covenants with the holders from time to time of the bonds, notes, and other obligations issued hereunder that the authority shall not be required to pay any taxes or assessments imposed by the state or any of its counties, municipal corporations, political subdivisions, or taxing districts upon any property acquired by the authority or under its jurisdiction, control, possession, or supervision or leased by it to others or upon its activities in the operation or maintenance of any such property or on any income derived by the authority in the form of fees, recording fees, rentals,

charges, purchase price, installments, or otherwise, and that the bonds, notes, and other obligations of the authority, their transfer, and the income therefrom shall at all times be exempt from taxation within the state. (Code 1981, § 46-9-331, enacted by Ga. L. 2000, p. 1117, § 1.)

46-9-332. Authorization for rail passenger excursion projects not limited.

The authorization for rail passenger excursion projects provided by this article shall be in addition to and not limited by any other authorization for rail passenger service or rail passenger service projects provided by this chapter. (Code 1981, § 46-9-332, enacted by Ga. L. 2000, p. 1117, § 1.)

CHAPTER 10

CONSUMERS' UTILITY COUNSEL DIVISION

Sec.		Sec.	
46-10-1.	Legislative purpose.	46-10-5.	Service of notice on director; authority of director to take depositions and obtain discovery.
46-10-2.	Definitions.	46-10-6.	Employment of staff personnel; compensation of director and staff.
46-10-3.	Creation of consumers' utility counsel division; appointment, qualifications, compensation, and reimbursement for expenses of director; annual report.	46-10-7.	Services of engineers and other technical assistants; access to records and reports in possession of commission.
46-10-3.1.	Performance and management audit of consumers' utility counsel [Repealed].	46-10-8.	Construction of chapter.
46-10-4.	Representative functions of director.	46-10-9.	Repeal date [Repealed].

RESEARCH REFERENCES

C.J.S. — 73B C.J.S., Public Utilities, §§ 60, 77.

46-10-1. Legislative purpose.

The General Assembly recognizes the importance of effective and economical public utilities to the economy of the State of Georgia. It is further recognized that the citizens of Georgia should receive adequate utility services at the lowest reasonable cost to the consumer while maintaining the ability of public utilities to furnish their products and services. It is further recognized that consumers should receive the benefit of technological advances. It is further recognized that the Public Service Commission has been established for the purpose of regulating public utilities and the rates which they charge the consumer and that the commission is responsible for representing the public interest. The General Assembly is aware, however, that the commission must be furnished with all available information concerning the effects of its decisions in rate cases and proceedings before it. It is the purpose of this chapter to ensure that the commission receives such information, particularly in those cases which directly involve the vast majority of Georgia's citizens. (Ga. L. 1981, p. 139, § 1; Ga. L. 1995, p. 167, § 1.)

46-10-2. Definitions.

As used in this chapter, the term:

- (1) "Administrator" means the administrator appointed pursuant to Code Section 10-1-395.

(2) "Consumer" means an individual user, primarily for personal, family, or household purposes, of the product or service of a public utility which is under the jurisdiction of the commission. This term shall also mean and include any sole proprietorship, partnership, or corporation which is a commercial user of the product or service of a public utility which is under the jurisdiction of the commission and which has ten or fewer employees and a net income after taxes of \$100,000.00 per annum or less for federal income tax purposes.

(3) "Director" means the director of the consumers' utility counsel division of the Governor's Office of Consumer Affairs.

(4) "Division" means the consumers' utility counsel division of the Governor's Office of Consumer Affairs.

(5) "Governor's Office of Consumer Affairs" means the office of the administrator created in Code Section 10-1-395. (Ga. L. 1981, p. 139, § 2; Ga. L. 1995, p. 167, § 1.)

RESEARCH REFERENCES

C.J.S. — 73B C.J.S., Public Utilities,
§§ 60-62.

46-10-3. Creation of consumers' utility counsel division; appointment, qualifications, compensation, and reimbursement for expenses of director; annual report.

There is created the consumers' utility counsel division within the Governor's Office of Consumer Affairs. There is created the position of director of the consumers' utility counsel division. The director shall be appointed and removed by the administrator. The director shall be a practicing attorney qualified by knowledge and experience to practice in public utility proceedings. The director shall receive compensation in an amount to be determined by the administrator, but not to exceed that provided or authorized by law for the district attorney for the Atlanta Judicial Circuit, excluding all city and county supplemental compensation and expenses. In addition to such compensation, the director shall also receive reimbursement for his or her reasonable and necessary expenses incurred in the performance of his or her duties, as provided by law for state employees. No person employed as director of the consumers' utility counsel division shall engage in the private practice of law while employed as director of the consumers' utility counsel division. The director shall submit a written report of the annual activities and expenditures of the division. The report shall be submitted by December 31 each year and shall be submitted to the Industry Committee of the Georgia House of Representatives and to the Finance and Public Utilities Committee of the Georgia Senate. (Ga. L. 1981, p. 139, § 3; Ga. L. 1982, p. 3, § 46; Ga. L. 1983, p. 834,

§ 1; Ga. L. 1985, p. 494, § 1; Ga. L. 1988, p. 1718, § 1; Ga. L. 1992, p. 6, § 46; Ga. L. 1995, p. 167, § 1.)

Cross references. — Conflicts of interest of state officers and employees generally, § 45-10-20 et seq.

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Administrative Law, § 24.

C.J.S. — 73 C.J.S., Public Administrative Law and Procedure, § 9.

46-10-3.1. Performance and management audit of consumers' utility counsel.

Repealed by Ga. L. 1995, p. 167, § 1, effective March 31, 1995.

Editor's notes. — This Code section was based on Code 1981, § 46-10-3.1, enacted by Ga. L. 1985, p. 494, § 2; Ga. L. 1991, p. 1707, § 1.

46-10-4. Representative functions of director.

(a) The director shall be entitled to appear, as a party or otherwise, on behalf of the consumers of this state of services provided by any person, firm, or corporation subject to the jurisdiction of the commission in all proceedings before the commission which may involve or affect rates for service or services of utilities and in all other proceedings before the commission under its regulatory jurisdiction over utilities.

(b) The director may also appear in the same representative capacity in similar administrative proceedings affecting the consumers of this state before any federal administrative agency or body which has regulatory jurisdiction over rates, services, and similar matters with respect to public utility services provided by any public utility doing business in this state.

(c) The director shall be authorized in the same representative capacity to initiate proceedings, by complaint or otherwise, before any federal or state administrative agency before which he or she is otherwise authorized to appear, with respect to matters properly within the cognizance of those agencies.

(d) The director shall be authorized in the same representative capacity to initiate or intervene as of right or otherwise appear in any judicial proceeding involving or arising out of any action taken by an administrative agency in a proceeding in which the director is authorized to appear under subsection (a), (b), or (c) of this Code section. (Ga. L. 1981, p. 139, § 4; Ga. L. 1995, p. 167, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Administrative Law, § 52.

C.J.S. — 73 C.J.S., Public Administrative Law and Procedure, § 49 et seq.

46-10-5. Service of notice on director; authority of director to take depositions and obtain discovery.

(a) In addition to other requirements of service and notice imposed by law, a copy of any application, complaint, pleading, or notice filed with or issued by the commission shall also be served on the director, and the director shall be notified of any other correspondence or paper filed with or issued by the commission or its staff. The commission shall not proceed to hear or determine any petition, complaint, or proceeding in which the director is entitled to appear unless it shall affirmatively appear that the director was given at least ten days' written notice thereof, unless such notice is affirmatively waived in writing or the director appears and specifically waives such notice.

(b) The director is authorized to take depositions and obtain discovery of any matter which is not privileged and which is relevant to the subject matter involved in any proceeding or petition before the commission in the same manner and subject to the same procedures which would otherwise be applicable if such proceeding was then pending before a superior court. The superior courts and the judges and clerks thereof are authorized to issue all orders, injunctions, and subpoenas and to take all actions necessary to carry out this subsection. (Ga. L. 1981, p. 139, § 5; Ga. L. 1983, p. 834, § 2; Ga. L. 1995, p. 167, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Administrative Law, § 52.

Law and Procedure, § 49 et seq. 73B C.J.S., Public Utilities, §§ 51, 81.

C.J.S. — 73 C.J.S., Public Administrative

46-10-6. Employment of staff personnel; compensation of director and staff.

The director is authorized to employ such assistants as he or she may need and is authorized to employ and fix the compensation of such consultants, expert witnesses, accountants, engineers, attorneys, investigators, stenographers, or other technical or clerical assistance, as may be necessary to carry out his or her duties; provided, however, that no such employment may occur nor may any contracts for payment of fees or expenses be paid for consultants, expert witnesses, accountants, engineers, attorneys, investigators, stenographers, or other technical or clerical assistance unless such employment or such contracts are first approved by the administrator and can be achieved using funds appropriated to the office of

the Governor for such purposes. The division shall keep suitable and proper records of all such expenditures. The compensation of the director and such staff shall be paid from state funds appropriated or otherwise made available to the office of the administrator created in Code Section 10-1-395 from funds appropriated to the office of the Governor for such purposes. (Ga. L. 1981, p. 139, § 6; Ga. L. 1988, p. 1718, § 2; Ga. L. 1991, p. 1707, § 2; Ga. L. 1995, p. 167, § 1.)

Cross references. — Applicability of conflicts of interest laws to full-time state employees hired by commission to assist Consumers' Utility Counsel in fulfilling duties and responsibilities, § 45-10-20.

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Administrative Law, § 52. **C.J.S.** — 73 C.J.S., Public Administrative Law and Procedure, § 49 et seq.

46-10-7. Services of engineers and other technical assistants; access to records and reports in possession of commission.

Services of all engineers, experts, accountants, and other technical assistants employed by the commission shall be available to the director in the performance of his or her duties; and such engineers, experts, accountants, and technical assistants shall make such appraisals and audits as the director, with the approval of the commission, may request. The director and his or her staff shall have access to all records, files, reports, documents, and other information in the possession or custody of the commission to the same extent as the members of the commission and its staff have access thereto and subject to the same limitations imposed on the use thereof by the members of the commission and its staff. (Ga. L. 1981, p. 139, § 7; Ga. L. 1995, p. 167, § 1.)

Cross references. — Applicability of conflicts of interest laws to full-time state employees hired by commission to assist Consumers' Utility Counsel in fulfilling duties and responsibilities, § 45-10-20.

46-10-8. Construction of chapter.

This chapter shall not be construed to prevent any party interested in any proceeding or action before the commission, any court, or any administrative body from appearing in person or by counsel in such proceeding or action. (Ga. L. 1981, p. 139, § 8; Ga. L. 1995, p. 167, § 1.)

46-10-9. Repeal date.

Repealed by Ga. L. 1995, p. 167, § 1, effective March 31, 1995.

Editor's notes. — This Code section was based on Ga. L. 1981, p. 139, § 9; Ga. L. 1983, p. 834, § 3; Ga. L. 1985, p. 494, § 3; Ga. L. 1986, p. 283, § 1; Ga. L. 1987, p. 634, § 1; Ga. L. 1988, p. 1718, § 3; Ga. L. 1991, p. 1707, § 3.

CHAPTER 11

TRANSPORTATION OF HAZARDOUS MATERIALS

Sec.		Sec.	
46-11-1.	Short title.	46-11-5.	Promulgation of rules and regulations by commissioner.
46-11-2.	Purpose of chapter.	46-11-6.	Enforcement of chapter.
46-11-3.	Definitions.		
46-11-4.	Regulation of transportation of hazardous materials on public roads of state generally.		

Editor’s notes. — The provisions of this chapter were enacted by both Ga. L. 1985, p. 469, § 2 and Ga. L. 1985, p. 1499, § 2 (which Acts enacted identical language) and were derived from former Article 7 of Chapter 6 of Title 32 (§§ 32-6-220 through 32-6-225), which article was repealed by Ga. L. 1985, p. 469, § 1 and by Ga. L. 1985, p. 1499, § 1. Both Acts became effective July 1, 1985. The provisions of this chapter are being treated as amendments to the provisions of the former article for historical-citation and amendment-note purposes.

Ga. L. 1985, p. 469, § 3 and Ga. L. 1985, p. 1499, § 3 neither of which was codified by the General Assembly, both provided as follows:

“(a) It is the intention of the General Assembly that the Public Service Commission replace the Department of Transportation as the responsible state agency to regulate and enforce the laws of this state relating to the transportation of hazardous materials.

“(b) All actions and investigations pending in the Department of Transportation pursuant to former Article 7 of Chapter 6 of Title 32 on June 30, 1985, and all books, papers, and records attaching to such actions and investigations are transferred to the Public Service Commission effective July 1, 1985.

“(c) All rules and regulations promulgated by the Department of Transportation pursuant to former Article 7 of Chapter 6 of Title 32 prior to July 1, 1985, shall remain in full force and effect until amended or repealed by the Public Service Commission.”

By resolution (Ga. L. 1985, p. 853), the General Assembly created the Hazardous Materials Emergency Response Advisory Council to study activities related to hazardous material, chemical, or waste transportation and storage or spills. The resolution required the council to make a report of its findings on or before December 31, 1986, on which date the council would stand abolished.

46-11-1. Short title.

This chapter shall be known and may be cited as the “Transportation of Hazardous Materials Act.” (Ga. L. 1979, p. 789, § 1; Code 1981, § 32-6-220; Code 1981, § 46-11-1, enacted by Ga. L. 1985, p. 469, § 2; Code 1981, § 46-11-1, enacted by Ga. L. 1985, p. 1499, § 2; Ga. L. 2000, p. 951, § 10-1.)

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which reenacted this Code section without change becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appoint-

ing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an

executive order issued June 29, 2001, by the Governor, the reenactment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-11-2. Purpose of chapter.

The General Assembly finds that the transportation of hazardous materials on the public roads of this state presents a unique and potentially catastrophic hazard to the public health, safety, and welfare of the people of Georgia and that the protection of the public health, safety, and welfare requires control and regulation of such transportation to minimize that hazard; to that end this chapter is enacted. The Department of Motor Vehicle Safety is designated as the agency to implement this chapter. (Ga. L. 1979, p. 789, § 2; Code 1981, § 32-6-221; Code 1981, § 46-11-2, enacted by Ga. L. 1985, p. 469, § 2; Code 1981, § 46-11-2, enacted by Ga. L. 1985, p. 1499, § 2; Ga. L. 2000, p. 951, § 10-1.)

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing personnel, and preparing for and phasing in

full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-11-3. Definitions.

As used in this chapter, the term:

(1) "Carrier" means any person engaged in the transportation on the public roads of this state of goods or property in, to, or through this state, whether or not such transportation is for hire.

(2) "Commissioner" means the commissioner of motor vehicle safety.

(3) "Hazardous material" means and includes radioactive materials, liquefied natural gas (LNG), and polychlorinated biphenyl (PCB).

(4) "Person" means and includes any individual, corporation, partnership, association, state, municipality, political subdivision of a state, and any agency or instrumentality of the United States government or any other entity and includes any officer, agent, or employee of any of the above.

(5) "Shipper" means any person who arranges for, provides for, solicits a carrier for, consigns to a carrier for, or contracts with a carrier for shipment or transport of goods or property. (Ga. L. 1979, p. 789, § 3; Ga. L. 1982, p. 3, § 32; Code 1981, § 32-6-222; Code 1981, § 46-11-3, enacted by Ga. L. 1985, p. 469, § 2; Code 1981, § 46-11-3, enacted by Ga. L. 1985, p. 1499, § 2; Ga. L. 2000, p. 951, § 10-1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1985, in paragraph (3) “liquefied” was substituted for “liquified”.

Editor’s notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials,

adopting rules and regulations, employing personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

46-11-4. Regulation of transportation of hazardous materials on public roads of state generally.

(a) Notwithstanding any other provision of law to the contrary, any person transporting hazardous material on the public roads of this state shall be subject to the requirements of this chapter.

(b) No person, including the state or any agency thereof, shall transport hazardous material in, to, or through this state on the public roads of this state, whether or not the hazardous material is for delivery in this state and whether or not the transportation originated in this state; nor shall any person deliver in this state any hazardous material to any person for transportation; nor shall any such person accept any hazardous material for transportation in this state without compliance with the following requirements: such materials shall be packaged, marked, labeled, handled, loaded, unloaded, stored, detained, transported, placarded, and monitored in compliance with rules and regulations promulgated by the commissioner pursuant to this chapter and consistent with federal law. Compliance with such rules and regulations shall be in addition to and supplemental of other regulations of the United States Department of Transportation, United States Nuclear Regulatory Commission, Georgia Department of Human Resources, and state fire marshal, applicable to such persons.

(c) The commissioner shall promulgate rules and regulations such that no person shall arrange for the transportation of or cause to be transported in, to, or through this state on the public roads of this state any hazardous material unless such person shall notify the commissioner or his or her designee in accordance with such rules and regulations.

(d) Knowledge by a shipper that a carrier proposes to transport hazardous material in or through this state on the public roads of this state shall be sufficient contact with this state to subject such shipper to the jurisdiction of the courts of this state with respect to such transport.

(e) No transportation of hazardous material shall take place in or through this state until the commissioner or his or her designee issues a permit authorizing the applicant to operate or move upon the state’s public roads a motor vehicle or combination of vehicles which carry hazardous

materials. The commissioner or his or her designee may require changes in the proposed dates, times, routes, detention, holding, or storage of such materials during transport as necessary to maximize protection of the public health, safety, welfare, or the environment. The commissioner is authorized to promulgate reasonable rules and regulations which are necessary or desirable in governing the issuance of permits, provided that such rules and regulations are not in conflict with other provisions of law.

(f) Every such permit shall be carried in the vehicles or combination of vehicles to which it refers and shall be open to inspection by any law enforcement officer or employee of the Department of Motor Vehicle Safety who has been given enforcement authority by the commissioner.

(g) For just cause, including, but not limited to, repeated and consistent past violations, the commissioner may refuse to issue or may cancel, suspend, or revoke the permit of an applicant or permittee.

(h)(1) The commissioner or the official designated by the commissioner, pursuant to this Code section and the rules and regulations developed by the commissioner, may issue an annual permit which shall allow vehicles transporting hazardous materials to be operated on the public roads of this state for 12 months from the date the permit is issued.

(2) The commissioner or the official designated by the commissioner, pursuant to this Code section and the rules and regulations developed by the commissioner, may issue a single-trip permit to any vehicle.

(i) The commissioner may charge a fee for the issuance of permits. The fee for the issuance of annual trip permits shall be \$100.00. The fee for the issuance of single-trip permits shall be established by rules and regulations promulgated by the commissioner.

(j) For purposes of this chapter, the commissioner is expressly authorized to contract with the Department of Public Safety, the Department of Human Resources, or other state agencies or departments to perform any activities necessary to implement this chapter.

(k) Notwithstanding any other provisions of this chapter, the commissioner is authorized to establish such exceptions or exemptions from the requirements of this chapter, or any provision hereof, for such kinds, quantities, types, or shipments of hazardous materials as it shall deem appropriate, consistent with the protection of the public health, safety, and welfare.

(l) This chapter shall not apply to the transportation, delivery, or acceptance for delivery of radioactive materials inside the confines of the authorized location of use of any person authorized to use, possess, transport, deliver, or store radioactive materials by the Department of Human Resources pursuant to Chapter 13 of Title 31 or by the United States Nuclear Regulatory Commission; nor shall this chapter apply to the

transportation, delivery, or acceptance for transportation of radioactive materials under the direction or supervision of the United States Nuclear Regulatory Commission or the United States Department of Defense where such transportation, delivery, or acceptance for transportation is escorted by personnel designated by or under the authority of those agencies.

(m) This chapter shall not apply to interstate pipeline facilities which are subject to the jurisdiction of the United States Department of Transportation under the Natural Gas Pipeline Safety Act of 1968.

(n) In the event of any damage to state property or any discharge of hazardous materials from the authorized shipping package or container or any threat of such discharge which results from the transportation, storage, holding, detention, delivery for transportation, or acceptance for transportation of hazardous materials in this state, the state may recover from any shipper, carrier, bailor, bailee, or any other person responsible for such storage, transportation, holding, detention, delivery, or acceptance all costs incurred by the state in the reparation of the damage and all costs incurred in the prevention, abatement, or removal of any such discharge or threatened discharge, including reasonable attorney's fees incurred with respect to recovery.

(o) Notwithstanding any other provisions of law, a bond or indemnity insurance required of carriers shall be established by rules and regulations of the commissioner and shall for all persons subject to this chapter, whether intrastate or interstate carriers, be at least in the maximum amount or amounts authorized or required by federal law or regulations.

(p) In addition to any other liability imposed by law, any person who violates any provision of this chapter shall be guilty of a misdemeanor. (Ga. L. 1979, p. 789, § 4; Code 1981, § 32-6-223; Ga. L. 1985, p. 149, § 32; Code 1981, § 46-11-4, enacted by Ga. L. 1985, p. 469, § 2; Code 1981, § 46-11-4, enacted by Ga. L. 1985, p. 1499, § 2; Ga. L. 2000, p. 951, § 10-1.)

Cross references. — Hazardous waste management, § 12-8-60 et seq.

Editor's notes. — Ga. L. 2000, p. 951, § 13-1, not codified by the General Assembly, provides that the 2000 Act which amended this Code section becomes fully effective July 1, 2001, but authorizes administrative action commencing April 28, 2000, for purposes of appointing certain officials, adopting rules and regulations, employing

personnel, and preparing for and phasing in full implementation; provided, however, that the Governor may by executive order extend the date for full implementation of the Act to no later than July 1, 2003. In accordance with an executive order issued June 29, 2001, by the Governor, the amendment of this Code section by Ga. L. 2000, p. 951, became fully effective July 1, 2001.

RESEARCH REFERENCES

ALR. — Carrier's "public duty" exception to absolute or strict liability arising out of carriage of hazardous substances, 31 ALR4th 658.

46-11-5. Promulgation of rules and regulations by commissioner.

The commissioner is authorized and empowered to adopt, promulgate, amend, repeal, or modify such standards, rules, and regulations and to issue such orders, authorizations, or amendments or modifications thereof as are necessary to implement this chapter. Any standards, rules, or regulations adopted pursuant to this chapter, if consistent with the applicable laws relating to adoption of such standards, rules, or regulations, shall have the force and effect of law. (Ga. L. 1979, p. 789, § 6; Code 1981, § 32-6-224; Code 1981, § 46-11-5, enacted by Ga. L. 1985, p. 469, § 2; Code 1981, § 46-11-5, enacted by Ga. L. 1985, p. 1499, § 2; Ga. L. 2000, p. 951, § 10-1.)

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46-11-6. Enforcement of chapter.

(a) The commissioner is authorized to employ such persons as may be necessary, in the discretion of the commissioner, for the proper enforcement of this chapter, the salaries for such employees to be fixed by the commissioner.

(b) The commissioner is vested with police powers and authority to designate, deputize, and delegate to employees of the Department of Motor Vehicle Safety the necessary authority to enforce this chapter, including the power to stop and inspect all motor vehicles using the public highways for purposes of determining whether such vehicles have complied with and are complying with the provisions of this chapter and all other laws regulating the use of the public highways by motor vehicles, and to arrest all persons found in violation thereof. (Ga. L. 1979, p. 789, § 5; Code 1981, § 32-6-225; Code 1981, § 46-11-6, enacted by Ga. L. 1985, p. 469, § 2; Code 1981, § 46-11-6, enacted by Ga. L. 1985, p. 1499, § 2; Ga. L. 2000, p. 951, § 10-1.)

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Index to Title 46

A

ACCOUNTANTS.

Public utilities.

Public service commission, §§46-2-40, 46-2-42.

ACCOUNTS AND ACCOUNTING.

Southwest Georgia railroad excursion authority, §46-9-325.

ACKNOWLEDGMENTS.

Rural telephone cooperatives.

Persons who may take acknowledgments, §46-5-98.

ACTING IN CONCERT.

For hire defined, §46-1-1.

ACTIONS.

Derivative actions.

Electric membership corporations, §46-3-272.

Electricity.

Wrongs and injuries by electric companies, §46-1-2.

Electric membership corporations.

Articles of incorporation amended.
Effect on pending causes of action, §46-3-364.

Cause of action existing as of July 1, 1981.

Effect of provisions on, §46-3-180.

Derivative actions by members, §46-3-272.

Directors.

Actions against, §46-3-304.

Members.

Derivative actions by members, §46-3-272.

Officers.

Actions against, §46-3-304.

Power to sue and be sued, §46-3-201.

Rights of way and easement acquisition, §46-3-204.

Gas.

Municipal gas authority of Georgia.

Jurisdiction of actions arising under provisions, §46-4-121.

Natural gas competition and deregulation act.

Damages for regulatory violations, §46-4-160.5.

ACTIONS —Cont'd

Gas —Cont'd

Violations of commission rules, orders or regulations.

Actions to enjoin, §46-4-1.

Municipal electric authority of Georgia.

Venue of actions under provisions, §46-3-151.

Municipal gas authority of Georgia.

Jurisdiction of actions under provisions, §46-4-121.

Natural gas competition and deregulation act.

Damages for regulatory violations, §46-4-160.5.

No call law violations, §46-5-27.

Public service commission.

Gas transmission and distribution facilities.

Enjoining violations of commission rules, orders or regulations, §46-4-1.

Injunctive relief, §46-2-95.

Jurisdiction of actions involving, §46-2-9.

Penalties.

Recovery by state through civil action, §46-2-92.

Railroads.

Actions against companies.

Authority of chairman or president as to legal proceeding, §46-8-50.

Leases.

Recordation by company in each county through which road runs.

Effect of failure or refusal to record on rights of action, §46-8-2.

Grade crossings.

Signs.

Cross buck signs.

Compelling railroad companies to post, §46-8-195.

Institution or defense of legal proceedings.

Authority of chairman or president, §46-8-50.

Receivers.

Actions against receivers of railroad companies, §46-8-314.

ACTIONS —Cont'd

Railroads —Cont'd

Trustees of railroad companies.

Actions against, §46-8-314.

Wrongs and injuries by railroad companies, §46-1-2.

Telegraph companies.

Power to sue and be sued, §46-5-146.

Service of process in actions against, §46-5-149.

Venue for actions against, §46-5-149.

Telephones.

"911" system.

Liability of service suppliers, §46-5-135.

Telephone solicitation no call law violations, §46-5-27.

Theft of telecommunications service, §§46-5-2, 46-5-3.

ACT OF GOD.

Common carriers.

Negligence.

Contractual limitation of liability generally, §46-9-3.

Presumption arising from loss of goods, §46-9-1.

ADAD EQUIPMENT.

Defined, §46-5-24.

Use, §46-5-23.

ADMINISTRATIVE PROCEDURE.

Electricity.

Residential conservation service.

Applicability of act to proceedings, §46-4A-8.

Gas.

Residential conservation service.

Applicability of act to proceedings, §46-4A-8.

ADVERTISING.

Household goods carriers for hire.

Operating without certificate, advertising falsely.

Penalty, §46-7-91.

Motor carriers.

Household goods carriers for hire.

Operating without certificate, advertising falsely.

Penalty, §46-7-91.

Railroads.

Grade crossings signs.

Standard signs.

Use of similar signs for advertising prohibited, §46-8-196.

AGE.

Electric membership corporations.

Directors.

Qualifications, §46-3-290.

Incorporators, §46-3-320.

Public service commission.

Qualifications of commissioners, §46-2-2.

Railroads.

Qualifications, §46-8-46.

AGENTS.

Electric membership corporations.

Indemnification, §46-3-306.

Liability insurance, §46-3-306.

Municipal electric authority of Georgia.

Bond issues.

Paying agents for bonds, §46-3-142.

Municipal gas authority of Georgia.

Bond issues.

Paying agents, §46-4-112.

ALABAMA.

Rapid rail transit.

Mississippi-Louisiana-Alabama-Georgia rapid rail transit compact, §46-9-300.

ALLEYS.

Municipal corporations.

Electrical service.

Wires, poles and other facilities of electric suppliers in alleys.

Municipal police powers over erection and maintenance.

Effect of provisions on, §46-3-14.

Railroad companies.

Street, suburban and interurban railroad companies.

Powers as to motor buses and trackless trolleys, §46-8-342.

Rural telephone cooperatives.

Powers, §46-5-63.

ALTERNATIVE DISPUTE RESOLUTION.

Natural gas competition and deregulation act.

Marketers, §46-4-160.1.

APPEALS.

Electricity.

Residential conservation service.

Judicial review of director, §46-4A-9.

Electric membership corporations.

Foreign electric cooperatives.

Revocation of certificate of authority, §46-3-523.

Secretary of state.

Certain actions of secretary, §46-3-523.

Gas.

Residential conservation service.

Judicial review of director, §46-4A-9.

APPEALS —Cont'd

Gas —Cont'd

Underground storage.

Orders approving or disapproving projects.

Judicial review, §46-4-56.

Motor carriers.

Imposition of penalty for violation of law administered by commissioner, §46-7-90.

Orders of commissioner, §46-7-33.

Municipal electric authority of Georgia.

Bond issues.

Validation of bonds, §46-3-131.

Public service commission.

Penalties recovered before commission, §46-2-91.

APPROPRIATIONS.

Public service commission.

Salaries and expenses, §46-2-8.

APPURTENANCES.

Railroads.

Street, urban or interurban railroad companies with tracks and appurtenances extended into adjoining state.

Tax exemption for property and capital stock, §46-8-338.

AQUIFERS.

Underground reservoir.

Defined, §46-4-51.

AREA CODES.

Telephones.

Inclusion of local exchanges 495 and 567 in area code 404, §46-5-5.

ARREST.

Railroad special officers, §46-8-230.

ARTICLES OF INCORPORATION.

Electric membership corporations.

See ELECTRIC MEMBERSHIP CORPORATIONS.

Rural telephone cooperatives.

See RURAL TELEPHONE COOPERATIVES.

ARTIFICIAL GAS.

Gas utilities.

Eminent domain authority, §46-4-57.

ASSESSMENTS.

Rail passenger authority.

Exemption of authority, §46-9-280.

ATTORNEY GENERAL.

Energy conservation assistance.

Duty to represent director in actions, §46-4A-10.

ATTORNEY GENERAL —Cont'd

Railroads.

Public service commission.

Representation of commission, §46-9-25.

ATTORNEYS.

Consumers' utility counsel division,

§§46-10-1 to 46-10-8.

See CONSUMERS' UTILITY COUNSEL DIVISION.

Fees.

Utility counsel.

Consumers' utility counsel division, §§46-10-1 to 46-10-8.

See CONSUMERS' UTILITY COUNSEL DIVISION.

ATTORNEYS' FEES.

Public service commission.

Liability of companies subject to jurisdiction of commission.

Actions for recovery, §46-2-90.

Theft of telecommunications service,

§§46-5-2, 46-5-3.

AUDITS.

Electricity.

Annual audit of affairs of electric utilities, §46-2A-1.

Management audit of electric utilities, §46-2A-2.

Municipal electric authority of Georgia,

§46-3-150.

Municipal gas authority of Georgia.

Annual audit, §46-4-120.

Public service commission.

Electric utilities.

Management audit, §46-2A-2.

Utility finance section.

Duties, §46-2-44.

AUTHORITIES.

Georgia rail passenger authority.

General provisions, §§46-9-270 to 46-9-281.

See RAIL PASSENGER AUTHORITY.

Municipal electric authority of Georgia,

§§46-3-110 to 46-3-155.

See MUNICIPAL ELECTRIC

AUTHORITY OF GEORGIA.

Municipal gas authority of Georgia,

§§46-4-80 to 46-4-125.

See MUNICIPAL GAS AUTHORITY OF GEORGIA.

Rail passenger authority.

General provisions, §§46-9-270 to 46-9-281.

See RAIL PASSENGER AUTHORITY.

AUTHORITIES —Cont'd

Southwest Georgia railroad excursion authority, §§46-9-320 to 46-9-332.
See **SOUTHWEST GEORGIA RAILROAD EXCURSION AUTHORITY**.

AUTOMATIC DIALING AND RECORDED MESSAGE EQUIPMENT.

Definition of "ADAD equipment," §46-5-24.
Use, §46-5-23.

B

BAD FAITH.

Telephones.

911 system, §46-5-131.
Physically impaired persons, §46-5-30.

BAGGAGE.

Common carriers, §46-9-136.
Lien of carriers, §§46-9-190 to 46-9-192.
Motor carriers, §46-7-20.
Railroads.

Checking, §46-9-152.
Connecting carriers, §§46-9-210, 46-9-211.

BOARDS.

Natural gas consumer education advisory board.
Creation and composition, §46-4-160.4.

BOATS AND OTHER WATERCRAFT.

Passenger tickets for passage on vessels, §§46-9-170 to 46-9-172.

BOND ISSUES.

Electricity.

Municipal electric authority of Georgia, §§46-3-131 to 46-3-147.
See **MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA**.

Electric membership corporations, §§46-3-176, 46-3-201.

Gas.

Municipal gas authority of Georgia, §§46-4-101 to 46-4-117.
See **MUNICIPAL GAS AUTHORITY OF GEORGIA**.

Municipal electric authority of Georgia, §§46-3-131 to 46-3-147.

See **MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA**.

Municipal gas authority of Georgia, §§46-4-101 to 46-4-117.

See **MUNICIPAL GAS AUTHORITY OF GEORGIA**.

BOND ISSUES —Cont'd

Rail passenger authority.

See **RAIL PASSENGER AUTHORITY**.

Railroads.

Consolidated companies.
Issuance of bonds, §46-8-81.
Procedure for issuing bonds, §46-8-53.
Street, suburban and interurban railroads.
Consolidation or merger.
Issuance by consolidated corporation, §46-8-337.

Rural telephone cooperatives.

Applicability of certain provisions, §46-5-104.

Southwest Georgia railroad excursion authority.

Generally.
See **SOUTHWEST GEORGIA RAILROAD EXCURSION AUTHORITY**.

BONDS, SURETY.

Common carriers.

Cancellation of bond.
Notice, §46-9-9.
Right of employee or surety, §46-9-9.
Requiring specific bonding company as surety.
Prohibited, §46-9-8.

Electric membership corporations.

Involuntary dissolution.
Receivers in liquidation proceedings, §46-3-433.

Hazardous materials and waste.

Transportation of hazardous materials, §46-11-4.

Motor carriers.

Certificates of public convenience and necessity.
Requirement before issuance, §46-7-12.
Interstate commerce.
Requirements for vehicles engaged solely in, §46-7-16.

Public service commission.

Changing rate, charge, classification or service, §46-2-25.

Railroads.

Protection of property.
Special officers, §46-8-232.

BRIDGES.

Railroads.

Alteration of railroad bridges to accommodate motor vehicles, §46-8-133.

BRIDGES —Cont'd

Railroads —Cont'd

- Appropriation of public bridges,
§46-8-103.
- Drawbridge at which there is a switch.
Signboards to warn of.
Erection and placement, §46-8-198.

BURDEN OF PROOF.

Injunctions.

- Public service commission, §46-2-95.

Motor carriers.

- Certificates of public convenience and
necessity.
Applications, §46-7-7.
- Exceptions to provisions.
Applicability, §46-7-38.

BUSES.

Motor carriers.

- General provisions, §§46-7-1 to
46-7-85.17.

See MOTOR CARRIERS.

Public service commission.

- General provisions, §§46-2-1 to 46-2-95.
See PUBLIC SERVICE COMMISSION.

BUSINESS CORPORATIONS.

Dissolution.

- Railroad companies.
Applicability of provisions to, §46-8-4.
General provisions, §§46-8-71 to
46-8-79.

Electric membership corporations.

- General provisions, §§46-3-170 to
46-3-541.

See ELECTRIC MEMBERSHIP
CORPORATIONS.

Merger.

- Electric membership corporations,
§§46-3-380 to 46-3-385.
See ELECTRIC MEMBERSHIP
CORPORATIONS.
- Railroads, §§46-8-80, 46-8-81.
Street, suburban and interurban
railroads, §§46-8-104, 46-8-105.

Railroads.

- Dissolution of railroad companies,
§§46-8-71 to 46-8-79.
See RAILROADS.
- Merger, §§46-8-80, 46-8-81.
Street, suburban and interurban
railroads, §§46-8-334 to 46-8-337.

C

CABLEGRAMS.

Electric membership corporations.

- Notice of special director meetings,
§46-3-298.

CABLEGRAMS —Cont'd

Railroad directors' meetings.

- Notice of special meetings, §46-8-47.

CABLE TELEVISION.

Electric membership corporations.

- Ownership prohibited, §46-3-178.

Theft of telecommunications service

- generally, §§46-5-2 to 46-5-4.

CALLER IDENTIFICATION.

Telephone solicitors.

- Blocking or circumventing subscriber's
service, §46-5-27.

CANCELLATION.

Municipal electric authority of Georgia.

- Evidences of indebtedness and interest
coupons, §§46-3-140, 46-3-141.

Municipal gas authority of Georgia.

- Retired bonds, §§46-4-110, 46-4-111.

Transportation of freight and passengers

generally.

- Cancellation of employee's bond,
§46-9-9.

CAR PHONES.

Telephone solicitations.

- Mobile or wireless subscribers.
No-call law, §46-5-27.

Theft of telecommunications service,

§§46-5-2 to 46-5-4.

CARRIERS.

Hazardous materials.

- Transportation, §§46-11-1 to 46-11-6.
See HAZARDOUS MATERIALS AND
WASTE.

Liens, §§46-9-190 to 46-9-192.

Limousine carriers.

- General provisions, §§46-7-85.1 to
46-7-85.17.

See LIMOUSINE CARRIERS.

Motor carriers, §§46-7-1 to 46-7-85.17.

See MOTOR CARRIERS.

CATASTROPHES.

Electric membership corporations.

- Emergency bylaws and emergency
powers of directors, §46-3-326.

CATASTROPHIC HAZARDS.

Hazardous materials transportation.

- Generally, §§46-11-1 to 46-11-6.
See HAZARDOUS MATERIALS AND
WASTE.

CATTLE GUARDS.

Railroad cattle guards, §§46-8-129 to

46-8-132.

See RAILROADS.

CATV.

Theft of telecommunications service,
§§46-5-2 to 46-5-4.

CAVERNS.

Underground storage of gas.

Underground reservoir includes cavern,
§46-4-51.

CEASE AND DESIST ORDERS.

Gas.

Intrastate pipelines and distribution
systems.

Public service commission, §46-4-26.

Telephone solicitation no call law
violations, §46-5-27.

CELLULAR RADIO

TELECOMMUNICATIONS
SERVICES.

Telephone solicitations.

Mobile or wireless subscribers.

No-call law, §46-5-27.

Theft of telecommunications service,
§§46-5-2 to 46-5-4.

CERTIFICATES OF PUBLIC

CONVENIENCE AND NECESSITY.

Electricity.

Integrated resource planning, §§46-3A-3
to 46-3A-6.

See **ELECTRICITY.**

CHATTEL MORTGAGES.

Rural telephone cooperatives.

Effect of recordation, §46-5-95.

CHOSES IN ACTION.

Electric membership corporation merger
or consolidation.

Rights, privileges, immunities, etc., of
surviving corporation, §46-3-384.

Rural telephone cooperative merger or
consolidation.

Rights, privileges, immunities, etc., of
surviving cooperative, §46-5-89.

CITIES.

Municipal electric authority of Georgia,
§§46-3-110 to 46-3-155.

See **MUNICIPAL ELECTRIC**
AUTHORITY OF GEORGIA.

Municipal gas authority of Georgia,
§§46-4-80 to 46-4-125.

See **MUNICIPAL GAS AUTHORITY OF**
GEORGIA.

CIVIL PRACTICE.

Railroads.

Actions against companies, §§46-8-310 to
46-8-314.

See **RAILROADS.**

CLAIMS.

Common carriers.

Adjustment and payment of claims,
§46-9-48.

COAL.

Gas defined as methane from coal beds,
§46-4-81.

COAL-BURNING GENERATING
FACILITY.

Recovery of costs of conversion from
oil-burning to, §46-2-26.3.

COGENERATION AND DISTRIBUTED
GENERATION ACT OF 2001.

Sale of electricity by generating facilities,
§§46-3-50 to 46-3-56.

See **ELECTRICITY.**

COGENERATION AND DISTRIBUTED
GENERATION FACILITIES.

Sale of electricity by generating facilities,
§§46-3-50 to 46-3-56.

See **ELECTRICITY.**

COLLECTIVE RATE-MAKING.

Motor carriers.

Authority of commission, §46-7-18.

COLLUSION.

Electric membership corporations.

Defense of ultra vires.

Plaintiffs acting in collusion officials of
corporation, §46-3-202.

COMMERCIAL PAPER.

Municipal electric authority of Georgia.

Bond issues, §46-3-144.

Municipal gas authority of Georgia.

Bond issues, §46-4-114.

COMMISSIONS.

Public service commission.

General provisions, §§46-2-1 to 46-2-95.

See **PUBLIC SERVICE COMMISSION.**

COMMON CARRIERS.

Baggage.

Carriage of baggage, §46-9-136.

Lien of carrier for baggage charges,
§46-9-190.

Bonds, surety.

Cancellation of bond.

Notice, §46-9-9.

Right of employee or surety, §46-9-9.

Requiring specific bonding company as
surety.

Prohibited, §46-9-8.

Claims.

Adjustment and payment of claims,
§46-9-48.

COMMON CARRIERS —Cont'd
Contracts.

- Limitation of liability, §46-9-2.
- Showings required, §46-9-3.

Damages.

- Acts committed outside scope of provisions.
- Liability for, §46-9-4.
- Freight.
 - Delay in delivery of goods.
 - Measure of damages, §46-9-43.

Discrimination.

- Freight-transportation rates, §46-9-52.
- Railroads.
 - Freight-storage charges, §§46-9-53, 46-9-55.

Employees.

- Passes.
 - Granting to former employees, §46-9-137.

Fraud.

- Freight.
 - Nature and value of goods, §46-9-47.

Freight.

- Bills.
 - Contents of freight bills, §46-9-112.
 - False billing, §§46-9-56, 46-9-57.
- Claims concerning freight.
 - Adjustment and payment, §46-9-48.
- Commencement of responsibility for goods, §46-9-45.
- Delay in delivery of goods.
 - Damages.
 - Measure of damages, §46-9-43.
 - Duty to deliver without unreasonable delay, §§46-9-41, 46-9-42.
- Delivery to consignee at intermediate point.
 - Recovery of pro rata for actual distance transported, §46-9-46.
- Duties of carriers.
 - Commencement of responsibility for goods, §46-9-45.
 - Receipt of goods, §46-9-40.
 - Termination of responsibility for goods, §46-9-45.
 - Transportation and delivery of goods safely and without unreasonable delay, §46-9-41.
 - Strike by carriers and employees.
 - Effect on duty, §46-9-42.
 - Estoppel to dispute title of goods delivered for shipment, §46-9-44.
 - False billing or false weighing.
 - Misdemeanors, §§46-9-56, 46-9-57.

COMMON CARRIERS —Cont'd

Freight —Cont'd

- Fraud on carrier as to nature and value of goods, §46-9-47.
- Liens.
 - Charges, §46-9-191.
- Lists.
 - Contents of freight lists, §46-9-112.
- Rates and charges.
 - Overcharging by officers, agents and employees, §46-9-252.
 - Unjust discrimination in rates, §46-9-52.
- Receipt of goods.
 - Duties of carriers, §46-9-40.
- Receipts.
 - Issuance to persons delivering goods for transportation, §46-9-110.
 - Railroad companies.
 - Duplicate freight receipts, §46-9-111.
- Termination of responsibility for goods, §46-9-45.
- Title to goods delivered for shipment.
 - Estoppel of carrier to dispute title, §46-9-44.
- Weighing of freight.
 - False weighing.
 - Misdemeanors, §§46-9-56, 46-9-57.
 - Railroads.
 - Carload shipments, §§46-9-49, 46-9-50.
- Hazardous materials.**
 - Transportation, §§46-11-1 to 46-11-6.
 - See HAZARDOUS MATERIALS AND WASTE.
- Interstate commerce.**
 - Applicability of provisions to carriers engaged in interstate commerce, §46-1-4.
- Liens, §§46-9-190 to 46-9-192.**
 - Baggage charges, §46-9-190.
- Freight.**
 - Charges, §46-9-191.
- Passengers.**
 - Fare and baggage charges, §46-9-190.
 - Priority, §46-9-192.
- Limitation of actions.**
 - Rates and charges.
 - Actions against common carriers for recovery of overcharges, §46-9-6.
 - Time of accrual of actions, §46-9-7.
 - Actions by common carriers for recovery of charges, §46-9-5.
 - Time of accrual of actions, §46-9-7.

COMMON CARRIERS —Cont'd

Limitation of liability.

Contractual limitation, §46-9-2.

Showings required, §46-9-3.

Motor carriers, §§46-7-1 to 46-7-85.17.

See MOTOR CARRIERS.

Negligence.

Contractual limitation of liability generally, §§46-9-2, 46-9-3.

Presumption.

Loss of goods, §46-9-1.

Exceptions, §46-9-1.

Showings required, §46-9-3.

Standard of care, §46-9-1.

Overcharging by officers, agents and employees, §46-9-252.

Passengers.

Baggage.

Carriage of baggage, §46-9-136.

Lien of carrier for baggage charges, §46-9-190.

Duties of carriers.

Lighting and ventilating cars, §46-9-133.

Receiving passengers, §46-9-130.

Seats.

Furnishing comfortable seats, §46-9-133.

Standard of care.

Extraordinary diligence, §46-9-132.

Unused tickets and unused portion of ticket.

Redemption, §46-9-140.

Ejecting passengers, §46-9-131.

Liens.

Fare and baggage charges, §46-9-190.

Passes.

Former employees of carrier, §46-9-137.

Sheriffs and their deputies.

Annual passes, §46-9-138.

Railroads.

Assignment of passengers to cars, compartments and seats, §§46-9-134, 46-9-135.

Rates and charges.

Overcharging by officers, agents and employees, §46-9-252.

Receiving passengers, §46-9-130.

Refusal of admittance to persons, §46-9-131.

Standard of care for carriers.

Extraordinary diligence, §46-9-132.

COMMON CARRIERS —Cont'd

Passengers —Cont'd

Tickets.

Selling or dealing in by person other than authorized agent of carrier, §46-9-139.

Unused ticket and unused portions of tickets.

Redemption.

Duty of common carriers, §46-9-140.

PCB (polychlorinated biphenyl).

Transportation of hazardous materials, §§46-11-1 to 46-11-6.

See HAZARDOUS MATERIALS AND WASTE.

Presumptions.

Negligence.

Loss of goods, §46-9-1.

Exceptions, §46-9-1.

Showings required, §46-9-3.

Public service commission.

Rates and charges.

Discrimination in rates and charges.

Witnesses.

Compelling testimony, §§46-2-55, 46-2-56.

Supervision of common carriers generally, §46-2-21.

Witnesses.

Compelling testimony as to certain matters regarding common carriers, §§46-2-55, 46-2-56.

Radioactive materials.

Transportation of hazardous materials, §§46-11-1 to 46-11-6.

See HAZARDOUS MATERIALS AND WASTE.

Rate discrimination, §§46-9-52, 46-9-53, 46-9-213.

Rates and charges.

Delivery of goods to consignee at intermediate point.

Pro rata recovery for actual distance transported, §46-9-46.

Freight.

Overcharging by officers, agents and employees, §46-9-252.

Unjust discrimination in rates, §46-9-52.

Limitation of actions.

Actions against common carriers for recovery of overcharges, §46-9-6.

Time of accrual of actions, §46-9-7.

COMMON CARRIERS —Cont'd

Rates and charges —Cont'd

Limitation of actions —Cont'd

Actions by common carriers for
recovery of charges, §46-9-5.

Time of accrual of actions, §46-9-7.

Passengers.

Overcharging by officers, agents and
employees, §46-9-252.

Receipts.

Issuance to persons delivering goods for
transportation, §46-9-110.

Railroad companies.

Duplicate freight receipts, §46-9-111.

Sheriffs.

Passes.

Annual passes for sheriffs and their
deputies, §46-9-138.

COMMON LAW.

Foreign electric cooperatives' names.

Common law principles concerning
trade names and trademarks not
derogated, §46-3-452.

COMMON OWNERSHIP.

Municipal electric authority.

Validation of contracts for payments
pledged as security, §46-3-132.

Municipal gas authority.

Necessary parties to revenue bonds
validation, §46-4-102.

Railroad companies.

Contracts by two or more chartered
companies to use same track in
common, §46-8-101.

COMMUNITY ANTENNA TELEVISION.

Theft of telecommunications service,

§§46-5-2 to 46-5-4.

COMPACTS.

Mississippi-Louisiana-Alabama-Georgia

rapid rail transit compact, §46-9-300.

COMPARATIVE NEGLIGENCE.

Railroad liability.

Comparative negligence as affecting
amount of recovery, §46-8-291.

COMPRESSED AIR.

Automatic door to firebox of locomotives.

Operation by, §46-8-172.

COMPRESSED COTTON PLANTS.

Public service commission.

Powers and duties extended to cotton
compress corporations or
associations, §46-2-21.

COMPROMISE AND SETTLEMENT.

Electric membership corporation.

Derivative actions by members,
§46-3-272.

CONDUCTORS.

Baggage checks.

Duty of railroad companies to provide,
§46-9-152.

Duty to assign passengers to cars and
compartments, §46-9-134.

Duty to stop trains at railroad crossings,
§46-8-193.

Ejectment of passengers by, §46-9-135.

Furnishing passengers with sufficient water
or light at night, §46-9-150.

Police powers, §46-9-134.

CONFIDENTIALITY OF INFORMATION.

Electric membership corporations.

Interrogatories propounded by secretary
of state.

Facts and information obtained from,
§46-3-522.

Family violence shelter location and
address.

Telephone directory information and
listings publishers or disseminators.

Plan for protecting filed with public
service commission, §46-5-7.

Public service commission.

Stocks and bonds.

Approval procedures for contemplated
issuance, §46-2-29.

CONFLICTS OF INTEREST.

Electric membership corporations.

Directors and officers, §46-3-305.

Public service commission.

Restrictions on commissioners, §46-2-2.

Utility finance section, §46-2-43.

Rail passenger authority.

Disclosure of pecuniary interest by
members, §46-9-274.

Railroads.

Incorporation.

Secretary of state.

Disqualification of secretary of state.

Performance of duties by
commissioner of insurance,
§46-8-40.

Southwest Georgia railroad excursion
authority, §46-9-324.

CONFLICT OF LAWS.

Electric membership corporations.

Allocation of territorial rights to
suppliers of electricity, §46-3-182.

CONFUSION.

- Electric membership corporation names,** §46-3-220.
- Foreign electric cooperative name,** §46-3-452.

CONSANGUINITY.

- Electric membership corporation.**
 - Elections committee.
 - Members to refrain from participating in deliberation or vote, §46-3-270.
 - Provisional director, §46-3-292.

CONSERVATION AND NATURAL RESOURCES.

- Electricity.**
 - Residential conservation service, §§46-4A-1 to 46-4A-14.
 - See ELECTRICITY.
- Gas.**
 - Residential conservation service, §§46-4A-1 to 46-4A-14.
 - See GAS.

CONSOLIDATION.

- Electric membership corporations.**
 - Merger or consolidation, §§46-3-380 to 46-3-385.
 - See ELECTRIC MEMBERSHIP CORPORATIONS.
- Railroads,** §§46-8-80, 46-8-81.
 - Street, suburban and interurban railroads.
 - Corporations operating electric railroads or generating electricity, §§46-8-334 to 46-8-337.
- Rural telephone cooperatives,** §46-5-87.
 - Effect, §46-5-89.
 - Telephone corporations.
 - Consolidation into a cooperative, §46-5-90.

CONSPIRACIES.

- Railroad companies.**
 - Conspiring to wreck.
 - Successful attempt, §46-8-363.
 - Unsuccessful attempt, §46-8-364.

CONSULS.

- Conditional sales or lease contracts.**
 - Validity of contracts executed in presence of, §46-8-272.

CONSUMER PROTECTION.

- Georgia no-call law,** §46-5-27.
- Telephone solicitors.**
 - No-call law, §46-5-27.

CONSUMER PROTECTION —Cont'd Utilities.

- Consumers' counsel, §§46-10-1 to 46-10-8.
- See CONSUMERS' UTILITY COUNSEL DIVISION.

CONSUMERS' UTILITY COUNSEL DIVISION, §§46-10-1 to 46-10-8.

- Counsel functions,** §46-10-4.
- Creation,** §46-10-3.
- Definitions,** §46-10-2.
- Depositions.**
 - Authority to take depositions, §46-10-5.
- Director,** §§46-10-3, 46-10-6.
- Discovery.**
 - Authority to obtain discovery, §46-10-5.
- Employment of personnel,** §46-10-6.
- Expert witness fees,** §46-10-6.
- Interpretation and construction,** §46-10-8.
- Intervention,** §46-10-4.
- Legislative declaration,** §46-10-1.
- Notice.**
 - Service of notice on director, §46-10-5.

Professional services.

- Technical assistants employed by commission, §46-10-7.

Public service commission.

- Assistance to director, §46-10-7.
- Purpose of provisions,** §46-10-1.
- Service of process.**
 - Service on director, §46-10-5.
- Staff,** §46-10-6.

CONTEMPT.

Electric membership corporations.

- Interrogatories propounded by secretary of state.
- Failure or refusal of officer or director to answer, §46-3-541.

Public service commission.

- Subpoenas.
- Failure or refusal to obey, §46-2-54.

CONTRABAND.

Theft of telecommunications service.

- Devices, equipment, etc., used for committing theft, §46-5-4.

CONTRACT CARRIERS.

- Motor carriers generally,** §§46-7-1 to 46-7-85.17.
- See MOTOR CARRIERS.

CONTRACTS.

Common carriers.

- Limitation of liability, §46-9-2.
- Showings required, §46-9-3.

CONTRACTS —Cont'd

Electric membership corporations.

Power to contract, §46-3-201.

Express companies.

Power to contract, §46-9-233.

Municipal electric authority of Georgia.

Political subdivisions.

Bond issues.

Contracts as prerequisite to issuance.

Validation of contracts for payments pledged as security for bonds, §46-3-132.

Eligibility to contract with authority, §46-3-130.

Use of projects and facilities of authority, §46-3-129.

Power to contract, §46-3-126.

Municipal gas authority of Georgia.

Bond issues.

Impairment of contracts to adversely affect rights of bondholders.

Prohibited, §46-4-116.

Political subdivisions, §46-4-99.

Entities with gas distribution systems, §46-4-100.

Power to contract with, §46-4-96.

Resolutions of declaration of intention to contract with authority, §46-4-83.

Power to contract, §46-4-96.

Natural gas competition and deregulation.

Special or negotiated contracts, §46-4-163.

Oil and gas.

Natural gas competition and deregulation, §46-4-163.

Rail passenger authority.

Powers of authority, §46-9-273.

Railroads.

Common use of tracks within cities, §46-8-101.

Rolling stock and other equipment.

Conditional sales, §§46-8-270, 46-8-272.

Lease, §§46-8-271, 46-8-272.

Street, suburban and interurban railroads.

Existing contracts between municipalities and railroad companies.

Effect of provisions on, §46-8-348.

Rural telephone cooperatives.

Nonprofit operation.

Content of contracts with members regarding, §46-5-92.

CONTRACTS —Cont'd

Southwest Georgia railroad excursion authority.

Powers as to contracts, §46-9-323.

Telephones.

911 systems.

General provisions, §§46-5-120 to 46-5-139.

See TELEPHONES.

Joint authorities, §46-5-138.

CONTRIBUTORY NEGLIGENCE.

Comparative negligence.

Railroad liability.

Amount of recovery, §46-8-291.

Railroad company.

Consent and contributory negligence as defenses, §46-8-291.

CORPORATIONS.

Electric membership corporations.

General provisions, §§46-3-170 to 46-3-541.

See ELECTRIC MEMBERSHIP CORPORATIONS.

Express companies.

General provisions, §§46-9-230 to 46-9-236.

See EXPRESS COMPANIES.

Railroad companies.

General provisions, §§46-8-1 to 46-8-382.

See RAILROADS.

Rural telephone cooperatives.

Consolidation of telephone corporations into a cooperative, §46-5-90.

Conversion of telephone corporation into cooperative, §46-5-90.

Telegraph companies.

See TELEGRAPHS.

Venue.

Elective membership corps, §§46-3-243, 46-3-430.

COST BENEFIT.

Integrated resource planning.

Issuance of certificate of public convenience and necessity, §46-3A-4.

COSTS.

Theft of telecommunications service,

§§46-5-2, 46-5-3.

COUNTIES.

Telephones.

"911" system.

General provisions, §§46-5-120 to 46-5-139.

See TELEPHONES.

CREDIT HISTORY OR CREDIT RECORD.

Natural gas competition and deregulation act.

Marketers, §46-4160.1.

CRIMINAL LAW AND PROCEDURE.

Common carriers.

Bonds, surety.

Requiring specific bonding company, §46-9-8.

False billing or weighing of freight, §§46-9-56, 46-9-57.

Overcharging, §46-9-252.

Selling of tickets by unauthorized persons, §46-9-136.

Electric membership corporations.

Signing false documents, §46-3-541.

Hazardous materials and waste.

Transportation of hazardous materials.

Violations as misdemeanors, §46-11-4.

High-voltage lines.

Violations of provisions, §46-3-40.

Household goods carriers for hire.

Operating without certificate, advertising services falsely, §48-7-91.

Motor carriers, §§46-7-38, 46-7-39.

Public service commission.

Violations of provisions or orders of commission, §46-2-93.

Railroads.

Grade crossings.

Blowposts to warn of crossings.

Violations of provisions, §46-8-190.

Within city limits, §46-8-191.

Signboards to warn of grade crossing at which there is a switch.

Violations of requirements, §46-8-198.

Standard signs.

Violations of provisions, §46-8-196.

Hiding on train for purpose of stealing a ride, §46-8-381.

Intruding on railroad tracks, §46-8-380.

Locomotive engineers.

Qualifications.

Violations by companies, §46-8-150.

Locomotives.

Equipment.

Violations of provisions, §§46-8-170, 46-8-172.

Passengers.

Assignment to cars, compartments and seats.

Failure to remain in assigned car, compartment or seat, §46-9-135.

CRIMINAL LAW AND PROCEDURE

—Cont'd

Railroads —Cont'd

Stopping at track intersections.

Violations of provisions, §46-8-193.

Switches.

Signboards to warn of drawbridges, grade crossings and stations at which there is a switch.

Violations of requirement, §46-8-198.

Wrecking railroad companies, §§46-8-361 to 46-8-364.

Ships and vessels.

Passenger tickets.

Violation of provisions, §46-9-172.

Telecommunications service.

Theft of, §§46-5-2 to 46-5-4.

Telephones.

Automatic dialing and recorded message (ADAD) equipment.

Prohibited acts as to use, §§46-5-23, 46-5-24.

Disconnection and removal of illegally used telephone facilities, §46-5-20.

Harassing purposes.

Use of telephone for, §46-5-21.

Obscenity.

Prohibited acts, §§46-5-21, 46-5-22.

Theft of telecommunications service.

Generally, §§46-5-2 to 46-5-4.

Threatening purposes.

Use of telephone communications for, §46-5-21.

Unsolicited commercial facsimile messages.

Transmission, §46-5-25.

CUSTOM OF BUSINESS OR TRADE.

Carrier's responsibilities for goods.

Commencement and termination, §46-9-45.

D

DAMAGES.

Common carriers.

Acts committed outside scope of provisions.

Liability for, §46-9-4.

Freight.

Delay in delivery of goods.

Measure of damages, §46-9-43.

Electricity.

High-voltage lines.

Strict liability for injury or damage, §46-3-40.

DAMAGES —Cont'd

Electricity —Cont'd

Wrongs and injuries by electric companies.

Measure of damages, §46-1-2.

Electric membership corporations.

Acquisition of rights of way and easements.

Damages recoverable in actions growing out of, §46-3-204.

Natural gas competition and deregulation act.

Retail customers for regulatory violations, §46-4-160.5.

No call law violations, §46-5-27.

Public service commission.

Liability of companies subject to jurisdiction of commission, §46-2-90.

Punitive damages.

Railroad companies.

Wrongs and injuries by, §46-1-2.

Theft of telecommunications service, §§46-5-2, 46-5-3.

Railroads.

Carload shipments.

Overcharges caused by overweight or false billing, §46-9-49.

Liability for damages.

Generally, §46-8-290.

Negligence, §46-8-290.

Comparative negligence as affecting amount of recovery, §46-8-291.

Contributory negligence as defense, §46-8-291.

Proof of injury from running of train.

Prima facie evidence of lack of reasonable skill and care, §46-8-292.

Railroad companies.

Wrongs and injuries by, §46-1-2.

Refrigerator cars.

Failure of company to furnish, §46-9-91.

Failure or refusal of shipper to accept cars, §46-9-92.

Telecommunications marketing.

Violations of article, §46-5-191.

Telephone solicitation no call law violations, §46-5-27.

Theft of telecommunications service, §46-5-3.

DEADLOCKS.

Electric membership corporations.

Appointment of provisional director, §46-3-292.

DEADLOCKS —Cont'd

Electric membership corporations

—Cont'd

Jurisdictional court to liquidate assets, etc., §46-3-431.

President's authority to institute or defend legal proceedings, §46-3-431.

Nonprofit corporations.

President's authority to institute or defend legal proceedings, §46-3-301.

DEATH.

Electric membership corporations.

Return of revenues upon member, §46-3-341.

DEBTORS AND CREDITORS.

Railroads.

Liens against companies, §§46-8-250 to 46-8-254.

See RAILROADS.

DEFACEMENT.

Crossing signs, §46-8-196.

Highway crossing signs, §46-8-196.

DEFENSES.

Electric membership corporations.

Ultra vires, §46-3-202.

Telephone solicitation no call law.

Actions for violations, §46-5-27.

DEFINED TERMS.

ADAD equipment, §§46-5-23, 46-5-24.

Address.

Electric membership corporations, §46-3-171.

Addressing.

Emergency telephone number "911" system, §46-5-122.

Adequate market conditions.

Natural gas competition and deregulation, §46-4-152.

Adjustment factor.

Gas utilities, §46-2-26.5.

Affiliate.

Natural gas competition and deregulation, §46-4-152.

Alternative regulation.

Telecommunications and competition development, §46-5-162.

Ancillary service.

Natural gas competition and deregulation, §46-4-152.

Articles of incorporation.

Electric membership corporations, §46-3-171.

DEFINED TERMS —Cont'd

Assigned area.

Electricity, §46-3-3.

Authority.

Southwest Georgia railroad excursion authority, §46-9-322.

Basic local exchange service.

Telecommunications and competition development, §46-5-162.

Bidirectional metering, §46-3-52.

Bond anticipation notes.

Municipal gas authority of Georgia, §46-4-81.

Bonds.

Municipal gas authority of Georgia, §46-4-81.

Rail passenger authority, §46-9-272.

Southwest Georgia railroad excursion authority, §46-9-322.

Caller identification service.

Telecommunications and competition development, §46-5-162.

Telemarketing services, §46-5-27.

Capacity resource.

Electricity, §46-3A-1.

Carrier, §46-1-1.

Transportation of hazardous materials, §46-11-3.

Certificate.

Certificate of public convenience and necessity, §46-1-1.

Limousine carriers, §46-7-85.1.

Chauffeur.

Limousine carriers, §46-7-85.1.

Coal.

Electric utilities, §46-2-26.3.

Cogeneration facility, §§46-3-51, 46-3-52.

Cogenerator, §46-3-51.

Commissioner of motor vehicle safety.

Motor carriers, §46-7-1.

Commodity sales service.

Natural gas competition and deregulation, §46-4-152.

Company.

Public utilities, §46-1-1.

Construction.

Electricity, §46-3A-1.

Consumer.

Consumers' utility counsel, §46-10-2.

Natural gas competition and deregulation act, §46-4-152.

Control, controlling or controlled by.

Natural gas competition and deregulation, §§46-4-152, 46-4-159.

Co-operative.

Rural telephone cooperatives, §46-5-62.

DEFINED TERMS —Cont'd

Corporation.

Allocation of gas and electricity service, §46-2-70.

Cost of any project.

Southwest Georgia railroad excursion authority, §46-9-322.

Cost of construction.

Municipal gas authority of Georgia, §46-4-81.

Cost of conversion.

Electric utilities, §46-2-26.3.

Cost of the project.

Municipal gas authority of Georgia, §46-4-81.

Rail passenger authority, §46-9-272.

Southwest Georgia railroad excursion authority, §46-9-322.

Covered utility.

Residential conservation service, §46-4A-3.

Cramming.

Natural gas competition and deregulation act, §46-4-152.

Customer assignment.

Natural gas competition and deregulation, §46-4-152.

Customer generator, §46-3-52.

Customer service.

Natural gas competition and deregulation, §46-4-152.

Delivery group.

Natural gas competition and deregulation, §46-4-152.

Demand-side capacity option.

Electricity.

Integrated resource planning, §46-3A-1.

Department of motor vehicle safety.

Motor carriers, §46-7-1.

Director.

Office of planning and budget, §46-4A-3.

Distributed generation facility, §46-3-52.

Distribution.

Municipal gas authority of Georgia, §46-4-81.

Distribution service.

Natural gas competition and deregulation, §46-4-152.

Electing company.

Telecommunications and competition development, §46-5-162.

Electing distribution company.

Natural gas competition and deregulation, §§46-4-152, 46-4-159.

DEFINED TERMS —Cont'd

Election committee.

Municipal gas authority of Georgia,
§46-4-81.

Electric company, §46-1-2.

Electricity activities.

Natural gas competition and
deregulation act, §46-4-152.

**Electric membership corporation,
§§46-3-52, 46-3-171.**

Allocation of territorial rights to electric
suppliers, §46-3-3.

Natural gas competition and
deregulation act, §46-4-152.

Electric plant.

Integrated resource planning, §46-3A-1.

Electric service provider, §46-3-52.

Electric supplier, §46-3-52.

Allocation of territorial rights, §46-3-3.

Cogeneration facilities, §46-3-51.

Electric utility, §§46-1-1, 46-3-52.

Natural gas competition and
deregulation act, §46-4-152.

EMC gas affiliate.

Natural gas competition and
deregulation act, §46-4-152.

Emergency "911" system, §46-5-122.

Exchange access facility.

Emergency telephone number "911"
system, §46-5-122.

Exploration.

Municipal gas authority of Georgia,
§46-4-81.

Federal agency.

Electric corporations, §46-3-171.

Firm.

Natural gas competition and
deregulation, §46-4-152.

Firm customer.

Gas utilities, §46-2-26.5.

Foreign electric cooperative, §46-3-171.

For hire.

Motor carriers, §46-1-1.

Fuel costs.

Electric utilities, §46-2-26.

Fuel cost savings.

Electric utilities, §46-2-26.3.

Gas.

Municipal gas authority of Georgia,
§46-4-81.

Underground storage, §46-4-51.

Gas activities.

Natural gas competition and
deregulation act, §46-4-152.

Gas company.

Public utilities, §46-1-1.

DEFINED TERMS —Cont'd

Gas supply plan.

Gas utilities, §46-2-26.5.

Gas utility, §46-2-26.5.

Underground storage, §46-4-51.

GDP-PI.

Telecommunications and competition
development, §46-5-162.

Governing bodies.

Rail passenger authority, §46-9-272.

Gross domestic product-price index.

Telecommunications and competition
development, §46-5-162.

Hazardous materials.

Transportation of hazardous materials,
§46-11-3.

High speed rail.

Railway passenger service corridor
system, §46-9-290.

High-voltage lines, §46-3-32.

Household goods.

Motor carriers, §46-1-1.

Insolvent.

Electric membership corporations,
§46-3-171.

Interconnection service.

Telecommunications and competition
development, §46-5-162.

Interruptible.

Natural gas competition and
deregulation, §46-4-152.

Interurban railroads, §46-8-330.

Limousine.

Limousine carriers, §46-7-85.1.

Limousine carrier, §46-7-85.1.

Line.

Electricity.

Allocation of territorial rights to
suppliers, §46-3-3.

Local calling area.

Telecommunications and competition
development, §46-5-162.

Local exchange company.

Telecommunications and competition
development, §46-5-162.

Local exchange services.

Telecommunications and competition
development, §46-5-162.

Local government.

Emergency telephone number "911"
system, §46-5-122.

Local interconnection services.

Telecommunications and competition
development, §46-5-162.

DEFINED TERMS —Cont'd

Long distance service.

Telecommunications marketing,
§46-5-181.

Long-term power purchase.

Electricity, §46-3A-1.

Low-income residential customer.

Natural gas competition and
deregulation act, §46-4-152.

Majority interest.

Natural gas competition and
deregulation act, §46-4-152.

Marketer.

Natural gas competition and
deregulation, §§46-4-152, 46-4-159.

Members.

Electric membership corporations,
§46-3-171.

Motor carrier of property, §46-1-1.

**Motor contract carrier and motor common
carrier, §46-1-1.**

Motor vehicle.

Carriers, §46-1-1.

Municipal electric utility, §46-3-52.

Municipality.

Electricity, §46-3-3.

"911" charge, §46-5-122.

Notice.

High-voltage safety, §46-3-32.

Operator services.

Telephones, §46-5-26.

Passenger.

Public conveyances, §46-1-1.

Permit.

Carriers, §46-1-1.

Person, §46-3-52.

Allocation of gas and electricity service,
§46-2-70.

Cogeneration facilities, §46-3-51.

Electric membership corporations,
§46-3-171.

Intrastate pipelines and distribution
systems, §46-4-20.

Limousine carriers, §46-7-85.1.

Natural gas competition and
deregulation, §46-4-152.

Public utilities, §46-1-1.

Rapid rail passenger service, §46-8A-1.

Residential conservation service,
§46-4A-3.

Rural telephone cooperatives, §46-5-62.

Telephones, §46-5-40.

Transportation of hazardous materials,
§46-11-3.

DEFINED TERMS —Cont'd

**Person responsible for the work to be
done.**

High-voltage lines, §46-3-32.

Plan.

Electricity, §46-3A-1.

Portability.

Telecommunications and competition
development, §46-5-162.

Premises.

Electricity, §46-3-3.

Primary supplier.

Electricity, §46-3-3.

Private carrier, §46-1-1.

Production.

Municipal gas authority of Georgia,
§46-4-81.

Program.

Residential conservation service,
§46-4A-3.

Projects.

Municipal gas authority of Georgia,
§46-4-81.

Rail passenger authority, §46-9-272.

Southwest Georgia railroad excursion
authority, §46-9-322.

Public agency.

Emergency telephone number "911"
system, §46-5-122.

Public highway, §46-1-1.

Limousine carriers, §46-7-85.1.

Public safety agency.

Emergency telephone number "911"
system, §46-5-122.

Public safety answering point.

Emergency telephone number "911"
system, §46-5-122.

Purchased gas adjustment rate.

Gas utilities, §46-2-26.5.

Purchased gas costs.

Gas utilities, §46-2-26.5.

Railroad corporation, §46-1-1.

Rate.

Electric utilities, §46-1-1.

Recovery year.

Gas utilities, §46-2-26.5.

Regulated gas service.

Natural gas competition and
deregulation act, §46-4-152.

Regulated provider of natural gas.

Natural gas competition and
deregulation act, §46-4-152.

Renewable energy sources, §46-3-52.

Residential, mobile or wireless subscriber.

Telephone solicitations, §46-5-27.

DEFINED TERMS —Cont'd

Retail customer or retail purchaser.

Natural gas competition and deregulation, §46-4-152.

Revenue bonds.

Municipal gas authority of Georgia, §46-4-81.

Rail passenger authority, §46-9-272.

Southwest Georgia railroad excursion authority, §46-9-322.

Rural area.

Rural telephone cooperatives, §46-5-62.

Secondary supplier.

Electricity, §46-3-3.

Service.

Electricity, §46-3-3.

Electric membership corporations, §46-3-171.

Service area.

Rail passenger authority, §46-9-272.

Southwest Georgia railroad excursion authority, §46-9-322.

Service supplier.

Emergency telephone number "911" system, §46-5-122.

Shipper.

Transportation of hazardous materials, §46-11-3.

Slamming.

Natural gas competition and deregulation act, §46-4-152.

Storage.

Municipal gas authority of Georgia, §46-4-81.

Straight fixed variable.

Natural gas competition and deregulation, §46-4-152.

Supply-side capacity option.

Electricity, §46-3A-1.

Switched access.

Telecommunications and competition development, §46-5-162.

Switched interconnection services.

Telecommunications and competition development, §46-5-162.

System.

Municipal gas authority of Georgia, §46-4-81.

Tariff.

Telecommunications and competition development, §46-5-162.

Telecommunications company.

Telecommunications and competition development, §46-5-162.

Telecommunications service provider.

Theft of service, §46-5-3.

DEFINED TERMS —Cont'd

Telecommunications services.

Telecommunications and competition development, §46-5-162.

Theft of service, §46-5-3.

Telegraph company, §46-5-140.

Telegraph line, §46-5-140.

Telephone company.

Rural telephone cooperatives, §46-5-62.

Telephone service.

Rural telephone cooperatives, §46-5-62.

Telephone solicitation.

Telemarketing services, §46-5-27.

Telephone subscriber.

Emergency "911" system, §46-5-122.

Toll service.

Telecommunications and competition development, §46-5-162.

To own.

Electricity, §46-3-3.

To wreck.

Railroad companies, §46-8-360.

Transmission.

Municipal gas authority of Georgia, §46-4-81.

Unassigned area-A.

Electricity, §46-3-3.

Unassigned area-B.

Electricity, §46-3-3.

Underground reservoir.

Gas, §46-4-51.

Universal access local exchange service.

Telecommunications and competition development, §46-5-162.

Universal access provider.

Telecommunications and competition development, §46-5-162.

Unlawful telecommunications device.

Theft of telecommunications service, §46-5-3.

Utilities protection center.

High-voltage safety, §46-3-32.

Utility, §46-1-1.

Allocation of gas and electricity service, §46-2-70.

Electricity, §46-3A-1.

Electric utilities, §§46-2-26, 46-2-26.3.

High-voltage safety, §46-3-32.

Utility service.

Allocation of gas and electricity service, §46-2-70.

Vehicle.

Carriers, §46-1-1.

Wholly new municipality.

Electricity, §46-3-3.

DEFINED TERMS —Cont'd

Winter heating season.

Natural gas competition and deregulation, §46-4-152.

Wireless enhanced "911" charge.

Emergency telephone number "911" system, §46-5-122.

Wireless service.

Emergency telephone number "911" system, §46-5-122.

Wireless service supplier.

Emergency telephone number "911" system, §46-5-122.

Wireless telecommunications connection.

Emergency telephone number "911" system, §46-5-122.

Work.

High-voltage safety, §46-3-32.

DEPOSITIONS.

Consumers' utility counsel division.

Authority to take depositions, §46-10-5.

Public service commission.

Employees and agents of commission.
Taking of depositions by, §46-2-57.

DEPOTS.

Railroads.

See RAILROADS.

DEPRECIATION.

Intrastate pipelines and distribution systems.

Issuance by commission of certificate of public convenience and necessity.
Factors to be considered, §46-4-25.

Railroad company stock.

Wrecking or attempting to wreck company, §46-8-365.

Street, suburban and interurban railroads.

Guarantee or acquisition of stock.
Value of stock of dissenting stockholder, §46-8-335.

DERIVATIVE ACTIONS.

Electric membership corporation,
§46-3-272.

DETARIFFED TELECOMMUNICATIONS SERVICES.

Reregulating and resubjecting detariffing by commission, §46-2-23.

DIAL 911, §§46-5-120 to 46-5-139.

See TELEPHONES.

DISASTERS.

Electric membership corporations.

Adoption of bylaws for emergency conditions, §46-3-326.

DISASTERS —Cont'd

Electric membership corporations

—Cont'd

Emergency powers of board of directors.
Generally, §46-3-326.

DISCONTINUANCE.

Motor carriers.

Service by carriers, §46-7-14.

Telephone services.

Illegally used telephone facilities,
§46-5-20.

DISCONTINUANCE OF ACTIONS.

Electric membership corporations.

Derivative actions by members,
§46-3-272.

Liquidation proceedings, §46-3-435.

DISCOUNTING BONDS.

Georgia rail passenger authority, §46-9-276.

Municipal electric authority of Georgia,
§46-3-131.

Municipal gas authority of Georgia,
§46-4-101.

DISCOVERY.

Consumers' utility counsel division.

Authority to obtain discovery, §46-10-5.

Public service commission.

Employees and agents of commission.
Obtaining of discovery by, §46-2-57.

DISCRIMINATION.

Common carriers.

Freight-storage charges, §§46-9-53,
46-9-55.

Freight-transportation rates, §46-9-52.

Motor carriers.

Rate discrimination, §46-7-19.

Railroads.

Rate discrimination, §46-9-251.

DISMANTLING.

Electric supply lines, §46-3-8.

DISSENTERS' RIGHTS.

Railroads, §46-8-335.

DISSOLUTION.

Electric membership corporations,
§§46-3-420 to 46-3-440.

See ELECTRIC MEMBERSHIP
CORPORATIONS.

Railroad companies, §§46-8-71 to 46-8-79.

See RAILROADS.

DISTRICTS.

Public service commission, §46-2-1.

DO-NOT-CALL LAW.

Telemarketers, §46-5-27.

DRAWBRIDGES.

Railroads.

- Signboards.
- Erection and placement to warn of drawbridges, §46-8-198.

DRIVERS' LICENSES.

Limousine carriers.

- Chauffeur's permits, §§46-7-85.9, 46-7-85.10, 46-7-85.14.

E

EASEMENTS.

Electric membership corporations.

- Acquisition.
- Actions growing out of, §46-3-204.
- Powers of corporations, §46-3-201.

EJECTION OF PASSENGERS.

Carriers.

- Right to eject passengers, §46-9-131.

Railroads.

- Refusal to remain in assigned car, compartment or seat, §46-9-135.

ELECTIONS.

Municipal electric authority of Georgia.

- Election of members.
- See MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA.

Municipal gas authority of Georgia.

- Election of members.
- See MUNICIPAL GAS AUTHORITY OF GEORGIA.

ELECTRICITY.

Allocation of electricity to protect public health, safety, etc.

- Definitions, §46-2-70.
- Immunity from liability.
- Persons acting in accordance with orders and rulings of commission, §46-2-72.
- Power of public service commission, §46-2-71.

Appeals.

- Residential conservation service.
- Judicial review of director, §46-4A-9.

Assistance to low or fixed income consumers.

- Department of human resources.
- Duties, §46-1-5.

Audits.

- Annual audit of affairs of electric utilities, §46-2A-1.
- Management audit of electric utilities, §46-2A-2.

ELECTRICITY —Cont'd

Bond issues.

- Municipal electric authority of Georgia, §§46-3-131 to 46-3-147.

See MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA.

Cogeneration and distributed generation.

- Sale of electricity by generating facilities, §§46-3-50 to 46-3-56.

- Definitions, §46-3-52.
- Determinations and declarations of legislature, §46-3-51.

- Fees of service providers, §46-3-54.

- Jurisdiction over certain facilities, §46-3-53.

- Legislative determinations and declarations, §46-3-51.

- Measurement of energy flow, §46-3-55.

- Payment of energy flow, §46-3-55.

- Public service commission.

- Jurisdiction over certain facilities, §46-3-53.

- Rates of service providers, §46-3-54.

- Requirement to purchase from customer generator, §46-3-56.

- Safety standards and regulations, §46-3-56.

- Short title, §46-3-50.

Damages.

- High-voltage lines.

- Violations of provisions.

- Strict liability for injury or damage, §46-3-40.

- Wrongs and injuries by electric companies.

- Measure of damages, §46-1-2.

Definitions.

- Cogeneration facilities.

- Sale of electricity by facilities to suppliers, §46-3-51.

- Electric membership corporations, §46-3-171.

- High-voltage lines, §46-3-32.

- Integrated resource planning, §46-3A-1.

- Municipal electric authority of Georgia, §46-3-111.

- Residential conservation service, §46-4A-3.

- Territorial rights.

- Allocation to suppliers, §46-3-5.

Department of human resources.

- Low or fixed income consumers of gas and electric service.

- Duties with regard to assistance to, §46-1-5.

ELECTRICITY —Cont'd

Electric membership corporations.

General provisions, §§46-3-170 to 46-3-541.

See ELECTRIC MEMBERSHIP CORPORATIONS.

Eminent domain.

Allocation of territorial rights to suppliers.

Limitation on power of electric suppliers to condemn property of other electric suppliers, §46-3-10.

Georgia territorial electric service act,

§§46-3-1 to 46-3-15.

High-voltage lines, §§46-3-30 to 46-3-40.

Applicability of provisions.

Exceptions, §§46-3-37, 46-3-38.

Citation of act.

Short title, §46-3-30.

Cost of delay.

Liability, §46-3-40.

Damages.

Violations of provisions.

Strict liability for injury or damage, §46-3-40.

Definitions, §46-3-32.

Degree of care applicable to owners and operators of high-voltage lines.

Effect of provisions, §46-3-39.

Electrical engineering systems.

Applicability of provisions to, §46-3-37.

Exceptions to provisions, §§46-3-37, 46-3-38.

Highway construction.

Expense of precautionary measures taken pursuant to.

Allocation, §46-3-35.

Legislative declaration.

Purpose of provisions, §46-3-31.

Liability of owners and operators.

Restrictions, §46-3-39.

Moving or transportation of housing or buildings.

Exception to provisions, §46-3-38.

Negligence.

Duty or degree of care applicable to owners and operators.

Effect of provisions, §46-3-39.

Notice of work, §§46-3-33, 46-3-34.

Purpose of provisions, §46-3-31.

Railroads.

Applicability of provisions to railway systems, §46-3-37.

Responsibility for completing safety requirements, §46-3-34.

ELECTRICITY —Cont'd

High-voltage lines —Cont'd

Title of act.

Short title, §46-3-30.

Utilities protection center, §46-3-34.

Defined, §46-3-32.

Violations of provisions.

Criminal penalties, §46-3-40.

Strict liability for injury or damage, §46-3-40.

Work.

Commencing work within ten feet of high-voltage line.

Required conditions, §46-3-33.

Defined, §46-3-32.

Notice, §46-3-34.

Defined, §46-3-32.

Required before commencing work within ten feet of high-voltage line, §46-3-33.

Highways, roads and streets.

High-voltage lines.

Expense of precautionary measures taken pursuant to public highway construction.

Allocation, §46-3-35.

Immunity.

Allocation of electricity to protect public health, safety, etc.

Persons acting in accordance with orders and rulings of public service commission, §46-2-72.

Injunctions.

Residential conservation service.

Violations of provisions, §46-4A-7.

Integrated resource planning, §§46-3A-1 to 46-3A-11.

Approval of plan, §46-3A-2.

Certificates of public convenience and necessity, §§46-3A-3 to 46-3A-6.

Applications, §§46-3A-4, 46-3A-5.

Contents, §46-3A-5.

Fees, §46-3A-5.

Issuance, §46-3A-4.

Modification, §46-3A-6.

Prohibition of certain actions without certificate, §46-3A-3.

Reexamination, §46-3A-6.

Required for certain activities, §46-3A-3.

Revocation, §46-3A-6.

Construction costs.

Canceled construction.

Recovery of costs, §46-3A-7.

ELECTRICITY —Cont'd

Integrated resource planning —Cont'd

Construction costs —Cont'd

Rate base.

Part of, §46-3A-7.

Definitions, §46-3A-1.

Demand-side capacity option.

Costs.

Recovery of actual costs, §46-3A-9.

Defined, §46-3A-1.

Recovery of actual costs, §46-3A-9.

Filing of plan, §46-3A-2.

Long-term power purchase.

Costs.

Recovery of actual costs, §46-3A-8.

Defined, §46-3A-1.

Recovery of actual costs, §46-3A-8.

Public service commission.

Approval and adoption of plan,

§46-3A-2.

Certificates of public convenience and necessity.

Generally, §§46-3A-3 to 46-3A-6.

Changed revenues and risks.

Effect on rates.

Basis and effect of commission

decision, §46-3A-10.

Rates and charges.

Changed revenues and risks.

Effect on rates, §46-3A-10.

Construction costs as part of rate base,

§46-3A-7.

Exemption of providers whose rates not fixed by commission,

§46-3A-11.

Investigations.

Residential conservation service.

Director, §46-4A-5.

Lines.

High-voltage lines, §§46-3-30 to 46-3-40.

See within this heading,

"High-voltage lines."

Municipal corporations.

Municipal electric authority of Georgia, §§46-3-110 to 46-3-155.

See MUNICIPAL ELECTRIC

AUTHORITY OF GEORGIA.

Municipal electric authority of Georgia,

§§46-3-110 to 46-3-155.

See MUNICIPAL ELECTRIC

AUTHORITY OF GEORGIA.

Notice.

High-voltage lines.

Notice of work, §§46-3-33, 46-3-34.

ELECTRICITY —Cont'd

Public service commission.

Allocation of electricity to protect public health, safety, etc., §§46-2-70 to 46-2-72.

Audits.

Management audit of electric utilities, §46-2A-2.

Cogeneration facilities.

Jurisdiction over certain facilities,

§46-3-52.

General provisions, §§46-2-1 to 46-2-95.

See PUBLIC SERVICE COMMISSION.

Integrated resource planning.

Approval and adoption of plan,

§46-3A-2.

Certificates of public convenience and necessity.

Generally, §§46-3A-3 to 46-3A-6.

Changed revenues and risks.

Effect on rates.

Basis and effect of commission

decision, §46-3A-10.

Municipal electric authority of Georgia.

Jurisdiction of commission, §46-3-152.

Powers and duties as to electric

companies generally, §§46-2-20,

46-2-21.

Rates and charges.

Accounting methods to be used in

rate-making proceedings,

§46-2-26.1.

Changing rates, §46-2-26.

Disclosure requirements for utilities

seeking rate change, §46-2-26.

Fuel costs.

Procedure for rate change based

solely on, §46-2-26.

Conversion from oil-burning to

coal-burning generating facility.

Recovery of costs, §46-2-26.3.

Fuel-adjustment tariffs.

Notation on bill of charges for fuel

adjustment, §46-2-27.

Restriction as to use, §46-2-26.

Municipal electric authority of

Georgia.

Jurisdiction of commission,

§46-3-152.

Notations required on bills, §46-2-27.

Territorial rights.

Allocation to suppliers.

Electric membership corporations.

Jurisdiction of commission over,

§46-3-12.

ELECTRICITY —Cont'd

Public service commission —Cont'd

Territorial rights —Cont'd

Allocation to suppliers —Cont'd

Enforcement of provisions, §46-3-13.

Rates and charges.

Electric membership corporations,

§§46-3-340, 46-3-341.

Integrated resource planning.

Changed revenues and risks.

Effect on rates, §46-3A-10.

Construction costs as part of rate base,
§46-3A-7.

Exemption of providers whose rates
not fixed by commission,
§46-3A-11.

Municipal electric authority of Georgia,
§46-3-148.

Fixing of rates and charges, §46-3-127.

Payment, §46-4-118.

Public service commission.

Jurisdiction of commission,
§46-3-152.

Trust funds.

Status of revenues as, §46-3-149.

Territorial rights.

Allocation to suppliers.

Discriminatory rates and charges,
§46-3-11.

Public utilities owned or operated
by counties or municipalities.

Effect of provisions on charges of,
§46-3-15.

**Residential conservation service, §§46-4A-1
to 46-4A-14.**

Administrative procedure act.

Applicability to hearings under
provisions, §46-4A-8.

Appeals.

Judicial review of director, §46-4A-9.

Attorney general.

Representation of director in actions,
§46-4A-10.

Citation of act.

Short title, §46-4A-1.

Definitions, §46-4A-3.

Director.

Attorney general to represent director,
§46-4A-10.

Defined, §46-4A-3.

Judicial review, §46-4A-9.

Powers and duties, §§46-4A-4, 46-4A-5.

Scope of authority relative to federal
law, §46-4A-11.

Proceedings before, §46-4A-6.

ELECTRICITY —Cont'd

Residential conservation service —Cont'd
Injunctions.

Violations of provisions, §46-4A-7.

Interpretation and construction,
§46-4A-12.

Investigations.

Director, §46-4A-5.

Legislative declaration, §46-4A-2.

Penalties.

Civil penalties.

Violations of provisions, §46-4A-14.

Title of act.

Short title, §46-4A-1.

Violations of provisions.

Civil penalties, §46-4A-14.

Failure of covered utility to comply
with provisions, §46-4A-13.

Injunctions, §46-4A-7.

Safety.

High-voltage lines.

General provisions, §§46-3-30 to
46-3-40. See within this heading,
“High-voltage lines.”

Territorial rights.

Allocation to suppliers, §§46-3-1 to
46-3-15.

Annexation.

Geographic areas annexed to
municipalities after March 29,
1973, §46-3-7.

Assignment of geographic areas,
§§46-3-4 to 46-3-7.

Assignment of geographic areas
outside municipal limits as of
March 29, 1973, §46-3-4.

Citation of act.

Short title, §46-3-1.

Condemnation of property of other
electric suppliers.

Limitation on power of electric
suppliers, §46-3-10.

Definitions, §46-3-3.

Discriminatory rates and charges,
§46-3-11.

Effect of provisions, §§46-3-14, 46-3-15.

Electric membership corporation.

Conflict of laws, §46-3-182.

Defined, §46-3-3.

Limitation on power to furnish
service within municipalities,
§46-3-9.

Public service commission.

Jurisdiction, §46-3-12.

ELECTRICITY —Cont'd

Territorial rights —Cont'd

Allocation to suppliers —Cont'd

Enforcement of provisions.

Public service commission, §46-3-13.

Exceptions to provisions, §46-3-8.

Grandfather rights, §46-3-8.

Legislative declaration, §46-3-2.

Municipalities.

Assignment of geographic areas generally, §§46-3-4 to 46-3-7.

Defined, §46-3-3.

Effect of provisions on powers, §46-3-14.

Electric membership corporations.

Limitation on power to furnish service within municipalities, §46-3-9.

Geographic areas annexed to municipalities after March 29, 1973, §46-3-7.

Geographic areas included within wholly new municipalities after March 29, 1973, §46-3-6.

Geographic areas outside municipal limits as of March 29, 1973, §46-3-4.

Geographic areas within municipal limits as of March 29, 1973, §46-3-5.

Police powers over electric wires, poles, etc.

Effect of provisions on, §46-3-14.

Rates and charges of utilities owned or operated by municipalities.

Effect of provisions on, §46-3-15.

Street franchises.

Effect of provisions on power of municipalities relating to granting, §46-3-14.

Policy of state, §46-3-2.

Prohibited acts by electric suppliers, §46-3-11.

Public service commission.

Electric membership corporations. Jurisdiction of commission, §46-3-12.

Enforcement of provisions, §46-3-13.

Rates and charges.

Discriminatory rates and charges, §46-3-11.

Public utilities owned or operated by counties or municipalities.

Effect of provisions on, §46-3-15.

Title of act.

Short title, §46-3-1.

ELECTRICITY —Cont'd

Territorial rights —Cont'd

Allocation to suppliers —Cont'd

Unassigned areas-A.

Defined, §46-3-3.

Unassigned areas-B.

Assignment or declaration as unassigned areas-B of geographic areas outside municipal limits as of March 29, 1973, §46-3-4.

Defined, §46-3-3.

Wholly new municipalities.

Defined, §46-3-3.

Geographic areas included within wholly new municipalities after March 29, 1973.

Assignment, §46-3-6.

Venue.

Actions against electric companies, §46-1-2.

ELECTRIC MEMBERSHIP CORPORATION ACT.

General provisions, §§46-3-170 to 46-3-541.

See ELECTRIC MEMBERSHIP CORPORATIONS.

Short title, §46-3-170.

ELECTRIC MEMBERSHIP

CORPORATIONS, §§46-3-170 to 46-3-541.

Actions.

Acquisition of rights of way and easements, §46-3-204.

Amendment of articles of incorporation.

Effect on pending causes of action, §46-3-364.

Cause of action existing as of July 1, 1981.

Effect of provisions on, §46-3-180.

Derivative actions by members, §46-3-272.

Directors.

Actions against, §46-3-304.

Members.

Derivative actions by members, §46-3-272.

Officers.

Actions against, §46-3-304.

Power to sue and be sued, §46-3-201.

Age.

Directors.

Qualifications, §46-3-290.

Incorporators, §46-3-320.

Agents.

Indemnification, §46-3-306.

Liability insurance, §46-3-306.

ELECTRIC MEMBERSHIP

CORPORATIONS —Cont'd

Annual reports.

- Contents, §46-3-480.
- Correction, §46-3-481.
- Filing, §46-3-481.
- Requirement, §46-3-480.

Appeals.

- Foreign electric cooperatives.
 - Revocation of certificate of authority, §46-3-523.
- Secretary of state.
 - Certain actions of secretary, §46-3-523.

Applicability of provisions, §46-3-172.

Articles of incorporation.

- Amendment.
 - Actions.
 - Effect on pending causes of action, §46-3-364.
 - Articles of amendment.
 - Contents, §46-3-362.
 - Execution, §46-3-362.
 - Filing, §46-3-363.
 - Certificates of amendment, §46-3-363.
 - Meeting of members to consider, §46-3-361.
 - Notice.
 - Proposed amendment, §46-3-361.
 - Publication, §46-3-363.
 - Procedure, §46-3-361.
 - Right to amend, §46-3-360.
 - Scope, §46-3-360.
 - Time of effectiveness, §46-3-364.
- Contents, §46-3-321.
- Defined, §46-3-171.
- Directors.
 - Classification of directors, §46-3-293.
 - Initial directors.
 - Statement of names and addresses, §46-3-291.
- Existence under articles, §46-3-201.
- Filing, §46-3-322.
- Foreign electric cooperatives.
 - Amendments.
 - Filing, §46-3-460.
 - Filing, §46-3-455.
 - Merger or consolidation, §46-3-385.
- Members.
 - Amendment of articles.
 - Meeting of members to consider, §46-3-361.
 - Provisions as to membership, §46-3-260.
 - Voting requirements in articles.
 - Effect, §46-3-267.

ELECTRIC MEMBERSHIP

CORPORATIONS —Cont'd

Articles of incorporation —Cont'd

- Restated articles of incorporation, §46-3-365.
- Signing, §46-3-321.

Assets.

- Sale or other disposition.
 - Member approval.
 - Dispositions not requiring, §46-3-400.
 - Dispositions requiring, §46-3-401.
 - Procedure, §46-3-401.
- Secured transactions.
 - Member approval not required, §46-3-400.

Bond issues.

- Federal loans.
 - Obligations issued to secure payment.
 - Status as securities, §46-3-176.
- Power to issue bonds, §46-3-201.

Bonds, surety.

- Dissolution.
 - Involuntary dissolution.
 - Liquidation proceedings, §46-3-433.

Bylaws.

- Adoption.
 - Emergency bylaws, §46-3-326.
 - Initial bylaws, §46-3-325.
- Contents, §§46-3-325, 46-3-340.
- Directors.
 - Adoption of bylaws, §§46-3-325, 46-3-326.
 - Power to alter and amend bylaws, §46-3-325.
- Emergency bylaws, §46-3-326.
- Members.
 - Voting requirements in bylaws.
 - Effect, §46-3-267.

Cable television systems.

- Ownership or operation not authorized, §46-3-178.

Certificate of incorporation, §46-3-323.

- Effect of issuance, §46-3-323.

Citation of act.

- Short title, §46-3-170.

Confidentiality of information.

- Interrogatories propounded by secretary of state.
 - Facts and information obtained from, §46-3-522.

Conflict of laws.

- Allocation of territorial rights to suppliers of electricity, §46-3-182.

Conflicts of interest.

- Directors and officers, §46-3-305.

ELECTRIC MEMBERSHIP

CORPORATIONS —Cont'd

Consolidation.

Generally, §§46-3-380 to 46-3-385. See within this heading, "Merger or consolidation."

Contempt.

Interrogatories propounded by secretary of state.
Failure or refusal of officer or director to answer, §46-3-541.

Contracts.

Power to contract, §46-3-201.

Damages.

Acquisition of rights of way and easements.
Damages recoverable in actions growing out of, §46-3-204.

Deadlocks.

Appointment of provisional director, §46-3-292.
Jurisdictional court to liquidate assets, etc., §46-3-431.
President's authority to institute or defend legal proceedings, §46-3-431.

Death.

Member.
Return of revenues upon, §46-3-341.

Defenses.

Ultra vires, §46-3-202.

Definitions, §46-3-171.

Directors.

Actions against directors, §46-3-304.
Articles of incorporation.
Classification of directors, §46-3-293.
Initial directors.
Statement of names and addresses, §46-3-291.

Bylaws.

Adoption of bylaws, §§46-3-325, 46-3-326.
Power to alter and amend bylaws, §46-3-325.

Classification of directors, §46-3-293.

Committees, §46-3-297.

Standard of care.

Discharge of duties as member of committee, §46-3-303.1.

Compensation, §46-3-290.

Conflicts of interest, §46-3-305.

Dissent by director, §46-3-300.

Election of directors, §46-3-290.

Classes of directors, §46-3-293.

Credentials and elections committee, §46-3-270.

ELECTRIC MEMBERSHIP

CORPORATIONS —Cont'd

Directors —Cont'd

Election of directors —Cont'd
Vacancies.

Filling, §46-3-294.

Executive committee, §46-3-297.

Financial information prepared by others.

Reliance upon, §§46-3-303, 46-3-303.1.

Good faith.

Standard of care in discharge of duties, §§46-3-303, 46-3-303.1.

Indemnification, §46-3-306.

Insurance.

Liability insurance, §46-3-306.

Management by, §46-3-290.

Meeting, §46-3-298.

Action without meeting, §46-3-299.

Adjournment, §46-3-298.

Calling of meetings, §46-3-298.

Consent to action without meeting, §46-3-299.

Dissent by director, §46-3-300.

Notice, §46-3-298.

Organizational meeting, §46-3-324.

Quorum, §46-3-296.

Telephone conference calls, §46-3-296.

Voting.

Action by majority vote, §46-3-296.

Waiver of notice, §46-3-298.

Members.

Election of directors, §46-3-291.

Classes of directors, §46-3-293.

Credentials and elections committee, §46-3-270.

Vacancies.

Filling, §46-3-294.

Removal of directors, §46-3-295.

Notice.

Meetings, §46-3-298.

Number of directors, §46-3-291.

Officers.

Appointment of officers, §46-3-301.

Filling of vacancies, §46-3-302.

Removal of officers, §46-3-302.

Provisional director, §46-3-292.

Prudent person rule.

Discharge of duties, §§46-3-303, 46-3-303.1.

Qualifications, §46-3-290.

Provisional director, §46-3-292.

Quorum, §46-3-296.

Removal of directors, §46-3-295.

Standard of care in discharge of duties, §§46-3-303, 46-3-303.1.

ELECTRIC MEMBERSHIP

CORPORATIONS —Cont'd

Directors —Cont'd

Terms of office, §46-3-291.

Vacancies.

Filling, §46-3-294.

Dissolution, §§46-3-420 to 46-3-440.

Absentee members.

Distribution of unclaimed funds,
§46-3-438.

Claims.

Deposit with department of
administrative services.

Amounts due unknown, disabled,
etc., creditors or members,
§46-3-438.

Involuntary dissolution.

Filing of liquidation claims,
§46-3-434.

Expiration of period of duration.

Revival after dissolution by, §46-3-440.

Foreign electric cooperatives.

Effect of termination of existence,
§46-3-465.

Involuntary dissolution.

Commencement of actions, §46-3-429.

Decree.

Entry, §46-3-436.

Notice, §46-3-437.

Filing, §46-3-437.

Grounds, §46-3-429.

Liquidation, §§46-3-421 to 46-3-435.

Claims filing, §46-3-434.

Discontinuance of liquidation
proceedings, §46-3-435.

Filing of claims, §46-3-434.

Jurisdiction of court, §46-3-431.

Procedure, §46-3-432.

Receivers, §46-3-432.

Bonds, surety, §46-3-433.

Qualifications, §46-3-433.

Notice.

Entry of decree, §46-3-437.

Liquidation proceedings.

Filing of claims, §46-3-434.

Service of process, §46-3-430.

Time of cessation of existence,
§46-3-436.

Venue, §46-3-430.

Superior courts.

Involuntary dissolution.

General provisions, §§46-3-429 to
46-3-437. See within this
subheading, "Involuntary
dissolution."

ELECTRIC MEMBERSHIP

CORPORATIONS —Cont'd

Dissolution —Cont'd

Survival of remedy after dissolution,
§46-3-439.

Unclaimed funds.

Distribution, §46-3-438.

Voluntary dissolution.

Articles of dissolution.

Contents, §46-3-427.

Execution, §46-3-427.

Filing, §46-3-428.

Rejection, §46-3-428.

Certificate of dissolution, §46-3-428.

Commencement of proceedings,
§46-3-420.

Intent to dissolve.

Notice, §46-3-423.

Statement of intent to dissolve,
§§46-3-421 to 46-3-423.

Meetings of members, §46-3-420.

Revocation of proceedings,
§46-3-424.

Notice.

Intent to dissolve, §46-3-423.

Meetings of members, §46-3-420.

Revocation of proceedings,
§46-3-424.

Revocation of proceedings.

Meeting of members, §46-3-424.

Resolutions of directors, §46-3-420.

Revocation of proceedings, §46-3-424.

Filing of statement of revocation,
§§46-3-425, 46-3-426.

Meetings of members, §46-3-424.

Resolution of directors, §46-3-424.

Statement of revocation.

Filing, §§46-3-425, 46-3-426.

Statement of intent to dissolve.

Effect, §46-3-422.

Filing, §46-3-421.

Effect, §46-3-422.

Procedure following, §46-3-423.

Time of cessation of existence,
§46-3-428.

Duration, §46-3-201.

Dissolution by expiration of period of
duration.

Revival of after dissolution, §46-3-440.

Easements.

Acquisition.

Actions growing out of, §46-3-204.

Powers of corporations, §46-3-201.

Election of directors, §46-3-290.

ELECTRIC MEMBERSHIP

CORPORATIONS —Cont'd

Emergencies.

Bylaws for emergency conditions,
§46-3-326.

Employees.

Indemnification, §46-3-306.
Liability insurance, §46-3-306.

Evidence.

Secretary of state.
Certificates issued by secretary,
§46-3-175.

Fees.

Certificates.
Certificate of search or certificate of
good standing, §46-3-502.
Issuance, §46-3-501.

Copies.

Certified copies, §46-3-502.
Filing of documents, §46-3-501.
Foreign electric cooperatives.
Revocation of certificate of authority.
Reinstatement, §46-3-468.

Notices.

Publication, §46-3-503.
Secretary of state, §§46-3-500 to 46-3-502.

Filing of documents, §46-3-174.

Annual reports, §46-3-481.
Certification of documents by secretary
of state, §46-3-175.
Correction of filed documents.
Articles of correction, §46-3-174.
Fees, §46-3-501.
Foreign electric cooperatives, §46-3-455.
Amendment to articles of
incorporation, §46-3-460.
Application for withdrawal, §46-3-464.

Fines.

Officers and directors.
Signing documents known to be false,
§46-3-541.

Foreign electric cooperatives, §§46-3-450 to 46-3-469.

Applicability of laws of state, §46-3-450.
Articles of incorporation.
Filing, §46-3-455.
Amendments, §46-3-460.
Certificate of authority.
Amendment, §46-3-462.
Application, §46-3-454.
Filing, §46-3-455.
Effect, §46-3-456.
Issuance, §46-3-455.
Effect, §46-3-456.
Powers under certificate, §46-3-451.

ELECTRIC MEMBERSHIP

CORPORATIONS —Cont'd

Foreign electric cooperatives —Cont'd

Certificate of authority —Cont'd
Required, §46-3-450.
Revocation, §§46-3-466 to 46-3-468.
Appeal, §46-3-523.
Transacting business without
certificate, §46-3-469.

Defined, §46-3-171.

Dissolution.

Effect of termination of existence,
§46-3-465.

Filing of documents, §46-3-455.

Amendment to articles of
incorporation, §46-3-460.

Application for withdrawal, §46-3-464.

Liability.

Transacting business without
certificate of authority, §46-3-469.

Merger or consolidation, §46-3-385.

Effect of merger where foreign electric
cooperative is surviving entity,
§46-3-461.

Names, §46-3-452.

Change of name, §46-3-453.

Amending certificate of authority,
§46-3-462.

Powers, §46-3-451.

Registered agent.

Change of registered agent, §46-3-458.

Consent to appointment as registered
agent, §§46-3-454, 46-3-457.

Required, §46-3-457.

Service of process on foreign electric
cooperatives, §46-3-459.

Registered office.

Change of registered office, §46-3-458.

Required, §46-3-457.

Reports.

Annual reports.

Generally, §46-3-480.

Revocation of certificate of authority.

Appeals, §46-3-523.

Certificate of revocation, §46-3-467.

Grounds, §46-3-466.

Notice, §46-3-466.

Reinstatement of revoked certificate.

Application for, §46-3-468.

Time of cessation of authority to
transact business, §46-3-467.

Secretary of state.

Filing of documents with secretary of
state, §46-3-455.

Amendments to articles of
incorporation, §46-3-460.

ELECTRIC MEMBERSHIP

CORPORATIONS —Cont'd

Foreign electric cooperatives —Cont'd

Secretary of state —Cont'd

Filing of documents with secretary of state —Cont'd

Application for withdrawal,
§46-3-464.

Records of registered agents and
offices, §46-3-457.

Service of process, §46-3-459.

Secretary of state, §46-3-459.

Termination of existence.

Effect, §46-3-465.

Transacting business in state.

Activities not to constitute, §46-3-450.

Certificate of authority required,
§46-3-450.

Transacting business without
certificate, §46-3-469.

Venue.

Proceedings against, §46-3-243.

Withdrawal, §§46-3-463, 46-3-464.

Application for withdrawal, §46-3-463.

Filing, §46-3-464.

Certificate of withdrawal, §46-3-464.

Functions, §46-3-200.

General assembly.

Reservation of power by general
assembly, §46-3-181.

Incorporation.

Age requirement for incorporators,
§46-3-320.

Certificate of incorporation, §46-3-323.

Effect of issuance, §46-3-323.

Notice, §46-3-322.

Number of incorporators, §46-3-320.

Organizational meeting of directors,
§46-3-324.

Indemnification.

Officers, directors, employees and
agents, §46-3-306.

Insurance.

Liability insurance.

Officers, directors, employees and
agents, §46-3-306.

Interrogatories.

Secretary of state.

Disclosure of facts and information
obtained from interrogatories,
§46-3-522.

Failure or refusal of officer or director
to answer.

Penalties, §46-3-541.

Propounding of interrogatories,
§46-3-521.

ELECTRIC MEMBERSHIP

CORPORATIONS —Cont'd

Jurisdiction.

Dissolution.

Involuntary dissolution.

Liquidation of assets and business,
§46-3-431.

Public service commission, §46-3-177.

Liability.

Foreign electric cooperatives.

Transacting business without
certificate of authority, §46-3-469.

Members, §46-3-261.

Merger or consolidation.

Effect on, §46-3-384.

Unauthorized assumption of corporate
powers, §46-3-203.

Limitation of actions.

Acquisition of rights of way and
easements.

Actions growing of, §46-3-204.

Directors and officers.

Actions against, §46-3-304.

Mail.

Meetings of members.

Notice, §46-3-263.

Members, §§46-3-260 to 46-3-272.

Actions.

Derivative actions by members,
§46-3-272.

Articles of incorporation.

Amendment of articles.

Meeting of members to consider,
§46-3-361.

Provisions as to membership,
§46-3-260.

Voting requirements in articles.
Effect, §46-3-267.

Bylaws.

Voting requirements in bylaws.
Effect, §46-3-267.

Credentials and elections committee,
§46-3-270.

Death.

Return of revenues upon, §46-3-341.

Defined, §46-3-171.

Derivative actions, §46-3-272.

Directors.

Classes of directors, §46-3-293.

Credentials and elections committee,
§46-3-270.

Election of directors, §46-3-291.

Removal of directors, §46-3-295.

Vacancies, §46-3-294.

Dissenters' rights, §46-3-269.

ELECTRIC MEMBERSHIP

CORPORATIONS —Cont'd

Members —Cont'd

- Liability, §46-3-261.
- Meetings, §46-3-262.
 - Adjournment.
 - Majority of members represented, §46-3-265.
- Amendment of articles of incorporation.
 - Meeting of members to consider, §46-3-361.
- Annual meetings, §46-3-262.
- Dissolution.
 - Voluntary dissolution, §46-3-420.
- Notice, §46-3-263.
 - Sale or other disposition of assets.
 - Meeting to consider, §46-3-401.
 - Voluntary dissolution of corporation, §46-3-420.
 - Revocation of proceedings, §46-3-424.
- Quorum of members, §46-3-265.
- Record date, §46-3-264.
- Sale or other disposition of assets.
 - Approval, §46-3-401.
- Special meetings, §46-3-262.
- Voluntary dissolution of corporation.
 - Revocation of proceedings, §46-3-424.
- Waiver of notice, §46-3-263.
- Officers.
 - Elections of officers, §46-3-301.
 - Removal of officers, §46-3-302.
- Proxy voting, §§46-3-266, 46-3-268.
- Qualifications, §46-3-260.
- Quorum, §46-3-265.
- Records.
 - Inspection of books and records, §46-3-271.
- Voting by members, §46-3-266.
 - Proxy voting, §§46-3-266, 46-3-268.
 - Record date, §46-3-264.
 - Requirements in articles of incorporation or bylaws.
 - Effect, §46-3-267.
- Merger or consolidation**, §§46-3-380 to 46-3-385.
 - Articles of consolidation, §46-3-383.
 - Articles of merger, §46-3-383.
 - Certificate of consolidation, §46-3-383.
 - Effect of issuance, §46-3-384.
 - Certificate of merger, §46-3-383.
 - Effect of issuance, §46-3-384.
 - Effect, §46-3-384.

ELECTRIC MEMBERSHIP

CORPORATIONS —Cont'd

Merger or consolidation —Cont'd

- Foreign electric cooperatives, §46-3-385.
 - Effect of merger where foreign electric cooperative is surviving entity, §46-3-461.
- Liability.
 - Effect on, §46-3-384.
- Meetings of members to consider, §46-3-382.
 - Approval required, §46-3-382.
 - Dissenters' rights, §46-3-269.
 - Notice, §46-3-382.
 - Publication, §46-3-382.
 - Waiver of notice, §46-3-263.
- Notice.
 - Meetings of members to consider, §46-3-382.
 - Publication of notice, §46-3-382.
 - Waiver of notice, §46-3-263.
 - Publication of notice, §46-3-383.
- Plan of consolidations, §46-3-381.
- Plan of merger, §46-3-380.
- Procedure, §§46-3-380, 46-3-381.
- Names**, §§46-3-220, 46-3-221.
 - Foreign electric cooperatives, §§46-3-452, 46-3-453.
 - Reservation of names, §46-3-221.
- Nonprofit operation**.
 - Requirement, §46-3-340.
- Notice**.
 - Amendment of articles of incorporation.
 - Proposed amendment, §46-3-361.
 - Publication of notice, §46-3-363.
 - Directors.
 - Meetings, §46-3-298.
 - Dissolution.
 - Involuntary dissolution.
 - Filing of decree, §46-3-437.
 - Liquidation proceedings.
 - Filing of claims, §46-3-434.
 - Fees for publication, §46-3-503.
 - Incorporation, §46-3-322.
 - Indemnification of officers, directors, employees and agents.
 - Notice to members of payment, §46-3-306.
 - Meetings of members, §46-3-263.
 - Sale or other disposition of assets, §46-3-401.
 - Voluntary dissolution of corporation, §46-3-420.
 - Revocation of proceedings, §46-3-424.

ELECTRIC MEMBERSHIP

CORPORATIONS —Cont'd

Notice —Cont'd

- Merger or consolidation.
- Meetings of members to consider,
§46-3-382.
- Publication of notice, §46-3-382.
- Waiver of notice.
- Requirements, §46-3-263.
- Publication of notice, §46-3-383.
- Restated articles of incorporation.
- Publication of notice, §46-3-365.
- Sale or other disposition of assets.
- Meeting of members to consider,
§46-3-401.
- Secretary of state.
- Certain actions taken by secretary of
state, §46-3-523.

Officers.

- Actions against officers, §46-3-304.
- Conflicts of interest, §46-3-305.
- Directors.
- Appointment of officers, §46-3-301.
- Filling of vacancies, §46-3-302.
- Removal of officers, §46-3-302.
- Financial information prepared by
others.
- Reliance upon, §§46-3-303, 46-3-303.1.
- Good faith.
- Standard of care in discharge of
duties, §§46-3-303, 46-3-303.1.
- Indemnification, §46-3-306.
- Insurance.
- Liability insurance, §46-3-306.
- Members.
- Elections of officers, §46-3-301.
- Removal of officers, §46-3-302.
- Prudent person rule.
- Discharge of duties, §§46-3-303,
46-3-303.1.
- Removal of officers, §46-3-302.
- Standard of care.
- Discharge of duties, §§46-3-303,
46-3-303.1.
- Vacancies.
- Filling, §46-3-302.

Penalties.

- Civil penalties, §§46-3-540, 46-3-541.
- Criminal penalties, §46-3-541.

Powers, §46-3-201.

- Foreign electric cooperatives, §46-3-451.
- Ultra vires.
- Defense of ultra vires, §46-3-202.
- Unauthorized assumption of corporate
powers.
- Liability, §46-3-203.

ELECTRIC MEMBERSHIP

CORPORATIONS —Cont'd

Prior law.

- Savings provisions, §§46-3-179, 46-3-180.

Prudent person rule.

- Directors and officers.
- Discharge of duties, §§46-3-303,
46-3-303.1.

Public service commission.

- Jurisdiction, §46-3-177.

Purposes, §46-3-200.

Rates and charges.

- Application, §46-3-340.
- Death of member.
- Return of revenues upon, §46-3-341.

Receivers.

- Dissolution.
- Involuntary dissolution.
- Liquidation proceedings, §§46-3-432,
46-3-433.

Records, §46-3-271.

- Inspection of books and records,
§46-3-271.

Registered agents, §46-3-240.

- Change of registered agent, §46-3-241.
- Foreign electric cooperatives.
- Change of registered agent, §46-3-458.
- Consent to appointment as registered
agent, §§46-3-454, 46-3-457.
- Required, §46-3-457.
- Service of process on foreign electric
cooperatives, §46-3-459.
- Service of process on, §46-3-242.

Registered office, §46-3-240.

- Change of registered office, §46-3-241.
- Foreign electric cooperatives.
- Change of registered office, §46-3-458.
- Required, §46-3-457.

Reports.

- Annual reports, §§46-3-480, 46-3-481.

Rights of way.

- Acquisition.
- Actions growing out of, §46-3-204.
- Powers of corporations, §46-3-201.

Saving provisions, §§46-3-179, 46-3-180.

Scope of provisions, §46-3-172.

Seals and sealed instruments.

- Affixing corporate seal, §46-3-173.
- Effect, §46-3-173.

Secretary of state, §§46-3-520 to 46-3-523.

- Appeals from secretary of state,
§46-3-523.

Evidence.

- Certificates issued by secretary,
§46-3-175.

ELECTRIC MEMBERSHIP

CORPORATIONS —Cont'd

Secretary of state —Cont'd

- Fees, §§46-3-500 to 46-3-502.
- Filing of documents with, §46-3-174.
- Certification of documents, §46-3-175.
- Foreign electric cooperatives.
- Filing of documents with secretary of state, §46-3-455.
- Amendments to articles of incorporation, §46-3-460.
- Application for withdrawal, §46-3-464.
- Records of registered agents and offices, §46-3-457.
- Interrogatories.
- Disclosure of facts and information obtained from, §46-3-522.
- Failure or refusal of officer or director to answer.
- Penalties, §46-3-541.
- Propounding of interrogatories, §46-3-521.
- Notice.
- Certain actions taken by secretary of state, §46-3-523.
- Powers, §46-3-520.
- Service of process.
- Secretary as agent for, §46-3-242.

Securities.

- Exemptions from securities laws, §46-3-176.

Service of process, §46-3-242.

- Dissolution.
- Involuntary dissolution actions, §46-3-430.
- Foreign electric cooperatives, §46-3-459.

Signatures.

- Articles of incorporation, §46-3-321.
- Documents, §46-3-173.
- False documents, §46-3-541.

Survival of actions.

- Dissolution.
- Survival of remedy after dissolution, §46-3-439.

Television.

- Cable television systems.
- Ownership or operation not authorized, §46-3-178.

Territorial rights.

- Allocation to suppliers.
- Conflict of laws, §46-3-182.
- Defined, §46-3-3.
- General provisions, §§46-3-1 to 46-3-15.
- See ELECTRICITY.

ELECTRIC MEMBERSHIP

CORPORATIONS —Cont'd

Territorial rights —Cont'd

- Allocation to suppliers —Cont'd
- Limitation on power to furnish service within municipalities, §46-3-9.
- Public service commission.
- Jurisdiction, §46-3-12.

Title of act.

- Short title, §46-3-170.

Ultra vires.

- Defense of ultra vires, §46-3-202.

Venue.

- Dissolution.
- Involuntary dissolution actions, §46-3-430.
- Proceedings against, §46-3-243.

EMBANKMENTS.

Railroad companies.

- Powers, §46-8-120.

EMERGENCIES.

Electric membership corporations.

- Bylaws for emergency conditions, §46-3-326.

Motor carriers.

- Registration of vehicles.
- Emergency vehicle registration permits, §46-7-15.
- Temporary emergency authority to operate, §46-7-13.

EMERGENCY MANAGEMENT.

Telephones.

- "911" system.
- General provisions, §§46-5-120 to 46-5-139.
- See TELEPHONES.

EMERGENCY TELEPHONE NUMBER

"911" SERVICE ACT OF 1977.

General provisions.

- "911" system, §§46-5-120 to 46-5-139.
- See TELEPHONES.

Short title, §46-5-120.

EMERGENCY VEHICLES.

Telephones.

- "911" system.
- General provisions, §§46-5-120 to 46-5-139.
- See TELEPHONES.

EMINENT DOMAIN.

Electricity.

- Allocation of territorial rights to suppliers.
- Limitation on power of electric suppliers to condemn property of other electric suppliers, §46-3-10.

EMINENT DOMAIN —Cont'd

Gas.

- Municipal gas authority of Georgia.
Powers, §46-4-96.
- Underground storage.
Exercise of right by gas utilities,
§46-4-57.

Municipal electric authority of Georgia.

- Powers of authority, §46-3-126.

Municipal gas authority of Georgia.

- Power of eminent domain, §46-4-96.

Railroads.

- Exercise of power by railroad companies,
§46-8-124.
- Approval by commission as
prerequisite, §46-8-121.

Rural telephone cooperatives.

- Power of eminent domain, §46-5-63.

Telegraphs.

- Exercise of power by telegraph
companies, §46-5-1.

Telephones.

- Exercise of power by telephone
companies, §46-5-1.
- Rural telephone cooperatives.
Power of eminent domain, §46-5-63.

ENERGY CHOICE.

**Natural gas competition and deregulation
act, §46-4-158.3.**

**ENERGY CONSERVATION ASSISTANCE,
§§46-4A-1 to 46-4A-14.**

Actions.

- Attorney general.
Duty to represent director, §46-4A-10.

Appeals.

- Judicial review of orders or actions,
§46-4A-9.

Attorney general.

- Duty to represent director in actions,
§46-4A-10.

Citation, §46-4A-1.

Compliance with chapter.

- Failure of covered utility to comply,
§46-4A-13.

Construction and interpretation, §46-4A-12.

Contractors.

- Removal for violating provisions of
chapter, §46-4A-14.

Covered utility.

- Defined, §46-4A-3.
- Failure to comply with chapter,
§46-4A-13.

Declaration of policy, §46-4A-2.

Definitions, §46-4A-3.

**ENERGY CONSERVATION ASSISTANCE
—Cont'd**

Director.

- Attorney general.
Duty to represent director in actions,
§46-4A-10.
- Defined, §46-4A-3.
- Duties, §§46-4A-4, 46-4A-5.
- Enforcement of chapter, §46-4A-5.
- Inspections, §46-4A-5.
- Investigations, §46-4A-5.
- Powers.
Generally, §§46-4A-4, 46-4A-5.
- Proceedings before director, §46-4A-6.
- Scope of authority to administer chapter
relative to federal law, §46-4A-11.

Enforcement of chapter.

- Duty of director, §46-4A-5.

Federal laws.

- Scope of director's authority to
administer chapter, §46-4A-11.

Hearings.

- Commencement and conduct of
hearings in accordance with
administrative procedure act,
§46-4A-8.

Injunctions.

- Violations, §46-4A-7.

Inspections.

- Duty of director, §46-4A-5.

Investigations.

- Duty of director, §46-4A-5.

Judicial review.

- Persons aggrieved by orders or actions,
§46-4A-9.

Legislative findings, §46-4A-2.

Lenders.

- Removal from master record, §46-4A-14.

Master record.

- Removal of contractors, suppliers or
lenders, §46-4A-14.

Penalties.

- Civil penalty, §46-4A-14.

Proceedings before director, §46-4A-6.

Program.

- Defined, §46-4A-3.

Restraining orders, §46-4A-7.

Short title, §46-4A-1.

Suppliers.

- Removal for violations, §46-4A-14.

Violations.

- Civil penalty, §46-4A-14.
- Injunctions, §46-4A-7.
- Proceedings before director, §46-4A-6.

EVIDENCE.

Electric membership corporations.

- Secretary of state.
- Certificates issued by secretary,
§46-3-175.

Motor carriers.

- Intentional violations of law.
- Possession of certain goods and prima
facie evidence, §46-7-38.

Public service commission.

- Discovery.
- Obtaining by employees and agents of
commission, §46-2-57.

Investigations.

- Rules of evidence, §46-2-51.

Orders.

- Admissibility in court proceedings,
§46-2-53.

Rate schedules.

- Admissibility in court proceedings,
§46-2-53.

Reports.

- Admissibility in court proceedings,
§46-2-53.

Railroads.

- Certificate of incorporation.
- Evidentiary effect, §46-8-43.
- Damages.
- Proof of injury from running of train.
- Prima facie evidence of lack of
reasonable skill and care,
§46-8-292.
- Rates and charges.
- Schedules of rates.
- Evidentiary effect, §§46-9-20,
46-9-21.
- Wrecking and railroad company.
- Depreciating value of stock.
- Acts done with intent and purpose
of depreciating value.
- Prima facie evidence of intent to
wreck, §46-8-365.

Rural telephone cooperatives.

- Certified copies of charter and secretary
of state's certificate.
- Evidentiary effect, §46-5-76.

EXPERT WITNESSES.

Consumers' utility counsel division.

- Employment of experts, §46-10-6.

Fees.

- Consumers' utility counsel division,
§46-10-6.

EXPLOSIVES AND EXPLOSIONS.

Railroads.

- Transportation of gunpowder or
dynamite, §46-9-253.

**EXPRESS COMPANIES, §§46-9-230 to
46-9-236.**

Certificate of incorporation, §46-9-230.

Contracts.

- Power to contract, §46-9-233.

Directors.

- Organization, §46-9-231.

Fees.

- Certificate of incorporation.
- Issuance, §46-9-230.

Forms.

- Certificate of incorporation, §46-9-230.

Incorporation, §46-9-230.

- Organization following, §46-9-231.

Jurisdiction.

- Superior courts, §46-9-234.

Office.

- Principal office.
- Location, §46-9-232.

Powers, §46-9-233.

President.

- Election, §46-9-231.
- Posting of name, §46-9-236.

Principal office.

- Location, §46-9-232.

Public service commission.

- Powers and duties of commission,
§§46-2-20, 46-2-22.

Service of process, §46-9-235.

- Posting of name of chief officer on
whom process may be served,
§46-9-236.

Stock and stockholders.

- Subscription for capital stock, §46-9-231.

Superior courts.

- Jurisdiction, §46-9-234.

F

FACSIMILE MACHINES.

Theft of telecommunications service,

- §§46-5-2 to 46-5-4.

Unsolicited commercial messages.

- Transmission, §46-5-25.

FAMILY VIOLENCE.

Shelters.

- Confidentiality of location.
- Telephone directory information and
listings publishers or
disseminators.
- Plan for protecting filed with public
service commission, §46-5-7.

FAX MACHINES.

Theft of telecommunications service,

- §§46-5-2 to 46-5-4.

FAX MACHINES —Cont'd

Unsolicited commercial messages.

Transmission, §46-5-25.

FEDERAL AID.

Telephones.

"911" system, §46-5-130.

FEES.

Electrical and low-voltage contractors.

Integrated resource planning.

Certificates of public convenience and necessity, §46-3A-5.

Electric membership corporations,

§§46-3-500 to 46-3-503.

Certificates.

Certificate of search or certificate of good standing, §46-3-502.

Issuance, §46-3-501.

Copies.

Certified copies, §46-3-502.

Filing of documents, §46-3-501.

Foreign electric cooperatives.

Revocation of certificate of authority.

Reinstatement, §46-3-468.

Notices.

Publication, §46-3-503.

Secretary of state, §§46-3-500 to 46-3-502.

Expert witnesses.

Consumers' utility counsel division, §46-10-6.

Express companies.

Certificate of incorporation.

Issuance, §46-9-230.

Gas.

Municipal gas authority of Georgia.

Bond issues.

Validation of bonds, §46-4-101.

Underground storage.

Orders approving or disapproving projects.

Application for.

Examination fee, §46-4-53.

Hazardous materials and waste.

Transportation of hazardous materials.

Permits, §46-11-4.

Motor carriers.

Certificate, §§46-7-7, 46-7-9.

Nonresident carriers.

Service of process on secretary of state, §46-7-17.

Registration of vehicles, §§46-7-15, 46-7-16.

Municipal gas authority of Georgia.

Bond issues.

Validation of bonds, §46-4-101.

FEES —Cont'd

Public service commission.

Special fee.

Payment by corporations and utilities subject to commission, §46-2-10.

Railroads.

Dissolution of railroad companies.

Petition.

Filing with secretary of state, §46-8-73.

Rural telephone cooperatives, §46-5-100.

Annual license fee, §46-5-101.

FELONIES.

Railroads.

Wrecking a railroad company, §§46-8-361 to 46-8-364.

See RAILROADS.

Telecommunications service.

Theft of, §§46-5-2, 46-5-3.

Telephones.

Theft of telecommunications service, §§46-5-2, 46-5-3.

Theft of telecommunications service.

Avoiding or attempting to avoid charges, §46-5-2.

Devices, equipment or apparatus.

Prohibited acts as to, §46-5-3.

FERRIES.

Railroads.

Appropriation of public ferries, §46-8-103.

FINES.

Electricity.

High-voltage lines, §46-3-40.

Electric membership corporations.

Officers and directors.

Signing documents known to be false, §46-3-541.

Felony sentences.

Telecommunications service.

Theft, §§46-5-2, 46-5-3.

Theft.

Telecommunications service, §§46-5-2, 46-5-3.

Household goods carriers for hire.

Operating without certificate, advertising services falsely, §48-7-91.

Public service commission.

Payment into state treasury, §46-2-32.

Railroads.

Grade crossings.

Signboards to warn of grade crossing at which there is a switch, §46-8-198.

FINES —Cont'd

Railroads —Cont'd

Grade crossings —Cont'd

Signs.

Standard signs, §46-8-196.

Locomotives.

Steam locomotives.

Automatic door to firebox,
§46-8-172.

Switches.

Signboards to warn of drawbridges,
grade crossings and stations at
which there is a switch, §46-8-198.

Ships and vessels.

Passenger tickets, §46-9-172.

Telecommunications service.

Theft of, §§46-5-2, 46-5-3.

Telephones.

Theft of telecommunications service,
§§46-5-2, 46-5-3.

Unsolicited commercial facsimile
messages.

Transmission, §46-5-25.

Telephone solicitation no call law.

Compiling or disseminating information
on data base, §46-5-27.

Theft.

Telecommunications service, §§46-5-2,
46-5-3.

FIREBOXES.

Steam locomotives, §46-8-172.

FIREFIGHTERS.

Railroads.

Street, suburban and interurban
railroads.

Free transportation for firefighters,
§46-8-340.

FIRES.

Telephones.

"911" system.

General provisions, §§46-5-120 to
46-5-139.

See TELEPHONES.

FLEETS OF MOTOR VEHICLES.

Motor common carrier exceptions, §46-1-1.

FOREIGN ELECTRIC COOPERATIVES.

General provisions, §§46-3-450 to 46-3-469.

See ELECTRIC MEMBERSHIP
CORPORATIONS.

FORGERY.

Telecommunications marketing, §46-5-188.

FORMS.

Electric membership corporations.

Foreign electric cooperatives.

Revocation of certificate of authority.

Application for reinstatement,
§46-3-468.

Express companies.

Certificate of incorporation, §46-9-230.

Railroads.

Certificate of incorporation, §46-8-42.

FRANCHISES.

Railroads.

Exercise of franchises in another state or
territory, §46-8-109.

Sale or lease of franchises upon
termination of prior lease,
§46-8-106.

Surrender of franchises, §46-8-70.

Dissolution of railroad companies.

General provisions, §§46-8-71 to
46-8-79.

See RAILROADS.

Order of secretary of state accepting
surrender, §46-8-78.

FRAUD AND DECEIT.

Common carriers.

Freight.

Nature and value of goods, §46-9-47.

FREIGHT.

Common carriers.

See COMMON CARRIERS.

Railroads generally.

See RAILROADS.

FREIGHT BILLS.

Common carriers.

Contents of freight bills, §46-9-112.

FREIGHT CARS.

Railroad company duties, §46-9-215.

FREIGHT STORAGE.

Rates, §§46-9-26, 46-9-53 to 46-9-55.

FREIGHT TRANSPORTATION.

Rate discrimination, §§46-9-52, 46-9-53,
46-9-213.

FUNDS.

Public service commission.

Public service commission fund, §46-2-8.

Telephones.

Universal access fund, §46-5-167.

Universal service fund.

Natural gas competition and
deregulation, §46-4-161.

G

GAS.

Actions.

- Municipal gas authority of Georgia.
- Jurisdiction of actions arising under provisions, §46-4-121.
- Violations of commission rules, orders or regulations.
- Actions to enjoin, §46-4-1.

Allocation of gas to protect public health, safety, etc.

- Definitions, §46-2-70.
- Immunity from liability.
- Persons acting in accordance with orders and rulings of commission, §46-2-72.
- Power of public service commission, §46-2-71.

Appeals.

- Residential conservation service.
- Judicial review of director, §46-4A-9.
- Underground storage.
- Orders approving or disapproving projects.
- Judicial review, §46-4-56.

Assistance to low or fixed income consumers.

- Department of human resources.
- Duties, §46-1-5.

Authorities.

- Municipal gas authority of Georgia, §§46-4-80 to 46-4-125.
- See MUNICIPAL GAS AUTHORITY OF GEORGIA.

Bond issues.

- Municipal gas authority of Georgia, §§46-4-101 to 46-4-117.
- See MUNICIPAL GAS AUTHORITY OF GEORGIA.

Cease and desist orders.

- Intrastate pipelines and distribution systems.
- Public service commission, §46-4-26.

Companies.

- Alternative form of regulation.
- Defined, §46-2-23.1.
- Defined, §46-1-1.
- Natural gas competition and deregulation generally, §§46-4-150 to 46-4-166.
- See NATURAL GAS COMPETITION AND DEREGULATION ACT.
- Rates and charges, §46-2-23.1.
- Discovery by public service commission, §46-2-57.

GAS —Cont'd

Department of human resources.

- Low or fixed income consumers of gas and electric service.
- Duties with regard to assistance to, §46-1-5.

Department of natural resources.

- Environmental protection division.
- Orders approving or disapproving projects.
- Investigation of projects, §46-4-54.

Eminent domain.

- Municipal gas authority of Georgia.
- Powers, §46-4-96.
- Underground storage.
- Exercise of right by gas utilities, §46-4-57.

Fees.

- Municipal gas authority of Georgia.
- Bond issues.
- Validation of bonds, §46-4-101.
- Underground storage.
- Orders approving or disapproving projects.
- Application for.
- Examination fee, §46-4-53.

Gas supply plans.

- Adjustment factors, §46-2-26.5.

Immunity.

- Allocation of gas to protect public health, safety, etc.
- Persons acting in accordance with orders and rulings of public service commission, §46-2-72.

Injunctions.

- Intrastate pipelines and distribution systems.
- Violations, §46-4-34.
- Residential conservation service.
- Violations of provisions, §46-4A-7.
- Underground storage.
- Enforcement of provisions, §46-4-61.
- Violations of commission rules, orders or regulations.
- Actions by commission to enjoin, §46-4-1.

Intrastate pipelines and distribution systems, §§46-4-20 to 46-4-35.

- Applicability of provisions, §§46-4-32, 46-4-33.
- Certificates of public convenience and necessity.
- Amendment, §46-4-28.
- Applicability of requirement, §46-4-33.
- Applications, §§46-4-22, 46-4-24.
- Notice of receipt, §46-4-22.

GAS —Cont'd

Intrastate pipelines and distribution systems —Cont'd

Certificates of public convenience and necessity —Cont'd

Construction or operation of pipeline or system as of February 17, 1956, §46-4-24.

Denial.

Power of commission, §46-4-23.

Factors to be considered in granting, §46-4-25.

Hypothecation, §46-4-29.

Issuance.

Factors to be considered in granting, §46-4-25.

Power of commission, §46-4-23.

Required, §46-4-21.

Applicability of requirement, §46-4-33.

Revocation or suspension, §46-4-28.

Transfer, §46-4-29.

Civil penalty for violations, §46-4-35.

Complaints to commission, §§46-4-26, 46-4-27.

Construction or extension.

Cease and desist orders, §46-4-26.

Controversies as to extensions of gas distribution service.

Jurisdiction of commission, §46-4-30.

Unreasonable interference with existing pipeline or distribution system, §46-4-27.

Definition of "person," §46-4-20.

Injunctions.

Violations, §46-4-34.

Liquefied petroleum gas sold in liquid form under pressure.

Applicability of provisions to, §46-4-32.

Notice.

Certificates of public convenience and necessity.

Receipt of application, §46-4-22.

Penalties.

Civil penalty for violations, §46-4-35.

Public service commission.

Cease and desist orders, §46-4-26.

Complaints to commission, §§46-4-26, 46-4-27.

Jurisdiction, §46-4-21.

Controversies as to extensions of gas distribution service, §46-4-30.

Orders, §46-4-31.

Cease and desist orders, §46-4-26.

Rules and regulations, §46-4-31.

GAS —Cont'd

Intrastate pipelines and distribution systems —Cont'd

Rules and regulations, §46-4-31.

Investigations.

Residential conservation service.

Director, §46-4A-5.

Liquefied natural gas.

Transportation of hazardous materials, §§46-11-1 to 46-11-6.

See HAZARDOUS MATERIALS AND WASTE.

Mandamus.

Underground storage.

Enforcement of provisions, §46-4-61.

Municipal gas authority of Georgia,

§§46-4-80 to 46-4-125.

See MUNICIPAL GAS AUTHORITY OF GEORGIA.

Natural gas competition and deregulation

act, §§46-4-150 to 46-4-166.

See NATURAL GAS COMPETITION AND DEREGULATION ACT.

Notice.

Intrastate pipelines and distribution systems.

Certificates of public convenience and necessity.

Receipt of application, §46-4-22.

Underground storage.

Orders approving or disapproving projects.

Hearing on application, §46-4-53.

Penalties.

Intrastate pipelines and distribution systems.

Civil penalty for violation, §46-4-35.

Residential conservation service.

Civil penalties for violations, §46-4A-14.

Pipelines.

Intrastate pipelines, §§46-4-20 to 46-4-35.

See within this heading, "Intrastate pipelines and distribution systems."

Public service commission.

Allocation of gas to protect public health, safety, etc., §§46-2-70 to 46-2-72.

Gas supply plans, §46-2-26.5.

Hearing procedures, §46-2-26.5.

General provisions, §§46-2-1 to 46-2-95.

See PUBLIC SERVICE COMMISSION.

Municipal gas authority of Georgia.

Exemption from regulation by commission, §46-4-122.

GAS —Cont'd

Public service commission —Cont'd

Powers and duties as to gas companies
generally, §§46-2-20, 46-2-21.

Purchased gas costs.

Recovery, §46-2-26.5.

Rates and charges.

Accounting procedures in gas utility
rate proceedings, §46-2-26.4.

Purchased gas adjustment rate,
§46-2-26.5.

Violations of commission rules, orders or
regulations.

Actions by commission to enjoin,
§46-4-1.

**Residential conservation service, §§46-4A-1
to 46-4A-14.**

Administrative procedure act.

Applicability to hearings, §46-4A-8.

Appeals.

Judicial review of director, §46-4A-9.

Citation of act.

Short title, §46-4A-1.

Definitions, §46-4A-3.

Director.

Defined, §46-4A-3.

Judicial review, §46-4A-8.

Powers and duties, §§46-4A-4, 46-4A-5.

Scope of authority relative to federal
law, §46-4A-11.

Proceedings before director, §46-4A-6.

Representation in actions by attorney
general, §46-4A-10.

Injunctions, §46-4A-7.

Interpretation and construction,
§46-4A-12.

Investigations.

Director, §46-4A-5.

Legislative declaration, §46-4A-2.

Penalties.

Civil penalties, §46-4A-14.

Title of act.

Short title, §46-4A-1.

Violations of provisions.

Civil penalties, §46-4A-14.

Failure of covered utility to comply,
§46-4A-13.

Injunctions, §46-4A-7.

Rules and regulations.

Intrastate pipelines and distribution
systems, §46-4-31.

Underground storage.

Board of natural resources, §46-4-60.

Public service commission, §46-4-61.

GAS —Cont'd

Rules and regulations —Cont'd

Violations.

Injunctions.

Actions to enjoin, §46-4-1.

Supply plans.

Adjustment factors, §46-2-26.5.

Transportation of hazardous materials,

§§46-11-1 to 46-11-6.

See HAZARDOUS MATERIALS AND
WASTE.

Underground storage, §§46-4-50 to 46-4-62.

Abandonment of reservoir by gas utility,
§46-4-59.

Appeals.

Orders approving or disapproving
projects.

Judicial review, §46-4-56.

Citation of act.

Short title, §46-4-50.

Definitions, §46-4-51.

Department of natural resources.

Effect of provisions on authority of
department, §46-4-62.

Inspections and examinations,
§46-4-60.

Rules and regulations.

Board of natural resources, §46-4-60.

Eminent domain.

Exercise of right by gas utilities,
§46-4-57.

Injunctions.

Enforcement of provisions, §46-4-61.

Legislative declaration, §46-4-52.

Mandamus.

Enforcement of provisions, §46-4-61.

Orders approving or disapproving
projects.

Applications for, §46-4-53.

Hearings on, §§46-4-53, 46-4-55.

Entry of order, §46-4-55.

Environmental protection division.

Investigation by director, §46-4-54.

Hearing on application, §§46-4-53,
46-4-55.

Investigation of project by director of
environmental protection division,
§46-4-54.

Investigation of site by state geologist,
§46-4-54.

Judicial review, §46-4-56.

Notice.

Hearing on application, §46-4-53.

State geologist.

Investigation of site, §46-4-54.

GAS —Cont'd

Underground storage —Cont'd

- Ownership of gas injected into underground reservoirs.
 - Determination, §46-4-58.
- Public service commission.
 - Abandonment of reservoir by gas utility.
 - Approval, §46-4-59.
 - Enforcement of provisions, §46-4-61.
 - Judicial review.
 - Orders approving or disapproving projects, §46-4-56.
 - Orders, §46-4-61.
 - Rules and regulations, §46-4-61.
 - Purpose of provisions, §46-4-52.
 - Rules and regulations.
 - Board of natural resources, §46-4-60.
 - Public service commission, §46-4-61.
 - Title of act.
 - Short title, §46-4-50.
 - Underground reservoirs.
 - Abandonment by gas utility, §46-4-59.
 - Defined, §46-4-51.
 - Ownership of gas injected into.
 - Determination, §46-4-58.

GASEOUS.

Tank vehicle.

- Defined as vehicle designed to transport gaseous materials, §46-4-81.

GASIFICATION.

- “Production” defined as including coal gasification, §46-4-81.

GENERAL ASSEMBLY.

Electric membership corporations.

- Reservation of power by general assembly, §46-3-181.

GEOLOGISTS.

Gas.

- Underground storage, §46-4-54.

GEORGIA COGENERATION AND DISTRIBUTED GENERATION ACT OF 2001.

- Sale of electricity by generating facilities, §§46-3-50 to 46-3-56.

See **ELECTRICITY.**

Short title, §46-3-50.

GEORGIA ELECTRIC MEMBERSHIP CORPORATION ACT.

- General provisions,** §§46-3-170 to 46-3-541.

See **ELECTRIC MEMBERSHIP CORPORATIONS.**

Short title, §46-3-170.

GEORGIA EMERGENCY TELEPHONE NUMBER “911” SERVICE ACT OF 1977.

General provisions.

“911” system, §§46-5-120 to 46-5-139.

See **TELEPHONES.**

Short title, §46-5-120.

GEORGIA NO-CALL LAW.

Telephone solicitors, §46-5-27.

GEORGIA RAIL PASSENGER AUTHORITY LAW.

- General provisions,** §§46-9-270 to 46-9-281.

See **RAIL PASSENGER AUTHORITY.**

Short title, §46-9-270.

GEORGIA TERRITORIAL ELECTRIC SERVICE ACT.

Electricity.

Allocation to suppliers, §§46-3-1 to 46-3-15.

See **ELECTRICITY.**

Short title, §46-3-1.

GEOTHERMAL GAS.

“Gas” defined as including, §46-4-81.

GOOD FAITH.

Common carriers.

Passenger tickets.

Selling or dealing by person other than authorized agent of carrier, §46-9-139.

Electric membership corporations.

Articles of incorporation.

Signing, §46-3-321.

Conflicts of interest.

Directors, §46-3-305.

Emergency bylaws, §46-3-326.

Indemnification.

Directors, §46-3-306.

Involuntary dissolution.

Contesting commencement of action, §46-3-429.

Reservation of names, §46-3-221.

Standard of care in discharge of duties, §§46-3-303, 46-3-303.1.

Gas.

Intrastate pipelines and distribution systems.

Civil penalty for violations, §46-4-35.

Underground storage.

Evidence of abandonment, §46-4-59.

Motor carriers.

Certificates of public convenience and necessity.

Considerations determining approval, §46-7-7.

GOOD FAITH —Cont'd

Public officers' annuity and benefit fund.

Standard of care for discharge of duties.

Directors and officers, §46-8-55.

Railroads.

Petition for incorporation, §46-8-41.

Telegraph companies.

Duties as to delivery of dispatches and messages, §46-5-147.

GOOD WILL.

Electric membership corporations.

Assets.

Sale or other disposition, §46-3-401.

GOVERNOR.

Public service commission.

Annual report to governor, §46-2-31.

Vacancies on commission.

Filling, §46-2-4.

Railroads.

Protection of property.

Special officers.

Appointment, §46-8-230.

Revocation of appointment and commission, §46-8-232.

GRADE CROSSINGS.

See RAILROADS.

GRADUATE CERTIFICATION.

Public service commission.

Director of utility finance section.

Qualifications, §46-2-41.

GRANDFATHER CLAUSE.

Electricity.

Territorial rights, §46-3-8.

GRANITE.

Public utilities.

"Motor common carrier" defined, §46-1-1.

GRANTEES.

Municipal electric authority of Georgia.

Powers of authority as grantee,

§§46-3-126, 46-4-96.

GRANTORS.

Municipal electric authority of Georgia.

Powers as grantor, §§46-3-126, 46-4-96.

GRASS.

Motor common carrier.

Defined as vehicles engaged in transportation of sod grass, §46-1-1.

GRAVEL.

Motor vehicle carriers.

Defined, §46-1-1.

GRAVEL —Cont'd

Railroad companies.

Power to obtain gravel and other materials, §§46-8-100, 46-8-120.

GROVES.

Public utilities.

Motor common carrier.

"Producer" defined, §46-1-1.

GUNPOWDER.

Common carriers.

Transportation of gunpowder, dynamite, etc., §46-9-253.

H

HANDICAPPED PERSONS.

Telephone system for the physically impaired, §§46-5-30, 46-5-31.

HARASSING PHONE CALLS, §46-5-21.

HAZARDOUS MATERIALS AND WASTE.

Bonds, surety.

Transportation of hazardous materials, §46-11-4.

Criminal law and procedure.

Transportation of hazardous materials.

Violations as misdemeanors, §46-11-4.

Definitions.

Transportation of hazardous materials, §46-11-3.

Fees.

Transportation of hazardous materials.

Permits, §46-11-4.

Permits.

Transportation of hazardous materials, §46-11-4.

Rules and regulations.

Transportation of hazardous materials, §§46-11-4, 46-11-5.

Transportation of hazardous materials.

Applicability of provisions, §46-11-4.

Bonds, surety, §46-11-4.

Citation of act.

Short title, §46-11-1.

Commissioner.

Enforcement of provisions, §46-11-6.

Definitions, §46-11-3.

Enforcement of provisions, §46-11-6.

Exceptions to provisions, §46-11-4.

Fees.

Permits, §46-11-4.

Legislative declaration, §46-11-2.

Misdemeanors.

Violations of provisions, §46-11-4.

Permits, §46-11-4.

HAZARDOUS MATERIALS AND WASTE

—Cont'd

Transportation of hazardous materials

—Cont'd

Purpose of provisions, §46-11-2.

Rules and regulations, §46-11-4.

Promulgation, §46-11-5.

Title of act.

Short title, §46-11-1.

HEALTH.

Telephones.

"911" system.

General provisions, §§46-5-120 to 46-5-139.

See TELEPHONES.

HEARINGS.

Gas supply plans.

Gas utility, §46-2-26.5.

Motor carriers.

Application for certificate, §46-7-10.

HIGH SPEED RAIL.

Railway passenger service corridor system,

§§46-9-290, 46-9-291.

HIGH-VOLTAGE LINES, §§46-3-30 to 46-3-40.

See ELECTRICITY.

HIGH-VOLTAGE SAFETY ACT.

High voltage lines generally, §§46-3-30 to 46-3-40.

See ELECTRICITY.

Short title, §46-3-30.

HIGHWAYS, ROADS AND STREETS.

Department of transportation.

Southwest Georgia railroad excursion authority.

Administrative assignment to department, §46-9-321.

High-voltage lines.

Expense of precautionary measures taken pursuant to public highway construction.

Allocation, §46-3-35.

Motor carriers.

No vested right or perpetual franchise in use of public highways, §46-7-32.

Railroad grade crossings.

Blowposts to warn of crossings, §§46-8-190, 46-8-191.

Occupying or blocking pursuant to company order.

Legal responsibility of crew member, §46-8-197.

HIGHWAYS, ROADS AND STREETS

—Cont'd

Railroad grade crossings —Cont'd

Relocation of highways necessitated by construction, §46-8-126.

Signs, §§46-8-194 to 46-8-196.

Grade crossings at which there is a switch.

Signboards, §46-8-198.

Railroads.

Appropriation by railroad corporations of public highways, §46-8-103.

Occupying or blocking pursuant to company orders.

Legal responsibility of member of crew, §46-8-197.

Relocation of highways necessitated by construction of crossings, §46-8-126.

Street, suburban and interurban railroads, §§46-8-330 to 46-8-348.

See RAILROADS.

HOBOS.

Railroads.

Hiding on train for purpose of stealing a ride.

Misdemeanor, §46-8-381.

HOMELESS PEOPLE.

Hobos.

Hiding on train, §46-8-381.

HOUSEHOLD GOODS CARRIERS FOR HIRE.

Motor carriers generally, §§46-7-1 to 46-7-85.17.

See MOTOR CARRIERS.

Operating without certificate, advertising services falsely.

Penalty, §46-7-91.

HUMAN RESOURCES.

Department of human resources.

Duties.

Gas and electric service.

Assistance to low or fixed income consumers, §46-1-5.

Electricity.

Assistance to low or fixed income consumers.

Duties as to, §46-1-5.

Gas.

Assistance to low or fixed income consumers.

Duties as to, §46-1-5.

I

IMMUNITY.

Electricity.

Allocation of electricity to protect public health, safety, etc.

Persons acting in accordance with orders and rulings of public service commission, §46-2-72.

Gas.

Allocation of gas to protect public health, safety, etc.

Persons acting in accordance with orders and rulings of public service commission, §46-2-72.

Railroads.

Stockholders.

Exemption of property of stockholders from debts or liabilities of corporation, §46-8-52.

Telephones.

"911" system, §46-5-131.

IN CHAMBERS.

Municipal electric authority of Georgia.

Issuance of revenue bonds and bond anticipation notes, §46-3-131.

Municipal gas authority of Georgia.

Revenue bond validation, §46-4-101.

Rural telephone cooperatives.

Power of superior court to create cooperatives, approved amendments, conversion, etc., §46-5-64.

INDEMNIFICATION.

Electric membership corporations.

Officers, directors, etc., §46-3-306.

INJUNCTIONS.

Electricity.

Residential conservation service.

Violations of provisions, §46-4A-7.

Gas.

Intrastate pipelines and distribution systems.

Violations, §46-4-34.

Residential conservation service.

Violations of provisions, §46-4A-7.

Underground storage.

Enforcement of provisions, §46-4-61.

Violations of commission rules, orders or regulations.

Actions by commission to enjoin, §46-4-1.

Motor carriers.

Enforcement of provisions, §46-7-30.

Operation without certificate, §46-7-31.

INJUNCTIONS —Cont'd

Public service commission.

Standard of proof for granting, §46-2-95.

Telephones.

Obscene comments or suggestions.

Using telephone communications for, §46-5-22.

Telephone solicitation no call law violations, §46-5-27.

INJURIES.

Common carriers.

Liability for acts committed outside scope of charter, §46-9-4.

INSPECTIONS.

Railroads.

Public service commission, §§46-8-24, 46-8-25.

INSURANCE.

Direct action against insurer, §46-7-12.

Motor carriers, §46-7-12.

Electric membership corporations.

Liability insurance.

Officers, directors, employees and agents, §46-3-306.

Motor carriers.

Indemnity insurance requirements.

Certificates of public convenience and necessity, §46-7-12.

Interstate commerce, vehicles engaged solely in, §46-7-16.

INSURANCE COMPANIES.

Direct action against insurer.

Motor carrier coverage, §46-7-12.

Motor carrier coverage.

Direct action against insurer, §46-7-12.

INTEREST.

Municipal electric authority of Georgia.

Bond issues, §46-3-139.

Municipal gas authority of Georgia.

Bond issues, §§46-4-101, 46-4-109.

Rail passenger authority.

Bond issues, §46-9-276.

INTERPRETATION AND CONSTRUCTION.

Consumers' utility counsel division, §46-10-8.

Motor carriers.

No vested right or perpetual franchise in use of public highways, §46-7-32.

Municipal electric authority of Georgia, §§46-3-154, 46-3-155.

Municipal gas authority of Georgia, §§46-4-124, 46-4-125.

**INTERPRETATION AND
CONSTRUCTION —Cont'd**

Natural gas competition and deregulation,
§46-4-164.

Public service commission.

Cumulative nature of remedies, §46-2-32.
Powers granted by provisions to other
companies or entities regulated by
commission.

Applicability, §46-1-3.

Rail passenger authority.

Liberal construction of provisions,
§46-9-278.

Provisions not to affect other authorities,
§46-9-281.

Railroads.

Duties and liabilities of railroad
companies under other laws.

Effect of provisions on, §46-8-192.

Rural telephone cooperatives.

Construction of provisions, §46-5-105.

**Southwest Georgia railroad excursion
authority.**

Additional nature of provisions,
§46-9-332.

Liberal construction of provisions,
§46-9-329.

INTERROGATORIES.

Electric membership corporations.

Secretary of state.

Disclosure of facts and information
obtained from interrogatories,
§46-3-522.

Failure or refusal of officer or director
to answer.

Penalties, §46-3-541.

Propounding of interrogatories,
§46-3-521.

INTERSTATE COMMERCE.

Common carriers.

Applicability of provisions to carriers
engaged in interstate commerce,
§46-1-4.

Motor carriers.

Carriers engaged in both interstate and
intrastate commerce.

Applicability of provisions, §46-7-36.

Requirements as to vehicles engaged
solely in interstate commerce,
§46-7-16.

INTERSTATE COMPACTS.

**Mississippi-Louisiana-Alabama-Georgia
rapid rail transit compact,** §46-9-300.

Rapid rail transit compact, §46-9-300.

INTERURBAN RAILROADS, §§46-8-330 to
46-8-348.

See **RAILROADS.**

INTERVENTION.

Consumers' utility counsel.

Representative functions, §46-10-4.

Municipal gas authority of Georgia.

Bond issues.

Validation proceedings, §46-4-102.

Public service commission.

Proceedings before commission,
§46-2-59.

INVESTIGATIONS.

Electricity.

Residential conservation service.

Director, §46-4A-5.

Gas.

Residential conservation service.

Director, §46-4A-5.

Railroads.

Public service commission, §46-8-22.

Dissolution of railroad companies,
§46-8-76.

Rates and charges.

Through rates, §46-9-22.

Surrender of franchises.

Application, §46-8-70.

INVESTMENTS.

Municipal electric authority of Georgia.

Bonds of authority as legal investments,
§46-3-134.

Powers of authority, §46-3-126.

Municipal gas authority of Georgia.

Bonds as legal investments, §46-4-104.

Powers of authority, §46-4-96.

J

JUNK FAX, §46-5-25.

JURISDICTION.

Electric membership corporations.

Dissolution.

Involuntary dissolution.

Liquidation of assets and business,
§46-3-431.

Public service commission, §46-3-177.

Express companies.

Superior courts, §46-9-234.

Long-arm statute.

Telephone solicitation no call law.

Actions for violations.

Personal jurisdiction over
nonresidents, §46-5-27.

JURISDICTION —Cont'd

Municipal electric authority of Georgia.

Public service commission, §46-3-152.

Municipal gas authority of Georgia.

Actions under provisions, §46-4-121.

Nonresidents.

Personal jurisdiction.

Telephone solicitation no call law.

Actions for violations, §46-5-27.

Public service commission, §46-2-20.

Actions involving, §46-2-9.

Gas.

Intrastate pipelines and distribution systems, §46-4-21.

Controversies as to extensions of gas distribution service, §46-4-30.

Telephones.

"911" system.

Jurisdiction of commission not affected, §46-5-138.

Rural telephone cooperatives.

Public service commission, §46-5-103.

Telephone solicitation no call law.

Actions for violations.

Personal jurisdiction over nonresidents, §46-5-27.

K

KILOWATT-HOURS.

Energy conservation assistance to residential customers.

Covered utility.

Definition, §46-4A-3.

Municipal electric authority of Georgia.

Election of members.

Distribution of votes among representatives to election committee.

Basis, §46-3-117.

Public service commission.

Conversion from oil-burning to coal-burning generating facility.

Recovery of costs.

Determination of rate, §46-2-26.3.

Rate amendments.

Adjustments.

Guidelines for making, §46-2-26.

L

LAW ENFORCEMENT OFFICERS.

Railroads.

Protection of property.

Special officers, §§46-8-230 to 46-8-233.

See RAILROADS.

LAW ENFORCEMENT OFFICERS

—Cont'd

Special policemen.

Railroads.

Protection of property.

Special officers, §§46-8-230 to 46-8-233.

See RAILROADS.

LEASES.

Railroads.

Recordation of leases by railroad companies, §§46-8-1, 46-8-2.

Rolling stock and other equipment.

Contracts for lease, §§46-8-271, 46-8-272.

Sale or lease of property, rights and franchises upon termination of prior lease, §46-8-106.

Service of process on lessee of railroad, §46-8-311.

Service of process on lessor railroad company, §§46-8-312, 46-8-313.

Street, suburban and interurban railroads.

Lease and sale of roads, franchises, etc., between companies, §46-8-341.

Venue.

Actions against lessee of railroad, §46-8-310.

LEGAL ORGANS.

Electric membership corporations.

Articles of incorporation.

Amendments, §46-3-363.

Disposition of assets.

Meeting, §46-3-401.

Intent to dissolve.

Publication of notice, §46-3-423.

Merger or consolidation plan.

Approval, §46-3-382.

Name of corporation, §46-3-383.

Notice of incorporation, §46-3-322.

Voluntary dissolution, §46-3-420.

Municipal electric authority of Georgia.

Revenue bonds, §46-3-131.

Municipal gas authority of Georgia.

Bonds, §46-4-101.

Railroad companies.

Petition for dissolution, §46-8-74.

Surrender of franchise, §46-8-70.

Telegraph service.

Stock-subscription books, §46-5-142.

LEWDNESS.

Telephone communications, §§46-5-21, 46-5-22.

LIABILITY.

Common carriers.

Power to limit liability, §46-9-2.

Telephones.

"911" system.

Exemptions from liability in operation of system, §46-5-131.

LICENSE PLATES.

Limousine carriers, §46-7-85.15.

LIENS.

Carriers, §§46-9-190 to 46-9-192.

Common carriers, §§46-9-190 to 46-9-192.

Municipal electric authority of Georgia.

Bond issues.

Lien of bond owners on funds,
§46-3-149.

Railroads.

Liens against companies, §§46-8-250 to
46-8-254.

See RAILROADS.

LIMITATION OF ACTIONS.

Common carriers, §§46-9-5 to 46-9-7.

Electric membership corporations.

Acquisition of rights of way and
easements.

Actions growing out of, §46-3-204.

Directors and officers.

Actions against, §46-3-304.

Rural telephone cooperatives, §46-5-97.

Telephone solicitation no call law.

Actions for violations, §46-5-27.

LIMOUSINE CARRIERS, §§46-7-85.1 to
46-7-85.17.

Age requirements.

Driver, §46-7-85.10.

Airport fees, §46-7-85.11.

Business license fees, §46-7-85.11.

Certificate.

Applications, §46-7-85.4.

Cancellation, §46-7-85.7.

Unlawful operation, §46-7-85.8.

Commission.

Duties, §46-7-85.5.

Definition of certificate, §46-7-85.1.

Encumberment, §46-7-85.6.

Issuance, §46-7-85.4.

Lease, §46-7-85.6.

Obtaining from commissioner, required,
§46-7-85.3.

Qualifications of applicant, §46-7-85.4.

Required, §46-7-85.3.

Revocation, §46-7-85.7.

Unlawful operation, §46-7-85.8.

LIMOUSINE CARRIERS —Cont'd

Certificate —Cont'd

Suspension, §46-7-85.7.

Unlawful operation, §46-7-85.8.

Temporary permits, §46-7-85.14.

Transfer, §46-7-85.6.

Unlawful operation, §46-7-85.8.

Chauffeurs.

Defined, §46-7-85.1.

Chauffeur's permit.

Application, §46-7-85.10.

Form, §46-7-85.10.

Fee, §46-7-85.9.

Form, §46-7-85.9.

Possession requirement, §46-7-85.9.

Requirements, §46-7-85.10.

Temporary permit, §46-7-85.14.

Term, §46-7-85.9.

Commissioner.

Administrative procedure, §46-7-85.13.

Defined, §46-7-85.1.

Compliance with article.

Required, §46-7-85.2.

Definitions, §46-7-85.1.

Department.

Defined, §46-7-85.1.

Fees.

Airport fees, §46-7-85.11.

Business license fees, §46-7-85.11.

Chauffeur's permit, §46-7-85.9.

License plates, §46-7-85.15.

Highways.

Public highway.

Defined, §46-7-85.1.

Inspections.

Mechanical inspections, §46-7-85.5.

Safety inspections, §46-7-85.5.

License plates.

Deadline, §46-7-85.15.

Fees, §46-7-85.15.

Placement, §46-7-85.15.

Local fees.

Authorized, §46-7-85.11.

Mechanical inspections, §46-7-85.5.

**Operation in compliance with article
required**, §46-7-85.2.

Orders.

Administrative procedure, §46-7-85.13.

Permits.

Chauffeur's permit, §46-7-85.9.

Temporary permits, §46-7-85.14.

Persons.

Defined, §46-7-85.1.

**Preemption of regulation by state of
Georgia**, §46-7-85.11.

Exceptions, §46-7-85.11.

LIMOUSINE CARRIERS —Cont'd

Public service commission.

Rules and regulations.

Duties, §46-7-85.17.

Rates and charges.

Tariff.

Filing, §46-7-85.12.

Rules and regulations.

Administrative procedure, §46-7-85.13.

Chauffeur's permits, §46-7-85.9.

Implementation of provisions,
§46-7-85.17.

Promulgation, §46-7-85.17.

Safety, §46-7-85.5.

Temporary permits, §46-7-85.14.

Unlawful operation, §46-7-85.8.

LINES.

Telephones.

See TELEPHONES.

LIQUEFIED NATURAL GAS.

Transportation of hazardous materials,
§§46-11-1 to 46-11-6.

See HAZARDOUS MATERIALS AND
WASTE.

LIVESTOCK.

Railroads.

Cattle guards, §§46-8-129 to 46-8-132.

See RAILROADS.

Killing or injury.

Damages for killing of livestock.

Liens against companies, §§46-8-252,
46-8-253.

Owner's putting injured livestock to
death.

Effect on right of recovery against
railroad company, §46-8-212.

Putting injured livestock to death,
§46-8-212.

Reports, §§46-8-210, 46-8-211.

LOCAL GOVERNMENT.

Telephones.

"911" system.

General provisions, §§46-5-120 to
46-5-139.

See TELEPHONES.

LONG ARM STATUTE.

Telephone solicitation no call law.

Actions for violations.

Personal jurisdiction over
nonresidents, §46-5-27.

LOUISIANA.

Rapid rail transit.

Mississippi-Louisiana-Alabama-Georgia
rapid rail transit compact, §46-9-300.

M

MAIL.

Electric membership corporations.

Meetings of members.

Notice, §46-3-263.

MANDAMUS.

Gas.

Underground storage.

Enforcement of provisions, §46-4-61.

Motor carriers.

Enforcement of provisions, §46-7-30.

MASS TRANSPORTATION.

Motor carriers, §§46-7-1 to 46-7-85.17.

See MOTOR CARRIERS.

MERGER.

Electric membership corporations.

Merger or consolidation, §§46-3-380 to
46-3-385.

See ELECTRIC MEMBERSHIP
CORPORATIONS.

Railroads, §§46-8-80, 46-8-81.

Street, suburban and interurban
railroads.

Corporations operating electric
railroads or generating electricity,
§§46-8-334 to 46-8-337.

Rural telephone cooperatives, §46-5-88.

Effect, §46-5-89.

METERS.

Utility rates.

Billing.

Charges for meter reading.

Notation on bill, §46-2-27.

MINERAL RESOURCES.

Railroads.

Crossing other railroads to reach
minerals, §§46-8-104, 46-8-105.

MISDEMEANORS.

Common carriers.

Bonds, surety.

Requiring specific bonding company
as surety, §46-9-8.

Freight.

False billing or false weighing by
common carrier, §46-9-56.

False billing or false weighing by
person who delivers property or
to whom property delivered,
§46-9-57.

Overcharging by officers, agents and
employees, §46-9-252.

MISDEMEANORS —Cont'd

Common carriers —Cont'd

Passenger tickets.

Selling or dealing in by person other than authorized agent of carrier, §46-9-139.

Electricity.

High-voltage lines.

Violations of provisions, §46-3-40.

Electric membership corporations.

Officers and directors.

Signing documents known to be false, §46-3-541.

Hazardous materials and waste.

Transportation of hazardous materials.

Violations of provisions, §46-11-4.

Household goods carriers for hire.

Operating without certificate, advertising services falsely, §48-7-91.

Motor carriers, §§46-7-38, 46-7-39.

Public service commission.

Violations of provisions or orders of commission, §46-2-93.

Railroads.

Grade crossings.

Blowposts to warn of crossings.

Violations of provisions, §46-8-190.

Within city limits, §46-8-191.

Signboards to warn of grade crossing at which there is a switch.

Violations of requirement, §46-8-198.

Signs.

Standard signs.

Violations of provisions, §46-8-196.

Hiding on train for purpose of stealing a ride, §46-8-381.

Intruding on railroad tracks, §46-8-380.

Locomotive engineers.

Qualifications.

Violations by companies, §46-8-150.

Locomotives.

Equipment.

Violations of provisions, §§46-8-170, 46-8-172.

Passengers.

Assignment to cars, compartments and seats.

Failure to remain in assigned car, compartment or seat, §46-9-135.

Stopping at track intersections.

Violations of provisions, §46-8-193.

MISDEMEANORS —Cont'd

Railroads —Cont'd

Switches.

Signboards to warn of drawbridges, grade crossings and stations at which there is a switch.

Violations of requirement, §46-8-198.

Ships and vessels.

Passenger tickets.

Violations of provisions, §46-9-172.

Telecommunications service.

Theft of, §46-5-2.

Telephones.

Automatic dialing and recorded message (ADAD) equipment.

Prohibited acts as to use, §§46-5-23, 46-5-24.

Harassing purposes.

Use of telephone for, §46-5-21.

Obscenity.

Prohibited use of telephones, §§46-5-21, 46-5-22.

Theft of telecommunications service, §46-5-2.

Threatening purposes.

Use of telephone for, §46-5-21.

Unsolicited commercial facsimile messages.

Transmission, §46-5-25.

Theft of telecommunications service.

Avoiding or attempting to avoid charges, §46-5-2.

MISSISSIPPI.

Rapid rail transit.

Mississippi-Louisiana-Alabama-Georgia rapid rail transit compact, §46-9-300.

MOBILE TELEPHONES.

Telephone solicitations.

Mobile or wireless subscribers.

No-call law, §46-5-27.

Theft of telecommunications service,

§§46-5-2 to 46-5-4.

MORTGAGES.

Railroads.

Powers of railroad companies, §46-8-100.

Sale of railroad under trust deed or upon foreclosure of mortgage, §§46-8-107, 46-8-108.

MORTGAGES —Cont'd

Rural telephone cooperatives.

- Approval of members, §46-5-93.
- Recordation.
- Effect, §46-5-95.
- Securing indebtedness to federal agency, §46-5-93.

MOTOR CARRIERS, §§46-7-1 to 46-7-85.17.

Actions.

- Direct action against insurer, §46-7-12.

Appeals.

- Imposition of penalty for violation of law administered by commissioner, §46-7-90.

- Orders of commissioner, §46-7-33.

Applicability of provisions.

- Carriers in both interstate and intrastate commerce, §46-7-36.
- Private carriers, §46-7-37.

Baggage.

- Generally, §46-7-20.
- Public service commission.
- Rates.

- Prescribing, §46-7-20.

- Rates for carriage, §46-7-20.

Bonds, surety.

- Certificates of public convenience and necessity.
- Requirement before issuance, §46-7-12.
- Interstate commerce.
- Requirements for vehicles engaged solely in, §46-7-16.

Burden of proof.

- Certificates of public convenience and necessity.
- Applications, §46-7-7.
- Exceptions to provisions.
- Applicability, §46-7-38.

Certificate.

- Alteration or amendment, §46-7-5.
- Applications, §46-7-8.
- Burden of proof, §46-7-7.
- Contents, §46-7-8.
- Fees, §46-7-9.
- Hearing on, §46-7-10.
- New application after denial, §46-7-11.
- Rules, adoption by commissioner, §46-7-8.

Bonds, surety.

- Requirement, §46-7-12.

Burden of proof as to applications, §46-7-7.

- Conditions determining granting of certificate, §46-7-7.

MOTOR CARRIERS —Cont'd

Certificate —Cont'd

Denial.

- New application, §46-7-11.

Fees, §46-7-9.

Generally, §46-7-3.

Household goods carriers.

- Operating without certificate, penalty, §46-7-91.

Hypothecation, §46-7-6.

Injunctions.

- Operation without certificate, §46-7-31.

Insurance.

Indemnity insurance.

- Requirement, §46-7-12.

Interstate commerce.

- Vehicles engaged solely in, §46-7-16.

Issuance, §46-7-4.

- Requirements before issuance, §46-7-12.

Protest by other carriers, §46-7-7.

Required, §46-7-3.

Revocation or suspension, §46-7-5.

Saving provision.

- Effect of certificates granted under prior laws, §46-7-34.

Terms and conditions, §46-7-4.

Transfer, §46-7-6.

Commissioner.

Appeals.

- Orders of commissioner, §46-7-33.

Defined, §46-7-1.

Hazardous materials transportation.

- Generally, §§46-11-1 to 46-11-6.

See HAZARDOUS MATERIALS AND WASTE.

Injunctions.

- Enforcement of provisions, §46-7-30.

Mandamus.

- Enforcement of provisions, §46-7-30.

Rates and charges.

- Authority as to, §46-7-18.

Rules and regulations.

- Enforcement of provisions, §46-7-27.

Criminal law and procedure.

- Misdemeanors, §§46-7-38, 46-7-39.

Department.

Defined, §46-7-1.

Hazardous materials transportation.

- Generally, §§46-11-1 to 46-11-6.

See HAZARDOUS MATERIALS AND WASTE.

Discontinuance of service.

- Notice, §46-7-14.

Discrimination in rates.

- Prohibited, §46-7-19.

MOTOR CARRIERS —Cont'd

Emergencies.

- Registration of vehicles.
- Emergency vehicle registration permits, §46-7-15.
- Temporary emergency authority to operate, §46-7-13.

Emergency, temporary or trip-lease registration permit.

- Issuance in lieu of registration, §46-7-16.

Evidence.

- Intentional violations of law.
- Possession of certain goods as prima facie evidence, §46-7-38.

Fees.

- Certificate, §46-7-9.
- Nonresident motor common carriers.
- Service of process on secretary of state, §46-7-17.
- Registration of vehicles, §§46-7-15, 46-7-16.

Free transportation.

- Permissible reductions in rates and waivers of charges.
- Commission orders, §46-7-19.
- Unauthorized free transportation.
- Use or acceptance, §46-7-38.

Gas.

- Transportation of hazardous materials, §§46-11-1 to 46-11-6.
- See HAZARDOUS MATERIALS AND WASTE.

Hazardous materials.

- Transportation, §§46-11-1 to 46-11-6.
- See HAZARDOUS MATERIALS AND WASTE.

Hearing on application for certificate,
§46-7-10.

Highways, roads and streets.

- No vested right or perpetual franchise in use of public highways, §46-7-32.

Household goods carriers for hire.

- Operating without certificate, advertising services falsely, penalty, §46-7-91.

Injunctions.

- Enforcement of provisions, §46-7-30.
- Operation without certificate, §46-7-31.

Insurance.

- Certificates of public convenience and necessity.
- Indemnity insurance.
- Requirement before issuance, §46-7-12.
- Direct action against insurer, §46-7-12.

MOTOR CARRIERS —Cont'd

Insurance —Cont'd

- Interstate commerce.
- Indemnity insurance.
- Requirements for vehicles engaged solely in, §46-7-16.

Interpretation and construction.

- No vested right or perpetual franchise in use of public highways, §46-7-32.

Interstate commerce.

- Carriers engaged in both interstate and intrastate commerce.
- Applicability of provisions, §46-7-36.
- Requirements as to vehicles engaged solely in, §46-7-16.

Limousine carriers.

- General provisions, §§46-7-85.1 to 46-7-85.17.
- See LIMOUSINE CARRIERS.

Mandamus.

- Enforcement of provisions, §46-7-30.

Misdemeanors, §§46-7-38, 46-7-39.

Nonresidents.

- Service of process, §46-7-17.

Notice.

- Certificate.
- Hearing on application, §46-7-10.
- Discontinuance of service, §46-7-14.

PCB (polychlorinated biphenyl).

- Transportation of hazardous materials, §§46-11-1 to 46-11-6.
- See HAZARDOUS MATERIALS AND WASTE.

Penalties.

- Household goods carriers for hire.
- Operating without certificate, advertising services falsely, §46-7-91.
- Violations of laws administered by commissioner, §46-7-90.

Permits.

- Emergency, temporary or trip-lease registration permit.
- Issuance in lieu of registration, §46-7-16.
- Motor carrier of property permits, §46-7-15.1.
- Certificates granted under prior laws, §46-7-34.

Private carriers, §46-7-37.

Public service commission.

- Books and records of carriers.
- Powers as to, §46-7-23.
- General provisions, §§46-2-1 to 46-2-95.
- See PUBLIC SERVICE COMMISSION.

MOTOR CARRIERS —Cont'd

Public service commission —Cont'd

Stock and stockholders.

Approval of issuance by commission.

Exemption for certain motor carriers, §46-2-28.

Radioactive materials.

Transportation of hazardous materials, §§46-11-1 to 46-11-6.

See HAZARDOUS MATERIALS AND WASTE.

Rates and charges.

Baggage, §46-7-20.

Commissioner.

Authority as to, §46-7-18.

Discrimination.

Prohibited, §46-7-19.

Tariffs, §46-7-18.

Rebates.

Misdemeanors, §46-7-38.

Records, §46-7-23.

Registration and licensing of motor vehicles.

Emergency registration permits, §46-7-15.

Exempt commodity intrastate commerce.

Vehicles engaged in, §46-7-15.

Fees, §§46-7-15, 46-7-16.

Interstate commerce.

Vehicles engaged solely in, §46-7-16.

Local government.

Powers, §46-7-15.

Temporary registration permits, §46-7-15.

Trip-lease vehicle registration permits, §46-7-15.

Regulation of carriers.

Commissioner's powers, §46-7-2.

Motor common or contract carriers, §46-7-2.

Rules and regulations.

Enforcement of provisions, §46-7-27.

Safety regulations, §46-7-26.

Private carriers, §46-7-37.

Safety.

Private carriers, §46-7-37.

Rules and regulations, §46-7-26.

Saving provision.

Certificates granted under prior laws, §46-7-34.

Secretary of state.

Nonresident motor common carriers.

Service of process on, §46-7-17.

Service of process.

Nonresidents, §46-7-17.

Size and weight of vehicles.

Observance of laws, §46-7-24.

MOTOR CARRIERS —Cont'd
Speed.

Observance of laws, §46-7-24.

Stock and stockholders.

Public service commission.

Approval of issuance of stocks and bonds.

Exemption for certain motor carriers, §46-2-28.

Temporary emergency authority to operate as, §46-7-13.

Trailers.

Safety regulations, §46-7-26.

Venue.

Actions against, §46-7-17.

Violations of laws administered by commissioner.

Penalty, procedure, §46-7-90.

MOTOR VEHICLE INSURANCE.

Direct action against insurer, motor carriers, §46-7-12.

Motor carriers.

Direct action against insurer, §46-7-12.

Interstate commerce, vehicles engaged solely in.

Indemnity insurance, §46-7-16.

MOTOR VEHICLES.

Department of motor vehicle safety.

Commissioner of motor vehicle safety.

Limousine carriers generally, §§46-7-85.1 to 46-7-85.17.

See LIMOUSINE CARRIERS.

Hazardous materials transportation.

Generally, §§46-11-1 to 46-11-6.

See HAZARDOUS MATERIALS AND WASTE.

Limousine carriers generally, §§46-7-85.1 to 46-7-85.17.

See LIMOUSINE CARRIERS.

License plates.

Limousine carriers, §46-7-85.15.

Railroads.

Alteration of tracks, bridges, etc., to accommodate motor vehicles, §46-8-133.

Registration.

Motor carriers, §§46-7-15, 46-7-16.

Weight and size of vehicles and loads.

Motor carriers.

Observance of laws, §46-7-24.

MUNICIPAL CORPORATIONS.

Authorities.

Municipal electric authority of Georgia, §§46-3-110 to 46-3-155.

See MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA.

MUNICIPAL CORPORATIONS —Cont'd
Electricity.

Municipal electric authority of Georgia,
§§46-3-110 to 46-3-155.

See MUNICIPAL ELECTRIC
AUTHORITY OF GEORGIA.

Gas.

Municipal gas authority of Georgia,
§§46-4-80 to 46-4-125.

See MUNICIPAL GAS AUTHORITY
OF GEORGIA.

Municipal electric authority of Georgia,
§§46-3-110 to 46-3-155.

See MUNICIPAL ELECTRIC
AUTHORITY OF GEORGIA.

Telephones.

"911" system.

General provisions, §§46-5-120 to
46-5-139.

See TELEPHONES.

**MUNICIPAL ELECTRIC AUTHORITY OF
GEORGIA, §§46-3-110 to 46-3-155.**

Actions.

Venue of actions under provisions,
§46-3-151.

Agents.

Bond issues.

Paying agents for bonds, §46-3-142.

Appeals.

Bond issues.

Validation of bonds, §46-3-131.

Audits, §46-3-150.

Bond anticipation notes, §46-3-143.

Defined, §46-3-111.

Bond issues, §§46-3-131 to 46-3-147.

Additional bonds.

Deficit in proceeds, §46-3-137.

Appeals.

Validation of bonds, §46-3-131.

Bond anticipation notes, §46-3-143.

Defined, §46-3-111.

Cancellation of evidences of

indebtedness and interest coupons,
§46-3-140.

Conditions precedent to issuance,
§46-3-131.

Definition of "bonds," §46-3-111.

District attorney.

Validation of bonds, §46-3-131.

Failure to pursue judicial validation
of bonds, §46-3-133.

Generally, §46-3-131.

Immunity of state and political
subdivisions from liability on,
§46-3-145.

**MUNICIPAL ELECTRIC AUTHORITY OF
GEORGIA —Cont'd**

Bond issues —Cont'd

Interest, §46-3-139.

Interest coupons.

Cancellation, §46-3-140.

Replacement of mutilated, lost, stolen
or destroyed coupons, §46-3-138.

Investments.

Bonds as legal investments, §46-3-134.

Liability on bonds, §46-3-145.

Lien of bond owners on funds,
§46-3-149.

Lost or destroyed bonds.

Replacement, §46-3-138.

Mutilated bonds.

Replacement, §46-3-138.

Negotiability of bonds and notes,
§46-3-144.

Notice.

Intention to issue, §46-3-131.

Validation of bonds, §46-3-131.

Validation of contracts for payments
pledged as security for bonds,
§46-3-132.

Paying agents for bonds, §46-3-142.

Payment of principal and interest.

Default.

Receiver, §46-3-147.

Pledge of revenues and earnings,
§46-3-135.

Trust agreement or indenture.

Securing of bonds by, §46-3-136.

Pledge of revenues and earnings to
payment of principal and interest,
§46-3-135.

Powers of authority, §46-3-126.

Preservation of interest and rights of
owners of bonds, §46-3-146.

Procedure for issuance, §46-3-131.

Proceeds.

Application, §46-3-137.

Surplus proceeds.

Application, §46-3-137.

Trust funds.

Status of proceeds as, §46-3-149.

Receiver.

Default on bonds, §46-3-147.

Records, §46-3-141.

Replacement of mutilated, lost, stolen or
destroyed bonds, §46-3-138.

Rights of owners of bonds.

Preservation, §46-3-146.

Securities.

Status as, §46-3-134.

Signatures, §46-3-131.

**MUNICIPAL ELECTRIC AUTHORITY OF
GEORGIA —Cont'd**

Bond issues —Cont'd

- Stolen bonds.
 - Replacement, §46-3-138.
- Tax exemption, §46-3-128.
- Terms and conditions of bonds, §46-3-131.
- Trust agreement or indenture.
 - Securing of bonds by, §46-3-136.
- Validation of bond, §46-3-131.
 - Certificate of validation, §46-3-131.
 - Failure of district attorney to pursue judicial validation, §46-3-133.
- Validation of contracts for payments pledged as security for bonds, §46-3-132.

Contracts.

- Political subdivisions.
 - Bond issues.
 - Contracts as prerequisite to issuance, §46-3-131.
 - Validation of contracts for payments pledged as security for bonds, §46-3-132.
 - Eligibility to contract with authority, §46-3-130.
 - Use of projects and facilities of authority, §46-3-129.
 - Power to contract, §46-3-126.

Creation, §46-3-112.

Declaration of necessity, §46-3-110.

Definitions, §46-3-111.

Election of members, §46-3-113.

- Election committee, §46-3-113.
 - Additional representatives, §46-3-116.
 - Selection by political subdivisions subsequently contracting with authority, §46-3-116.
 - Defined, §46-3-111.
 - Ineligibility of representatives for authority membership, §46-3-114.
- Meetings.
 - Time of meeting prior to annual meeting of authority, §46-3-115.
- Quorum, §46-3-117.
- Vacancies on authority.
 - Filling, §46-3-118.
- Voting by representatives.
 - Distribution of votes, §46-3-117.

Eminent domain.

- Powers of authority, §46-3-126.

Interest.

- Bond issues, §46-3-139.

**MUNICIPAL ELECTRIC AUTHORITY OF
GEORGIA —Cont'd**

Interpretation and construction.

- Liberal construction of provisions, §46-3-155.
- Supplemental nature of powers, §46-3-154.

Investments.

- Bonds of authority as legal investments, §46-3-134.
- Powers of authority, §46-3-126.

Jurisdiction.

- Public service commission, §46-3-152.

Legislative declaration, §46-3-110.

- Authority property as public property, §46-3-128.
- Purpose of authority, §46-3-125.

Liens.

- Bond issues.
 - Lien of bond owners on funds, §46-3-149.

Meetings, §46-3-121.

- Adjournment.
 - Less than majority present, §46-3-120.
- Applicable laws, §46-3-153.
- Notice, §46-3-121.

Negotiable instruments.

- Bond issues, §46-3-144.

Notice.

- Bond issues, §46-3-131.
 - Validation of bond, §46-3-131.
 - Validation of contracts for payments pledged as security for bonds, §46-3-132.
- Meetings, §46-3-121.
- Removal of members from office, §46-3-123.

Number of members, §46-3-113.

Office.

- Location of principal office, §46-3-112.

Officers, §46-3-119.

- Election from membership, §46-3-119.

Personnel.

- Employment, §46-3-122.

Powers, §46-3-126.

- Supplemental nature of powers, §46-3-155.

Projects.

- Contracts with political subdivisions for use of projects, §46-3-129.
- Defined, §46-3-111.
- Nonprofit operation, §46-3-127.
- Powers as to, §46-3-126.

Public service commission.

- Jurisdiction of commission, §46-3-152.

Purpose of authority, §46-3-125.

**MUNICIPAL ELECTRIC AUTHORITY OF
GEORGIA —Cont'd**

Quorum, §46-3-120.

Rates and charges, §46-3-148.

Fixing by authority, §46-3-127.

Payment, §46-3-148.

Public service commission.

Jurisdiction of commission, §46-3-152.

Trust funds.

Status of revenues as, §46-3-149.

Real property.

Acquisition of property.

Powers of authority, §46-3-126.

Receivers.

Bond issues.

Default on bonds, §46-3-147.

Records, §46-3-124.

Applicable laws, §46-3-153.

Bond issues, §46-3-141.

Reimbursement of members for expenses,
§46-3-122.

Removal of members from office,
§46-3-123.

Residence.

Legal situs or residence of authority,
§46-3-112.

Members of authority.

Residency requirements, §46-3-114.

Rules and regulations, §46-3-122.

Signatures.

Bond issues, §46-3-131.

Status.

Instrumentality of state, §46-3-112.

Taxation.

Exemption from taxation, §46-3-128.

Payments in lieu of taxes, §46-3-128.

Terms of members, §§46-3-113, 46-3-115.

Trusts and trustees.

Bond issues.

Securing of bonds by trust agreement
or indenture, §46-3-136.

Revenues and earnings of authority.

Status as trust funds, §46-3-149.

Vacancies.

Filling, §46-3-118.

Venue.

Actions under provisions, §46-3-151.

Voting by members.

Action by majority vote, §46-3-120.

**MUNICIPAL GAS AUTHORITY OF
GEORGIA**, §§46-4-80 to 46-4-125.

Actions.

Jurisdiction of actions under provisions,
§46-4-121.

**MUNICIPAL GAS AUTHORITY OF
GEORGIA —Cont'd**

Agents.

Bond issues.

Paying agents, §46-4-112.

Audits.

Annual audit, §46-4-120.

Bond issues.

Bond anticipation notes, §46-4-113.

Defined, §46-4-81.

Cancellation of retired bonds, §46-4-110.

Debt or pledge of faith of state.

Bonds not to constitute, §46-4-115.

Definition of "bonds," §46-4-81.

Destruction of retired bonds, §46-4-110.

Interest, §§46-4-101, 46-4-109.

Investments.

Bonds as legal investments, §46-4-104.

Issuance of bonds, §46-4-101.

Liability on bonds, §46-4-115.

Lost, stolen or destroyed bonds.

New bonds, §46-4-108.

Mutilated bonds.

New bonds, §46-4-108.

Negotiability, §46-4-114.

Notice, §46-4-101.

Paying agents, §46-4-112.

Payment of principal and interest.

Default.

Appointment of receivers, §46-4-117.

Pledge of revenue, §46-4-105.

Pledge of revenue, §46-4-105.

Power to issue bond, §46-4-96.

Proceeds.

Surplus proceeds, §46-4-107.

Use, §46-4-107.

Receiver.

Appointment upon default, §46-4-117.

Records, §46-4-111.

Resolution authorizing issuance,
§46-4-101.

Rights of bondholders.

Protection, §46-4-116.

Security.

Trust agreement or indenture,
§46-4-106.

Taxation.

Exemptions, §46-4-98.

Terms and conditions of bonds,
§46-4-101.

Trust agreement or indenture to secure
bonds, §46-4-106.

Trusts and trustees.

Revenues held in trust for
bondholders, §46-4-119.

**MUNICIPAL GAS AUTHORITY OF
GEORGIA —Cont'd**

Bond issues —Cont'd

Validation of bonds.

Bond anticipation notes.

Prerequisite to issuance of notes,
§46-4-113.

Effect of adjudication, §46-4-102.

Failure of district attorney to file
petition, §46-4-103.

Fees, §46-4-101.

Intervention in proceedings,
§46-4-102.

Parties.

Necessary parties, §46-4-102.

Petition for judicial validation,
§46-4-101.

Failure of district attorney to file,
§46-4-103.

Contracts.

Bond issues.

Impairment of contracts to adversely
affect rights of bondholders.

Prohibited, §46-4-116.

Political subdivisions, §46-4-99.

Entities with gas distribution systems,
§46-4-100.

Power to contract with, §46-4-96.

Resolutions of declaration of intention
to contract with authority,
§46-4-83.

Power to contract, §46-4-96.

Creation, §46-4-82.

Declaration of need, §46-4-80.

Definitions, §46-4-81.

Election of members, §46-4-83.

Election committee, §46-4-83.

Defined, §46-4-81.

Designation of representatives,
§46-4-86.

Eligibility of members for membership
on authority, §46-4-84.

Meetings, §46-4-85.

Quorum, §46-4-87.

Removal of members from office,
§46-4-93.

Representatives, §46-4-86.

Vacancies in membership of authority.
Filling, §46-4-88.

Voting by representatives.

Weighted vote, §46-4-87.

Eminent domain.

Power of eminent domain, §46-4-96.

Expenses of members.

Reimbursement, §46-4-92.

**MUNICIPAL GAS AUTHORITY OF
GEORGIA —Cont'd**

Fees.

Bond issues.

Validation of bonds, §46-4-101.

Functions, §46-4-95.

Interest.

Bond issues, §§46-4-101, 46-4-109.

Interpretation and construction.

Liberal construction of provisions,
§46-4-125.

Supplementary nature of provisions,
§46-4-124.

Intervention.

Bond issues.

Validation proceedings, §46-4-102.

Investments.

Bonds as legal investments, §46-4-104.

Powers of authority, §46-4-96.

Jurisdiction.

Actions under provisions, §46-4-121.

Legislative declaration, §46-4-80.

Public purpose, §46-4-98.

Meetings.

Annual meetings, §46-4-91.

Applicable laws, §46-4-123.

Notice, §46-4-91.

Quorum, §46-4-90.

Special meetings, §46-4-91.

Voting.

Action by majority vote, §46-4-90.

Negotiable instruments.

Bond issues, §46-4-114.

Nonprofit operation, §46-4-97.

Notice.

Bond issues, §46-4-101.

Meetings, §46-4-91.

Office.

Principal office, §46-4-82.

Officers, §46-4-89.

Personnel.

Employment, §46-4-92.

Powers, §46-4-96.

Projects.

Defined, §46-4-81.

Public service commission.

Exemption from regulation by
commission, §46-4-122.

Purpose, §46-4-95.

Public purpose, §46-4-98.

Qualifications of members, §46-4-84.

Rates and charges, §46-4-118.

Fixing by authority, §§46-4-97, 46-4-118.

Trusts and trustees.

Revenues held in trust for
bondholders, §46-4-119.

**MUNICIPAL GAS AUTHORITY OF
GEORGIA —Cont'd**

Real property.

- Acquisition of real property.
- Powers of authority, §46-496.
- Public property.
- Status of authority property as,
§46-498.

Receivers.

- Bond issues.
- Default.
- Appointment of receiver, §46-4117.

Records, §46-494.

- Applicable laws, §46-4123.
- Bond issues, §46-4111.

Removal of members from office, §46-493.

Residence.

- Legal situs, §46-482.

Secretary-treasurer, §46-489.

Taxation.

- Exemptions from taxation, §46-498.
- Payments in lieu of taxes, §46-498.

Terms of office of members, §46-485.

Trusts and trustees.

- Revenues held in trust for bondholders,
§46-4119.

Vacancies in membership.

- Filling, §46-488.

MUTILATION.

Municipal electric authority of Georgia.

- Bond issues.
- Interest coupons.
- Replacement of mutilated coupons,
§46-3-138.
- Replacement of mutilated bonds,
§46-3-138.

Municipal gas authority of Georgia.

- Bond issues.
- New bonds for mutilated bonds,
§46-4-108.

Railroads.

- Highway crossings.
- Mutilation of crossing signs
prohibited, §46-8-196.

N

NAMES.

Electric membership corporations,

§§46-3-220, 46-3-221.

- Foreign electric cooperatives, §§46-3-452,
46-3-453.

- Reservation of names, §46-3-221.

Rural telephone cooperatives, §46-5-65.

NATURAL GAS.

Competition and deregulation act,
§§46-4-150 to 46-4-166.

See NATURAL GAS COMPETITION
AND DEREGULATION ACT.

**NATURAL GAS COMPETITION AND
DEREGULATION ACT, §§46-4-150 to**

46-4-166.

Actions.

- Damages for regulatory violations,
§46-4-160.5.

Adequate market condition determination,
§46-4-156.

Auditors.

- Independent auditors.
- Competitive requests for proposal
process, §46-4-158.1.

Certificates of authority, §§46-4-153,
46-4-153.1.

Citation of act, §46-4-150.

Classes of service for retail customers.

- Firm natural gas customers, §§46-4-158.4,
46-4-158.5.

Commission.

- Authority with respect to marketers,
§46-4-160.
- Certificates of authority, §§46-4-153,
46-4-153.1.
- Determination of adequate market
conditions, §46-4-156.
- Jurisdiction, §46-4-155.
- Limitations, §46-4-162.
- Regulations, §46-4-156.
- Reports, §46-4-165.
- Responsibility, §46-4-154.
- Temporary directives, §46-4-157.

Construction of provisions, §46-4-164.

Consumer bill of rights, §46-4-151.

Consumer complaint process.

- Retail natural gas marketers,
§§46-4-158.2, 46-4-158.5.

Consumer energy choice information.

- Disclosure statements, §46-4-158.3.

Contracts.

- Special or negotiated contracts valid.
- Validity of special or negotiated
contracts, §46-4-163.

Control, defined, §46-4-159.

Cross-subsidizations.

- Electric membership corporations and
gas affiliates, §46-4-153.1.

Customer three-day right of recession.

- Retail natural gas marketers,
§§46-4-158.2, 46-4-158.5.

**NATURAL GAS COMPETITION AND
DEREGULATION ACT —Cont'd**

Damages.

Retail customers for regulatory violations, §46-4160.5.

Definitions, §46-4152.

Disconnection of service for nonpayment of bill.

Prompt billing requirement, §§46-4158.2, 46-4158.5.

Electing distribution company.

Defined, §46-4152.

Service quality standards, §46-4158.1.

Election to provisions of article.

Electing distribution company, defined, §46-4152.

Jurisdiction of commission, §46-4155.

Notice of election, §46-4154.

Required activities, §46-4158.

EMC gas affiliates.

Certification of authority.

Contents of commission's order, §46-4153.1.

Defined, §46-4152.

Energy choice information.

Disclosure statements, §46-4158.3.

Review of marketer's compliance, §46-4158.5.

Estimated residential consumer bills.

Retail natural gas marketers, §§46-4158.2, 46-4158.5.

Firm natural gas customers.

Classes of service for retail customers, §§46-4158.4, 46-4158.5.

Selection of regulated provider, §46-4166.

Funds.

Universal service fund, §46-4161.

Independent auditors.

Competitive requests for proposal process, §46-4158.1.

Intent of legislature, §46-4151.

Interpretation and construction, §46-4164.

Issuance of certificate of authority,

§§46-4153, 46-4153.1.

Jurisdiction of commission, §46-4155.

Legislative findings, §46-4151.

Limitations on commission, §46-4162.

Low-income residential customers.

Cancellation fees prohibition, §§46-4158.2, 46-4158.5.

Defined, §46-4152.

Selection of regulated provider, §46-4166.

**NATURAL GAS COMPETITION AND
DEREGULATION ACT —Cont'd**

Low-income residential customers —Cont'd

Voluntary contributions by energy customers, §46-4160.3.

Marketers.

Authority of commission with respect to, §46-4160.

Billing disputes and payment arrangements.

Establishment of polices and procedures, §§46-4158.2, 46-4158.5.

Billing errors, §46-4160.2.

Consumer energy choice information, §46-4158.3.

Defined, §46-4152.

Dispute resolution, §46-4160.1.

Pricing methodology in disclosure statement, §§46-4158.2, 46-4158.5.

Restraint of competition from another provider or marketer, §§46-4158.2, 46-4158.5.

Service quality standards for certified marketers, §46-4158.1.

Terms of service for natural gas customers, §§46-4158.2, 46-4158.5.

Natural gas consumer education advisory board.

Creation and composition, §46-4160.4.

Notice of election, §46-4154.

Regulated providers of natural gas.

Defined, §46-4152.

Firm natural gas customers.

Selection of service provider, §46-4166.

Low-income residential customers.

Selection of service provider, §46-4166.

Service quality standards, §46-4158.1.

Regulations, §46-4156.

Reports, §46-4165.

Required activities, §46-4158.

Response to complaints, §46-4159.

Responsibility of commission, §46-4154.

Service quality standards, §46-4158.1.

Short title, §46-4150.

Tariffs, §46-4159.

Temporary directives, §46-4157.

Universal service fund, §46-4161.

Voluntary contributions by energy customers.

Low-income residential customers, §46-4160.3.

NATURAL RESOURCES.

Department of natural resources.

- Gas.
 - Underground storage.
 - Effect of provisions.
 - Authority of department of natural resources, §46-4-62.

NECESSARY PARTIES.

Municipal gas authority of Georgia.

- Bond issues.
- Validation proceedings, §46-4-102.

NEGLIGENCE.

Common carriers, §§46-9-1 to 46-9-3.

- Contractual limitation of liability generally, §§46-9-2, 46-9-3.
- Presumption, §46-9-1.
- Loss of goods.
 - Exceptions, §46-9-1.
 - Showings required, §46-9-3.
- Standard of care, §46-9-1.

Comparative negligence.

- Railroad liability.
 - Amount of recovery, §46-8-291.

Ordinary care or diligence.

- Carriers, §46-9-1.
 - Passengers.
 - Extraordinary diligence, §46-9-132.
- Common carriers.
 - Extraordinary diligence, §46-9-1.

Railroads.

- Liability for damages, §§46-8-290, 46-8-291.

911 SYSTEM, §§46-5-120 to 46-5-139.

See **TELEPHONES.**

NO-CALL TELEMARKETING LAW,

§46-5-27.

NONPROFIT CORPORATIONS.

Deadlocks.

- President's authority to institute or defend legal proceedings, §46-3-301.

NONRESIDENTS.

Jurisdiction.

- Personal jurisdiction over.
 - Telephone solicitation no call law.
 - Actions for violations, §46-5-27.

Motor carriers, service of process,

§46-7-17.

Telephone solicitation no call law.

- Actions for violations.
 - Personal jurisdiction over nonresidents, §46-5-27.

NOTES.

Southwest Georgia railroad excursion authority.

- Bond anticipation notes, §46-9-327.
- Governments not obligated, §46-9-330.

NOTICE.

Consumers' utility counsel division.

- Service of notice on director, §46-10-5.

Electricity.

- High-voltage lines.
 - Notice of work, §§46-3-33, 46-3-34.

Electric membership corporations.

- See **ELECTRIC MEMBERSHIP CORPORATIONS.**

Gas.

- Underground storage.
 - Orders approving or disapproving projects.
 - Hearing on application, §46-4-53.

Motor carrier certificate.

- Hearing on application, §46-7-10.

Motor carrier service discontinuance,

§46-7-14.

Municipal electric authority of Georgia.

- Bond issues, §46-3-131.
 - Validation of bond, §46-3-131.
 - Validation of contracts for payments pledged as security for bonds, §46-3-132.
- Meetings, §46-3-121.
- Removal of members from office, §46-3-123.

Municipal gas authority of Georgia.

- Bond issues, §46-4-101.
- Meetings, §46-4-91.

Public service commission.

- Changing rate, charge, classification or service, §46-2-25.
- Rates and charges.
 - Changing rates, §46-2-25.
- Special fee.
 - Notice of amount due, §46-2-10.

Railroads.

- See **RAILROADS.**

Rural telephone cooperatives.

- Meetings of members, §46-5-80.
 - Amendment of articles of incorporation, §46-5-85.
- Consolidation of cooperatives, §46-5-87.
- Dissolution of cooperatives, §46-5-91.
- Merger of cooperatives, §46-5-88.
- Sale of all or substantial part of property, §46-5-93.
- Waiver of notice, §46-5-81.

NOTICE —Cont'd

Telephone lines, plants or systems.

Certificate of public convenience and necessity.

Application.

Notice of receipt, §46-5-43.

NUISANCES.

Telephone solicitors.

Georgia no-call law, §46-5-27.

O

OATHS.

Public service commission.

Hearing officers.

Power to administer oaths, §46-2-58.

Oath of office of commissioners, §46-2-3.

OBSCENITY.

Telephones.

Prohibited use of telephones, §§46-5-21, 46-5-22.

OIL-BURNING ELECTRIC

GENERATING FACILITIES.

Public service commission.

Rates and charges.

Conversion from oil-burning to coal-burning generating facility.

Recovery of costs, §46-2-26.3.

ORGANS.

Legal organs.

Electric membership corporations.

Articles of incorporation.

Amendments, §46-3-363.

Disposition of assets.

Meeting, §46-3-401.

Intent to dissolve, §46-3-423.

Merger or consolidation plan.

Approval, §46-3-382.

Name of corporation, §46-3-383.

Notice of incorporation, §46-3-322.

Voluntary dissolution, §46-3-420.

Municipal electric authority of Georgia.

Revenue bonds, §46-3-131.

Municipal gas authority of Georgia.

Bonds, §46-4-101.

Railroad companies.

Petition for dissolution, §46-8-74.

Surrender of franchise, §46-8-70.

Telegraph service.

Stock-subscription books, §46-5-142.

OVERCHARGES.

Common carriers.

Limitation of actions.

Recovery of overcharges, §§46-9-6, 46-9-7.

OVERCHARGES —Cont'd

Common carriers —Cont'd

Overcharging by officers, agents and employees, §46-9-252.

Railroads.

Freight.

Carload shipments.

Weighing.

Measure of damages for overcharges caused by overweight or false billing, §46-9-49.

P

PARTIES.

Public service commission.

Proceedings before commission, §46-2-59.

PASSENGERS.

Common carriers.

General provisions.

See COMMON CARRIERS.

Railroads.

See RAILROADS.

Ships and vessels.

Passenger tickets, §§46-9-170 to 46-9-172.

PAYMENT IN FULL.

Gas companies.

Bonds, §46-4-101.

Contracts with state, §46-4-99.

Municipal electric authority of Georgia.

Power companies.

Contract with state, §46-3-129.

Revenue bonds, §46-3-131.

PAY TELEPHONES.

Public service commission, §46-5-6.

PCB (POLYCHLORINATED BIPHENYL).

Transportation of hazardous materials,

§§46-11-1 to 46-11-6.

See HAZARDOUS MATERIALS AND WASTE.

PEACE OFFICERS.

Railroads.

Protection of property.

Special officers, §§46-8-230 to 46-8-233.

See RAILROADS.

PEACE OFFICERS' ANNUITY AND BENEFIT FUND.

Prudent man rule.

Directors and officers.

Standard of care for discharge of duties, §46-8-55.

PECUNIARY.

Interest.

Railroads, §46-9-274.

PENALTIES.

Electricity.

Residential conservation service.

Civil penalties for violations,
§46-4A-14.

Electric membership corporations.

Civil penalties, §§46-3-540, 46-3-541.

Gas.

Intrastate pipelines and distribution
systems.

Civil penalty for violation, §46-4-35.

Residential conservation service.

Civil penalties for violations,
§46-4A-14.

Household goods carriers for hire.

Operating without certificate, advertising
services falsely, §46-7-91.

Motor carriers.

Household goods carriers for hire.

Operating without certificate,
advertising services falsely,
§46-7-91.

Violations of laws administered by
commissioner, §46-7-90.

Public service commission.

Recovery by state through civil action,
§46-2-92.

Recovery of penalties before
commission, §46-2-91.

Railroads.

Baggage.

Checking by conductor.

Failure to comply with
requirements, §46-9-152.

Connecting carriers.

Violations of provisions, §46-9-216.

Hours of service for employees engaged
in train operation.

Violation of limitations by companies,
§46-8-152.

Obstructing commission in discharge of
its duties, §46-8-382.

Reports.

Neglect or refusal to make report
required by commission,
§46-8-382.

Telegraph operators.

Qualifications of railroad telegraph
operators.

Violations by companies, §46-8-151.

**Telephone solicitation no call law
violations, §46-5-27.**

PERMITS.

Hazardous materials.

Transportation of hazardous materials,
§46-11-4.

Motor carriers.

Emergency, temporary or trip-lease
registration permit.

Issuance in lieu of registration,
§46-7-16.

Motor carrier of property, §46-7-15.1.

Certificates granted under prior laws,
§46-7-34.

Rapid rail passenger service.

Applications, §46-8A-3.

Extension of line or system, §46-8A-4.

Required, §46-8A-2.

PERSONS WITH DISABILITIES.

**Telephone system for the physically
impaired, §§46-5-30, 46-5-31.**

PHONE SOLICITATION SALES.

Georgia no-call law, §46-5-27.

PIPELINES.

**Intrastate pipelines and distribution
systems, §§46-4-20 to 46-4-35.**

See GAS.

PLANNING.

Electricity.

Integrated resource planning, §§46-3A-1
to 46-3A-11.

See ELECTRICITY.

POLICE.

Railroads.

Protection of property.

Special officers, §§46-8-230 to 46-8-233.

See RAILROADS.

Street, suburban and interurban
railroads.

Free transportation for policemen,
§46-8-340.

Telephones.

"911" system.

General provisions, §§46-5-120 to
46-5-139.

See TELEPHONES.

POLYCHLORINATED BIPHENYL.

Transportation, §§46-11-1 to 46-11-6.

See HAZARDOUS MATERIALS AND
WASTE.

POWER LINES.

High-voltage lines, §§46-3-30 to 46-3-40.

See ELECTRICITY.

PRESUMPTIONS.

Common carriers.

Negligence.

Loss of goods, §46-9-1.

Showings required, §46-9-3.

Railroads.

Damages.

Proof of injury from running of train.

Prima facie evidence of lack of
reasonable skill and care,
§46-8-292.

PRISON TERMS.

Railroads.

Grade crossings.

Standard signs.

Violations of provisions, §46-8-196.

Telecommunications service.

Theft of, §§46-5-2, 46-5-3.

Theft.

Telecommunications service, §§46-5-2,
46-5-3.

PRIVATE MOTOR CARRIERS, §46-7-37.

PRO RATA.

Freight billing, §46-9-46.

PRUDENT PERSON RULE.

Electric membership corporations.

Directors and officers.

Discharge of duties, §§46-3-303,
46-3-303.1.

Peace officers' annuity and benefit fund.

Directors and officers.

Standard of care for discharge of
duties, §46-8-55.

Railroads.

Directors and officers.

Standard of care in discharge of
duties, §46-8-55.

PUBLICATION.

Rural telephone cooperatives.

Articles of incorporation, §§46-5-71,
46-5-72.

Change of principal office.

Application, §46-5-86.

PUBLIC OFFICERS AND EMPLOYEES.

**Consumers' utility counsel, §§46-10-1 to
46-10-8.**

See CONSUMERS' UTILITY COUNSEL
DIVISION.

**PUBLIC SERVICE COMMISSION,
§§46-2-1 to 46-2-95.**

Actions.

Gas transmission and distribution
facilities.

Violations of commission rules, orders
or regulations as to.

Actions by commission to enjoin,
§46-4-1.

PUBLIC SERVICE COMMISSION

—Cont'd

Actions —Cont'd

Jurisdiction of actions involving, §46-2-9.

Penalties.

Recovery by state through civil action,
§46-2-92.

Age.

Qualifications of commissioners, §46-2-2.

Appeals.

Penalties recovered before commission,
§46-2-91.

Appropriations.

Salaries and expenses, §46-2-8.

Attorneys' fees.

Liability of companies subject to
jurisdiction of commission.

Actions for recovery, §46-2-90.

Audits.

Electric utilities.

Management audit, §46-2A-2.

Utility finance section.

Duties, §46-2-44.

Bonds, surety.

Changing rate, charge, classification or
service, §46-2-25.

Chairman.

Selection, §46-2-5.

Term of office, §46-2-5.

**Changing rate, charge, classification or
service.**

Procedure, §46-2-25.

Common carriers.

Rates and charges.

Discrimination in rates and charges.

Witnesses.

Compelling testimony, §§46-2-55,
46-2-56.

Supervision of common carriers
generally, §46-2-21.

Witnesses.

Compelling testimony as to certain
matters regarding common
carriers, §§46-2-55, 46-2-56.

Confidentiality of information.

Stocks and bonds.

Approval procedures for contemplated
issuance, §46-2-29.

Conflicts of interest.

Restrictions on commissioners, §46-2-2.

Utility finance section, §46-2-43.

Consumers' utility counsel division.

Assistance to director, §46-10-7.

Criminal law and procedure.

Violations of provisions or orders of
commission, §46-2-93.

PUBLIC SERVICE COMMISSION

—Cont'd

Damages.

Liability of companies subject to jurisdiction of commission, §46-2-90.

Depositions.

Employees and agents of commission.

Taking of depositions by, §46-2-57.

Director of utilities, §46-2-7.1.

Discovery.

Employees and agents of commission.

Obtaining of discovery by, §46-2-57.

Districts, §46-2-1.

Domicile, §46-2-9.

Duties, §§46-2-20, 46-2-21.

Elections.

Members of commission, §46-2-1.

Terms of office, §46-2-1.

Electricity.

Allocation of electricity to protect public health, safety, etc., §§46-2-70 to 46-2-72.

Audits.

Management audit of electric utilities, §46-2A-2.

Cogeneration facilities.

Jurisdiction over certain facilities, §46-3-52.

Integrated resource planning.

Approval and adoption of plan, §46-3A-2.

Certificates of public convenience and necessity.

Generally, §§46-3A-3 to 46-3A-6.

Changed revenues and risks.

Effect on rates.

Basis and effect of commission decision, §46-3A-10.

General provisions, §§46-3A-1 to 46-3A-11.

See ELECTRICITY.

Municipal electric authority of Georgia.

Jurisdiction of commission, §46-3-152.

Powers and duties as to electric

companies generally, §§46-2-20, 46-2-21.

Rates and charges.

Accounting methods to be used in rate-making proceedings, §46-2-26.1.

Changing rates, §46-2-26.

Disclosure requirements for utilities seeking rate change, §46-2-26.

Fuel costs.

Procedure for rate change based solely on, §46-2-26.

PUBLIC SERVICE COMMISSION

—Cont'd

Electricity —Cont'd

Rates and charges —Cont'd

Conversion from oil-burning to coal-burning generating facility.

Recovery of costs, §46-2-26.3.

Fuel-adjustment tariffs.

Notation on bill of charges for fuel adjustment, §46-2-27.

Restriction as to use, §46-2-26.

Municipal electric authority of Georgia.

Jurisdiction of commission, §46-3-152.

Notations required on bills, §46-2-27.

Territorial rights.

Allocation to suppliers.

Electric membership corporations.

Jurisdiction of commission over, §46-3-12.

Enforcement of provisions, §46-3-13.

Emeritus commissions.

Salaries, §46-2-6.

Employees, §46-2-7.

Compensation, §46-2-7.

Criminal prosecutions for violations.

Witnesses.

Calling of agents and employees as, §46-2-93.

Director of utilities, §46-2-7.1.

Public information officer, §46-2-7.2.

Evidence.

Discovery.

Obtaining by employees and agents of commission, §46-2-57.

Investigations.

Rules of evidence, §46-2-51.

Orders.

Admissibility in court proceedings, §46-2-53.

Rate schedules.

Admissibility in court proceedings, §46-2-53.

Reports.

Admissibility in court proceedings, §46-2-53.

Express companies.

Powers and duties of commission, §§46-2-20, 46-2-22.

Fees.

Special fee.

Payment by corporations and utilities subject to commission, §46-2-10.

Fines.

Payment into state treasury, §46-2-32.

PUBLIC SERVICE COMMISSION

—Cont'd

Funds.

Public service commission fund, §46-2-8.

Gas.

Allocation of gas to protect public health, safety, etc., §§46-2-70 to 46-2-72.

Municipal gas authority of Georgia.

Exemption from regulation by commission, §46-4-122.

Powers and duties as to gas companies generally, §§46-2-20, 46-2-21.

Purchased gas costs.

Recovery, §46-2-26.5.

Rates and charges.

Accounting procedures in gas utility rate proceedings, §46-2-26.4.

Purchased gas adjustment rate, §46-2-26.5.

Supply plans, §46-2-26.5.

Hearing procedure, §46-2-26.5.

Violations of commission rules, orders or regulations.

Actions by commission to enjoin, §46-4-1.

Governor.

Annual report to governor, §46-2-31.

Vacancies on commission.

Filling, §46-2-4.

Hearings.

Conducting hearings, §46-2-50.

Hearing officers.

Conducting of hearings by, §46-2-58.

Penalties.

Recovery before commission, §46-2-91.

Witnesses.

Generally, §§46-2-54 to 46-2-56.

Injunctions.

Standard of proof for granting, §46-2-95.

Interpretation and construction.

Cumulative nature of remedies, §46-2-32.

Powers granted by provisions to other companies or entities regulated by commission.

Applicability, §46-1-3.

Intervention.

Proceedings before commission, §46-2-59.

Investigations.

Conducting investigations, §46-2-50.

Evidence.

Rules of evidence, §46-2-51.

Railroads, §46-8-22.

Dissolution of railroad companies, §46-8-76.

PUBLIC SERVICE COMMISSION

—Cont'd

Investigations —Cont'd

Railroads —Cont'd

Rates and charges.

Through rates, §46-9-22.

Surrender of franchises, §46-8-70.

Records of proceedings on formal investigations, §46-2-52.

Subpoenas, §46-2-54.

Witnesses.

Generally, §§46-2-54 to 46-2-56.

Jurisdiction, §46-2-20.

Actions involving, §46-2-9.

Gas.

Intrastate pipelines and distribution systems, §46-4-21.

Controversies as to extensions of gas distribution service, §46-4-30.

Telephones.

"911" system.

Jurisdiction of commission not affected, §46-5-137.

Municipal electric authority of Georgia.

Jurisdiction of commission, §46-3-152.

Municipal gas authority of Georgia.

Exemption from regulation by commission, §46-4-122.

Natural gas competition and deregulation act, §§46-4-150 to 46-4-166.

See NATURAL GAS COMPETITION AND DEREGULATION ACT.

Notice.

Changing rate, charge, classification or service, §46-2-25.

Rates and charges.

Changing rates, §46-2-25.

Special fee.

Notice of amount due, §46-2-10.

Oaths.

Hearing officers.

Power to administer oaths, §46-2-58.

Oath of office of commissioners, §46-2-3.

Office.

Furnishing, §46-2-9.

Orders.

Discovery.

Obtaining by employees and agents of commission.

Orders permitting, §46-2-57.

Evidence.

Admissibility of orders in court proceedings, §46-2-53.

Rehearing or reconsideration.

Rules and regulations as to, §46-2-51.

PUBLIC SERVICE COMMISSION

—Cont'd

Orders —Cont'd

Violations.

Civil penalties, §46-2-92.

Misdemeanors, §46-2-93.

Parties.

Proceedings before commission,
§46-2-59.

Penalties.

Recovery by state through civil action,
§46-2-92.

Recovery of penalties before
commission, §46-2-91.

Powers, §§46-2-20 to 46-2-22.

Rates and charges, §46-2-23.

Public information officer, §46-2-7.2.

Qualifications of commissioners, §46-2-2.

Railroads.

See RAILROADS.

Rates and charges.

Changing rates.

Procedure, §46-2-25.

Common carriers.

Discrimination in rates and charges.

Witnesses.

Compelling testimony, §§46-2-55,
46-2-56.

Evidence.

Admissibility of rate schedules,
§46-2-53.

Gas companies, §46-2-23.1.

Just and reasonable rates and charges.

Quality of service.

Consideration, §46-2-24.

Powers, §46-2-23.

Quality of service.

Consideration in determining just and
reasonable rates and charges,
§46-2-24.

Railroads.

Attorney general.

Representation of commission in
certain proceedings, §46-9-25.

Contracts and agreements between
railroad companies as to rates.

Submission to commission, §46-8-24.

Investigations.

Through rates, §46-9-22.

Powers of commission, §46-8-20.

Reports.

Excessive, unreasonable, etc.,
through rates, §§46-9-23,
46-9-24.

PUBLIC SERVICE COMMISSION

—Cont'd

Rates and charges —Cont'd

Railroads —Cont'd

Schedules of rates.

Change and revision.

Duties of commission, §§46-9-20,
46-9-21.

Maximum rates and charges for
freight storage.

Prescribing schedule, §46-9-26.

Tax accounting by utilities in
rate-making proceedings, §46-2-26.2.

Telephones.

County-wide local telephone calling,
§46-2-25.1.

Powers, §46-2-23.

Sixteen mile toll free telephone
calling.

Rate-making power of commission
not affected, §46-2-25.2.

Records.

Investigations.

Formal investigations, §46-2-52.

Reports.

Annual report to governor, §46-2-31.

Evidence.

Admissibility in court proceedings,
§46-2-53.

Residency requirements, §46-2-1.

Rules and regulations, §46-2-30.

Rehearing and reconsideration of
orders, §46-2-51.

Rural telephone cooperatives.

Jurisdiction, §46-5-103.

Salaries.

Generally, §46-2-6.

Limitations, §46-2-6.

Payment by commission, §46-2-8.

Stock and stockholders.

Contemplated issuance.

Approval procedures, §46-2-28.

Confidentiality of information,
§46-2-29.

Subpoenas.

Hearing officers.

Powers, §46-2-58.

Witnesses, §46-2-54.

Taxation.

Rates and charges.

Tax accounting by utilities in
rate-making proceedings,
§46-2-26.2.

Telecommunications marketing.

Factual findings by, §46-5-190.

PUBLIC SERVICE COMMISSION

—Cont'd

Telegraphs.

Companies.

Stock and stockholders.

Review of capitalization of proposed company, §46-5-142.

Powers and duties as to telegraph companies, §§46-2-20 to 46-2-22.

Rate-making.

Special provisions as to telecommunications companies, §46-2-23.

Telephones.

Family violence shelters.

Confidentiality of locations and addresses.

Protection by directory information or listings publishers and disseminators.

Plan filed with commission, §46-5-7.

"911" system.

Coordination with commission, §46-5-126.

Powers of commission not affected, §46-5-137.

Pay telephones, §46-5-6.

Powers and duties as to telephone companies, §§46-2-20, 46-2-21.

Rate-making.

County-wide local calling, §46-2-25.1.

Sixteen mile toll free telephone calling.

Rate-making power of commission not affected, §46-2-25.2.

Special provisions as to telecommunications companies, §46-2-23.

Rural telephone cooperatives.

Jurisdiction of commission, §46-5-103.

Toll-free calls within 22 miles of an exchange, §46-2-25.3.

Utility finance section.

Composition, §46-2-40.

Conflicts of interest, §46-2-43.

Creation, §46-2-40.

Director.

Appointment, §46-2-41.

Assistant director, §46-2-42.

Conflicts of interest, §46-2-43.

Conflicts of interest, §46-2-43.

Duties, §46-2-41.

Qualifications, §46-2-41.

Duties, §46-2-44.

PUBLIC SERVICE COMMISSION

—Cont'd

Utility finance section —Cont'd

Personnel, §46-2-42.

Conflicts of interest, §46-2-43.

Relationship to commission, §46-2-45.

Status, §46-2-45.

Vacancies.

Filling, §46-2-4.

Venue.

Criminal prosecutions for violations, §46-2-93.

Liability of companies subject to jurisdiction of commission.

Actions for recovery, §46-2-90.

Penalties.

Recovery by state through civil action, §46-2-92.

Witnesses.

Common carriers.

Compelling testimony as to certain matters regarding common carriers, §§46-2-55, 46-2-56.

Criminal prosecutions for violations.

Agents and employees of company.

Calling as witnesses, §46-2-93.

Hearing officers.

Powers as to, §46-2-58.

Immunity from prosecution.

Common carriers.

Compelling testimony as to certain matters regarding common carriers, §§46-2-55, 46-2-56.

Subpoenas, §46-2-54.

PUBLIC TRANSPORTATION.

Limousine carriers.

General provisions, §§46-7-85.1 to 46-7-85.17.

See LIMOUSINE CARRIERS.

Motor carriers, §§46-7-1 to 46-7-85.17.

See MOTOR CARRIERS.

Railroads.

General provisions, §§46-8-1 to 46-8-382.

See RAILROADS.

PUBLIC UTILITIES.

Accountants.

Public service commission, §§46-2-40 to 46-2-42.

Conservation.

Residential conservation service, §§46-4A-1 to 46-4A-14.

See GAS.

Consumers' utility counsel, §§46-10-1 to 46-10-8.

See CONSUMERS' UTILITY COUNSEL DIVISION.

PUBLIC UTILITIES —Cont'd

Distribution, storage and sale of gas.

General provisions, §§46-4-1.

Intrastate pipelines and distribution systems, §§46-4-20 to 46-4-35.

See GAS.

Municipal gas authority of Georgia,

§§46-4-80 to 46-4-125.

See MUNICIPAL GAS AUTHORITY OF GEORGIA.

Underground storage of gas, §§46-4-50 to 46-4-62.

See GAS.

Electricity.

Integrated resource planning, §§46-3A-1 to 46-3A-11.

See ELECTRICITY.

Residential conservation service,

§§46-4A-1 to 46-4A-14.

See ELECTRICITY.

Electric utilities.

Electrical service.

Generation and distribution of electricity generally.

Allocation of territorial rights to electric suppliers, §§46-3-1 to 46-3-15.

See ELECTRICITY.

High-voltage lines, §§46-3-30 to 46-3-40.

See ELECTRICITY.

Electric membership corporations and foreign electric cooperatives.

Amendment and restatement of articles of incorporation of electric membership corporations, §§46-3-360 to 46-3-365.

See ELECTRIC MEMBERSHIP CORPORATIONS.

Annual reports, §§46-3-480, 46-3-481.

Corporate name, §§46-3-220, 46-3-221.

Corporate purposes and powers, §§46-3-200 to 46-3-204.

See ELECTRIC MEMBERSHIP CORPORATIONS.

Directors and officers, §§46-3-290 to 46-3-306.

See ELECTRIC MEMBERSHIP CORPORATIONS.

Dissolution of electric membership corporations, §§46-3-420 to 46-3-440.

See ELECTRIC MEMBERSHIP CORPORATIONS.

PUBLIC UTILITIES —Cont'd

Electric utilities —Cont'd

Electric membership corporations and foreign electric cooperatives

—Cont'd

Fees and charges, §§46-3-500 to 46-3-503.

See ELECTRIC MEMBERSHIP CORPORATIONS.

General provisions, §§46-3-170 to 46-3-182.

See ELECTRIC MEMBERSHIP CORPORATIONS.

Members, §§46-3-260 to 46-3-272.

See ELECTRIC MEMBERSHIP CORPORATIONS.

Mergers and consolidations involving electric membership corporations and foreign electric cooperatives, §§46-3-380 to 46-3-385.

See ELECTRIC MEMBERSHIP CORPORATIONS.

Operation of electric membership corporations generally, §§46-3-340, 46-3-341.

Organization of electric membership corporations, §§46-3-320 to 46-3-326.

See ELECTRIC MEMBERSHIP CORPORATIONS.

Penalties, §§46-3-540, 46-3-541.

Powers and duties of foreign electric cooperatives transacting business in state generally, §§46-3-450 to 46-3-469.

See ELECTRIC MEMBERSHIP CORPORATIONS.

Provisions relating to the secretary of state, §§46-3-520 to 46-3-523.

See ELECTRIC MEMBERSHIP CORPORATIONS.

Registered office, registered agents, service of process and venue, §§46-3-240 to 46-3-243.

See ELECTRIC MEMBERSHIP CORPORATIONS.

Sale and other disposition of corporate assets, §§46-3-400, 46-3-401.

Generally, §§46-2A-1, 46-2A-2.

Municipal electric authority of Georgia, §§46-3-110 to 46-3-155.

See MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA.

PUBLIC UTILITIES —Cont'd

Gas.

Residential conservation service,
§§46-4A-1 to 46-4A-14.
See GAS.

General provisions, §§46-1-1 to 46-1-5.

Integrated resource planning, §§46-3A-1 to 46-3A-11.

See ELECTRICITY.

Limousine carriers.

General provisions, §§46-7-85.1 to 46-7-85.17.

See LIMOUSINE CARRIERS.

Motor carriers, §§46-7-1 to 46-7-85.17.

See MOTOR CARRIERS.

Municipal electric authority of Georgia,

§§46-3-110 to 46-3-155.

See MUNICIPAL ELECTRIC
AUTHORITY OF GEORGIA.

Municipal gas authority of Georgia,

§§46-4-80 to 46-4-125.

See MUNICIPAL GAS AUTHORITY OF
GEORGIA.

**Natural gas competition and deregulation
act,** §§46-4-150 to 46-4-166.

See NATURAL GAS COMPETITION
AND DEREGULATION ACT.

Provisions of energy conservation

**assistance to residential customers by
electric and gas utilities,** §§46-4A-1 to 46-4A-14.

See GAS.

Public service commission.

Allocation of gas and electricity to
protect public health and safety,
§§46-2-70 to 46-2-72.

General provisions, §§46-2-1 to 46-2-95.

See PUBLIC SERVICE COMMISSION.

Investigations and hearings.

General provisions, §§46-2-50 to 46-2-59.

See PUBLIC SERVICE
COMMISSION.

Jurisdiction, powers, and duties
generally, §§46-2-20 to 46-2-32.

See PUBLIC SERVICE COMMISSION.

Miscellaneous offenses and penalties,
§§46-2-90 to 46-2-93.

Organization and members.

General provisions, §§46-2-1 to 46-2-10.

See PUBLIC SERVICE
COMMISSION.

Utility finance section, §§46-2-40 to 46-2-45.

See PUBLIC SERVICE COMMISSION.

PUBLIC UTILITIES —Cont'd

Railroad companies.

Acts or attempts resulting in insolvency
or judicial seizure of a company,
§§46-8-360 to 46-8-365.

See RAILROADS.

Construction, improvement and repair
of rail lines, depots and roads,
§§46-8-120 to 46-8-133.

See RAILROADS.

General provisions, §§46-8-1 to 46-8-4.

Incorporation, consolidation, etc., of
railroad companies and
requirements as to directors and
officers.

Consolidation, merger, surrender of
franchise and dissolution of
companies, §§46-8-70 to 46-8-82.

See RAILROADS.

Incorporation, organization,
subscription of capital stock,
selection of officers and directors,
§§46-8-40 to 46-8-55.

See RAILROADS.

Leases and conditional sales of rolling
stock, §§46-8-270 to 46-8-272.

Liability of companies for damages
generally, §§46-8-290 to 46-8-292.

Liens against companies generally,
§§46-8-250 to 46-8-254.

See RAILROADS.

Miscellaneous offenses, §§46-8-380 to 46-8-382.

Operation of trains generally.

Employees engaged in operation of
trains generally, §§46-8-150 to 46-8-152.

Injury to livestock and other property,
§§46-8-210 to 46-8-212.

Operation of trains at crossings,
drawbridges, etc., §§46-8-190 to 46-8-198.

See RAILROADS.

Signal whistles and lights on trains,
§§46-8-170 to 46-8-172.

Powers and duties of commission as to
railroad companies generally,
§§46-8-20 to 46-8-25.

See RAILROADS.

Powers of companies generally,
§§46-8-100 to 46-8-109.

See RAILROADS.

Special officers for protection of railroad
property, §§46-8-230 to 46-8-233.

See RAILROADS.

PUBLIC UTILITIES —Cont'd

Railroad companies —Cont'd

Street, suburban and interurban
railroads, §§46-8-330 to 46-8-348.

See RAILROADS.

Venue and service of process for actions
against railroad companies,
§§46-8-310 to 46-8-314.

See RAILROADS.

**Rapid rail passenger service, §§46-8A-1 to
46-8A-4.**

See RAPID RAIL PASSENGER SERVICE.

**Rural telephone cooperatives, §§46-5-60 to
46-5-105.**

See RURAL TELEPHONE
COOPERATIVES.

**Telecommunications marketing, §§46-5-180
to 46-5-192.**

See TELECOMMUNICATIONS
MARKETING.

Telemarketing services, §46-5-27.

Telephone and telegraph service.

General provisions, §§46-5-1 to 46-5-4.

Telegraph service, §§46-5-140 to
46-5-149.

See TELEGRAPHS.

Telephone service.

Construction and operation of lines,
plants or systems generally,
§§46-5-40 to 46-5-46.

See TELEPHONES.

Emergency telephone number "911"
system, §§46-5-120 to 46-5-139.

See TELEPHONES.

General provisions, §§46-5-20 to
46-5-25.

See TELEPHONES.

Rural telephone cooperatives,
§§46-5-60 to 46-5-105.

See RURAL TELEPHONE
COOPERATIVES.

Telephone system for the physically
impaired, §§46-5-30, 46-5-31.

**Transportation of freight and passengers
generally.**

Carriers' liens, §§46-9-190 to 46-9-192.

Connecting carriers generally, §§46-9-210
to 46-9-216.

See RAILROADS.

Establishment, revision, etc., of rates for
railroad transportation, §§46-9-20 to
46-9-26.

See RAILROADS.

Express companies, §§46-9-230 to
46-9-236.

See EXPRESS COMPANIES.

PUBLIC UTILITIES —Cont'd

**Transportation of freight and passengers
generally —Cont'd**

General provisions, §§46-9-1 to 46-9-9.

See COMMON CARRIERS.

Georgia rail passenger authority law,
§§46-9-270 to 46-9-281.

See RAIL PASSENGER AUTHORITY.

Miscellaneous offenses, §§46-9-250 to
46-9-253.

Railway passenger service corridor
system, §§46-9-290, 46-9-291.

Rapid rail transit compact, §46-9-300.

Southwest Georgia railroad excursion
authority, §§46-9-320 to 46-9-332.

See SOUTHWEST GEORGIA
RAILROAD EXCURSION
AUTHORITY.

Transportation and storage of freight,
livestock, etc.

Duties, liabilities, etc., of carriers, etc.,
generally, §§46-9-40 to 46-9-57.

See COMMON CARRIERS.

Freight receipts, freight bills, etc.,
§§46-9-110 to 46-9-112.

Furnishing of refrigerator cars by
railroad companies, §§46-9-90 to
46-9-92.

Transportation of passengers.

Issuance, sale, etc., of tickets, etc., for
passage on vessels, §§46-9-170 to
46-9-172.

Transportation by carriers generally,
§§46-9-130 to 46-9-140.

See COMMON CARRIERS.

Transportation by railroad companies,
§§46-9-150 to 46-9-152.

**Transportation of hazardous materials,
§§46-11-1 to 46-11-6.**

See HAZARDOUS MATERIALS AND
WASTE.

R

RADIOACTIVE WASTE.

**Transportation of hazardous materials,
§§46-11-1 to 46-11-6.**

See HAZARDOUS MATERIALS AND
WASTE.

**RAIL PASSENGER AUTHORITY,
§§46-9-270 to 46-9-281.**

Assessments.

Exemption of authority, §46-9-280.

Bond issues, §46-9-275.

Bond anticipation notes, §46-9-276.

RAIL PASSENGER AUTHORITY —Cont'd

Bond issues —Cont'd

Debt or obligation of state or political subdivision.

Bonds not to constitute, §46-9-279.

Definition of "bonds," §46-9-272.

Interest, §46-9-276.

Powers of authority as to, §46-9-273.

Proceeds.

Use, §46-9-276.

Purposes to be promoted by, §46-9-277.

Refunding bonds, §46-9-275.

Rights of bondholders.

Restrictions, §46-9-279.

Tax exemption, §46-9-280.

Validation of bonds, §46-9-276.

Citation of law.

Short title, §46-9-270.

Composition, §46-9-274.

Conflicts of interest.

Disclosure of pecuniary interest by members, §46-9-274.

Contracts.

Powers of authority, §46-9-273.

Creation, §46-9-271.

Definitions, §46-9-272.

Exemption from assessments, §46-9-280.

Expense allowance, §46-9-274.

Interest.

Bond issues, §46-9-276.

Interpretation and construction.

Liberal construction of provisions, §46-9-278.

Provisions not to affect other authorities, §46-9-281.

Legislative declaration, §46-9-271.

Officers.

Election, §46-9-274.

Powers, §46-9-273.

Projects.

Defined, §46-9-272.

Purpose of provisions, §46-9-277.

Service areas.

Defined, §46-9-272.

Taxation.

Exemption of authority, §46-9-280.

Terms of office of members, §46-9-274.

Title of law.

Short title, §46-9-270.

Travel reimbursement, §46-9-274.

RAIL PASSENGER AUTHORITY LAW.

General provisions, §§46-9-270 to 46-9-281.

See RAIL PASSENGER AUTHORITY.

Short title, §46-9-270.

RAILROADS, §§46-8-1 to 46-8-382.

Actions.

Actions against companies.

Authority of chairman or president as to legal proceeding, §46-8-50.

Leases.

Recordation by company in each county through which road runs.

Effect of failure or refusal to record on rights of action, §46-8-2.

Grade crossings.

Signs.

Cross buck signs.

Compelling railroad companies to post, §46-8-195.

Institution or defense of legal proceedings.

Authority of chairman or president, §46-8-50.

Receivers.

Actions against receivers of railroad companies, §46-8-314.

Trustees of railroad companies.

Actions against, §46-8-314.

Wrongs and injuries by railroad companies, §46-1-2.

Advertising.

Grade crossings.

Signs.

Standard signs.

Use of similar signs for advertising prohibited, §46-8-196.

Age.

Qualifications, §46-8-46.

Arrest.

Protection of property.

Special officers.

Power of arrest, §46-8-230.

Attorney general.

Public service commission.

Representation of commission, §46-9-25.

Authorities.

Georgia rail passenger authority, §§46-9-270 to 46-9-281.

See RAIL PASSENGER AUTHORITY.

Bond issues.

Consolidated companies.

Issuance of bonds, §46-8-81.

Procedure for issuing bonds, §46-8-53.
Street, suburban and interurban railroads.

Consolidation or merger.

Issuance by consolidated corporation, §46-8-337.

RAILROADS —Cont'd

Bonds, surety.

- Protection of property.
- Special officers, §46-8-232.

Branch roads.

- Construction, §46-8-123.

Bridges.

- Alteration of railroad bridges to accommodate motor vehicles, §46-8-133.
- Appropriation of public bridges, §46-8-103.
- Drawbridge at which there is a switch.
 - Signboards to warn of.
 - Erection and placement, §46-8-198.

Cattle guards.

- Applicability of provisions, §46-8-132.
- Construction and maintenance, §46-8-129.
- Failure to build.
 - Liability of company to landowner, §46-8-130.
- Rights of way.
 - Request of owner of land crossed by railroad right of way, §46-8-131.
- Exceptions to provisions, §46-8-132.
- Failure to build.
 - Liability of company to landowner, §46-8-130.
- Notice.
 - Owner of affected lands.
 - Notice to company, §46-8-129.
- Rights of way.
 - Land crossed by railroad right of way.
 - Construction of upon request of and at expense of owner of land, §46-8-131.

Certificate of incorporation, §§46-8-42, 46-8-43.

Conflicts of interest.

- Incorporation.
 - Secretary of state.
 - Disqualification of secretary of state.
 - Performance of duties by commissioner of insurance, §46-8-40.

Connecting carriers, §§46-9-210 to 46-9-216.

- Baggage.
 - Duty of companies to check baggage over connecting roads, §46-9-210.
 - Duty to receive and transport baggage checked upon tickets, §46-9-211.

RAILROADS —Cont'd

Connecting carriers —Cont'd

- Cars consigned to points over or beyond connecting roads.
 - Switching off and delivering to connecting roads, §46-9-212.
 - Interstate shipments and consignments, §46-9-214.
- Discrimination in freight-transportation rates charged to, §46-9-213.
- Interstate shipments and consignments, §46-9-214.

Freight.

- Discrimination in freight-transportation rates charged to, §§46-9-213, 46-9-214.
- Receiving freight cars from, §46-9-215.

Penalties.

- Civil penalties for violations, §46-9-216.
- Switching off and delivering all cars consigned to points over or beyond connecting roads, §§46-9-212, 46-9-214.

Tickets.

- Duty of companies to place their tickets for sale with connecting roads, §46-9-211.
- Duty of companies to put on sale and sell tickets of connecting roads, §46-9-210.

Consolidation, §§46-8-80, 46-8-81.

- Street, suburban and interurban railroads.
 - Corporations operating electric railroads or generating electricity, §§46-8-334 to 46-8-337.

Contracts.

- Common use of tracks within cities, §46-8-101.
- Rolling stock and other equipment.
 - Conditional sales, §§46-8-270, 46-8-272.
 - Lease, §§46-8-271, 46-8-272.
- Street, suburban and interurban railroads.
 - Existing contracts between municipalities and railroad companies.
 - Effect of provisions on, §46-8-348.

Corridors.

- Designated corridors, §46-9-290.
- Planning and development, §46-9-291.

RAILROADS —Cont'd

Damages.

Freight.

Carload shipments.

Overcharges caused by overweight or false billing.

Measure of damages, §46-9-49.

Liability for damages.

Generally, §46-8-290.

Negligence, §46-8-290.

Comparative negligence as affecting amount of recovery, §46-8-291.

Contributory negligence as defense, §46-8-291.

Proof of injury from running of train.

Prima facie evidence of lack of reasonable skill and care, §46-8-292.

Refrigerator cars.

Failure of company to furnish, §46-9-91.

Failure or refusal of shipper to accept cars, §46-9-92.

Wrongs and injuries by railroad companies.

Measure of damages, §46-1-2.

Depots.

Agent or other officer of lessee of railroad.

Service of process on, §46-8-311.

Construction and maintenance.

Powers of railroad companies, §46-8-120.

Eminent domain power, §46-8-124.

Delayed trains.

Duty of railroad companies to telegraph and post bulletins, §46-9-151.

General powers of companies, §46-8-100.

Public service commission.

Power to order erection of depots, §46-8-21.

Power to require locating of depots, §46-8-20.

Supplying passenger with water or light at night.

Duty of railroad companies, §46-9-150.

Designated corridors, §46-9-290.

Planning and development, §46-9-291.

Directors, §§46-8-3, 46-8-46 to 46-8-55.

Chairman, §46-8-47.

Committees, §46-8-48.

Action by written consent without meeting, §46-8-49.

Compensation, §46-8-47.

RAILROADS —Cont'd

Directors —Cont'd

Election of directors, §46-8-46.

Executive committee, §46-8-48.

Liability.

Eliminating or limiting personal liability, §46-8-51.

Meetings, §46-8-47.

Action by written consent without meeting, §46-8-49.

Notice, §46-8-47.

Prudent person rule.

Standard of care in discharge of duties, §46-8-55.

Qualifications, §46-8-46.

Standard of care in discharge of duties, §46-8-55.

Stock and stockholders.

Election of directors, §46-8-46.

Transcripts of proceedings.

Furnishing, §46-8-3.

Vacancies.

Filling, §46-8-46.

Discrimination.

Rate discrimination, §46-9-251.

Dissolution of railroad companies,

§§46-8-71 to 46-8-79.

Advertisement of petition, §46-8-74.

Certification by judge of probate court, §46-8-77.

Applicability of certain provisions, §46-8-4.

Authorized, §46-8-71.

Effect, §46-8-79.

Petition, §§46-8-72, 46-8-73.

Advertisement of petition, §46-8-74.

Certification by judge of probate court, §46-8-77.

Transfer of copy from secretary of state to commission, §46-8-75.

Prerequisites, §46-8-71.

Public service commission.

Certificate approving or disapproving application, §46-8-76.

Investigation of proposed dissolution, §46-8-76.

Petition.

Transfer of copy from secretary of state to commission, §46-8-75.

Resolution, §46-8-72.

Secretary of state.

Order dissolving corporation, §46-8-78.

Effect, §46-8-79.

RAILROADS —Cont'd

Dissolution of railroad companies

—Cont'd

Secretary of state —Cont'd

Petition.

Filing with secretary of state,
§46-8-72.

Duties of secretary of state upon,
§§46-8-74, 46-8-75.

Fee, §46-8-73.

Recordation of certain documents,
§46-8-78.

Distance between tracks with same terminal points, §46-8-127.

Street, suburban and interurban
railroads, §46-8-331.

Dynamite.

Transportation, §46-9-253.

Eminent domain.

Exercise of power by railroad companies,
§46-8-124.

Approval by commission as
prerequisite, §46-8-121.

Employees.

Hours of service for employees engaged
in train operation.

Limitation, §46-8-152.

Lien for wages, §§46-8-250, 46-8-251.

Locomotive engineers.

Duties.

Blowposts to warn of crossings.

Duties upon reaching, §§46-8-190,
46-8-191.

Qualifications, §46-8-150.

Telegraph operators.

Qualifications, §46-8-151.

Evidence.

Certificate of incorporation.

Evidentiary effect, §46-8-43.

Damages.

Proof of injury from running of train.

Prima facie evidence of lack of
reasonable skill and care,
§46-8-292.

Rates and charges.

Schedule of rates.

Evidentiary effect, §§46-9-20,
46-9-21.

Wrecking a railroad company.

Depreciating value of stock.

Acts done with intent and purpose
of depreciating value.

Prima facie evidence of intent to
wreck, §46-8-365.

RAILROADS —Cont'd

Explosives.

Transportation of gunpowder or
dynamite, §46-9-253.

Extensions.

Construction, §46-8-123.

Fees.

Dissolution of railroad companies.

Petition.

Filing with secretary of state,
§46-8-73.

Ferries.

Appropriation of public ferries,
§46-8-103.

Fines.

Grade crossings.

Signboards to warn of grade crossing
at which there is a switch.

Violation of requirements,
§46-8-198.

Signs.

Standard signs.

Violations of provisions, §46-8-196.

Locomotives.

Steam locomotives.

Automatic door to firebox.

Violations of requirement,
§46-8-172.

Switches.

Signboards to warn of drawbridges,
grade crossings and stations at
which there is a switch.

Violations of requirement,
§46-8-198.

Firefighters.

Street, suburban and interurban
railroads.

Free transportation for firefighters,
§46-8-340.

Franchises.

Exercise of franchises in another state or
territory, §46-8-109.

Sale or lease of franchises upon
termination of prior lease,
§46-8-106.

Surrender of franchises, §46-8-70.

Dissolution of railroad companies.

Generally, §§46-8-71 to 46-8-79. See
within this heading,
"Dissolution of railroad
companies."

Order of secretary of state accepting
surrender, §46-8-78.

RAILROADS —Cont'd

Freight.

- Carload shipments.
 - Failure of company to supply cars.
 - Written application for cars as prerequisite to penalties or forfeitures, §46-9-51.
- Weighing.
 - Certified public weighers.
 - Weighing of cars by, §46-9-50.
 - Facilities for weighing freight.
 - Duty of company to furnish, §46-9-49.
 - Manner of weighing cars, §46-9-50.
 - Overcharges caused by overweight or false billing.
 - Measure of damages, §46-9-49.
 - Written application for railroad cars.
 - Prerequisites to penalties or forfeitures for failure of company to supply cars, §46-9-51.
- Connecting carriers.
 - Discrimination in
 - freight-transportation rates charged to, §§46-9-213, 46-9-214.
 - Receiving freight cars from, §46-9-215.
- Rates and charges.
 - Demand or receipt of more than fair and reasonable rate, §46-9-250.
 - Discrimination as to rates, §46-9-251.
- Receipts.
 - Duplicate freight receipts, §46-9-111.
- Storage charges.
 - Discrimination in applying, §46-9-53.
 - Remedy, §46-9-55.
- Excessive rates.
 - Prohibited, §46-9-54.
 - Remedy, §46-9-55.

Georgia rail passenger authority,

§§46-9-270 to 46-9-281.

See RAIL PASSENGER AUTHORITY.

Governor.

- Protection of property.
 - Special officers.
 - Appointment, §46-8-230.
 - Revocation of appointment and commission, §46-8-232.

Grade crossings.

- Blowposts to warn of crossings.
 - Duties of locomotive engineers upon reaching, §46-8-190.
 - Within city limits, §46-8-191.

RAILROADS —Cont'd

Grade crossings —Cont'd

- Blowposts to warn of crossings —Cont'd
 - Erection and maintenance, §46-8-190.
 - Within city limits, §46-8-191.
- Occupying or blocking pursuant to company order.
 - Legal responsibility of member of crew, §46-8-197.
- Relocation of highways necessitated by construction of crossings, §46-8-126.
- Signs and signals.
 - Bells and whistles.
 - Blowposts to warn of crossings, §§46-8-190, 46-8-191.
- Cross buck signs.
 - Erection and maintenance, §46-8-194.
 - Actions to compel, §46-8-195.
- Standards.
 - Conformance to, §46-8-194.
- Grade crossings at which there is a switch.
 - Signboards, §46-8-198.
- Mutilation, destruction or defacement.
 - Unlawful, §46-8-196.
- Standard signs, §46-8-196.

Grandfather clause.

- Adoption of provisions by certain companies and persons, §46-8-54.

Highways, roads and streets.

- Appropriation by railroad corporations of public highways, §46-8-103.
- Occupying or blocking pursuant to company orders.
 - Legal responsibility of member of crew, §46-8-197.
- Relocation of highways necessitated by construction of crossings, §46-8-126.
- Street, suburban and interurban railroads.
 - Generally, §§46-8-330 to 46-8-348. See within this heading, "Street, suburban and interurban railroads."

Hobos.

- Hiding on train for purpose of stealing a ride.
 - Misdemeanor, §46-8-381.

Immunity.

- Stockholders.
 - Exemption of property of stockholders from debts or liabilities of corporation, §46-8-52.

RAILROADS —Cont'd

Incorporation.

Certificate of incorporation, §§46-8-42, 46-8-43.

Forfeiture.

Failure to construct, equip and operate fifteen miles of road within three years, §46-8-82.

Grandfather clause.

Adoption of provisions by prior companies, §46-8-54.

Number of incorporators, §46-8-41.

Organizational meeting, §46-8-46.

Petition for incorporation, §46-8-41.

Affidavit to be attached, §46-8-41.

Sale of railroad under trust deed, upon foreclosure of mortgage or by judicial decree.

Reorganization of corporation by purchasers, §46-8-108.

Secretary of state.

Certificate of incorporation.

Issuance, §46-8-42.

Duties prior to, §46-8-43.

Conflicts of interest.

Disqualification of secretary of state.

Performance of duties by commissioner of insurance, §46-8-40.

Grant of corporate powers and privileges by, §46-8-40.

Petition for incorporation.

Submission to and indorsement by, §46-8-41.

Street, suburban and interurban railroads, §46-8-331.

Subscription to capital stock, §§46-8-44, 46-8-45.

Indemnification, §46-8-51.

Inspections.

Public service commission.

Contracts and agreements between railroad companies, §46-8-24.

Safety inspections, §46-8-25.

Interpretation and construction.

Duties and liabilities of railroad companies under other laws.

Effect of provisions on, §46-8-192.

Intersections of tracks.

Stopping at, §46-8-193.

Interurban railroads.

Generally, §§46-8-330 to 46-8-348. See within this heading, "Street, suburban and interurban railroads."

Intruding on railroad tracks.

Misdemeanor, §46-8-380.

RAILROADS —Cont'd

Investigations.

Public service commission, §46-8-22.

Dissolution of railroad companies, §46-8-76.

Rates and charges.

Through rates, §46-9-22.

Surrender of franchises.

Application, §46-8-70.

Leases.

Recordation of leases by railroad companies, §§46-8-1, 46-8-2.

Rolling stock and other equipment.

Contracts for lease, §§46-8-271, 46-8-272.

Sale or lease of property, rights and franchises upon termination of prior lease, §46-8-106.

Service of process on lessee of railroad, §46-8-311.

Service of process on lessor railroad company, §§46-8-312, 46-8-313.

Street, suburban and interurban railroads.

Lease and sale of roads, franchises, etc., between companies, §46-8-341.

Venue.

Actions against lessee of railroad, §46-8-310.

Liens against companies, §§46-8-250 to 46-8-254.

Employees.

Lien for wages, §§46-8-250, 46-8-251.

Livestock.

Damages for killing of livestock, §§46-8-252, 46-8-253.

Materials, supplies, etc.

Furnishing, §§46-8-252, 46-8-253.

Receivers.

Duties as to payment of liens, §46-8-254.

Manner of payment after placement of company in receivership, §§46-8-251, 46-8-253.

Wages of employees.

Generally, §46-8-250.

Receivership.

Manner of payment after placement of company in, §46-8-251.

Seizure of railroad presumption to conveyance of debt.

Manner of payment after, §46-8-251.

RAILROADS —Cont'd

Lights.

Locomotives.

Equipping locomotives with headlights, §46-8-170.

Track motor cars.

Headlights and red rear lights, §46-8-171.

Livestock.

Cattle guards, §§46-8-129 to 46-8-132. See within this heading, "Cattle guards."

Killing or injury.

Damages for killing of livestock.

Liens against companies, §§46-8-252, 46-8-253.

Owner's putting injured livestock to death.

Effect on right of recovery against railroad company, §46-8-212.

Putting injured livestock to death, §46-8-212.

Reports, §§46-8-210, 46-8-211.

Locomotives.

Engineers.

Qualifications, §46-8-150.

Lights.

Equipping locomotives with headlights, §46-8-170.

Signal bells and whistles.

Blowposts to warn of crossings.

Engineer to blow whistle upon reaching, §46-8-190.

Equipping with, §46-8-170.

Steam locomotives.

Automatic door to firebox.

Required, §46-8-172.

Merger, §§46-8-80, 46-8-81.

Street, suburban and interurban railroads.

Corporations operating electric railroads or generating electricity, §§46-8-334 to 46-8-337.

Mineral resources.

Crossing other railroads to reach minerals, §§46-8-104, 46-8-105.

Misdemeanors.

Grade crossings.

Blowposts to warn of crossings.

Violations of provisions, §46-8-190.

Within city limits, §46-8-191.

Signboards to warn of grade crossing at which there is a switch.

Violations of requirements, §46-8-198.

RAILROADS —Cont'd

Misdemeanors —Cont'd

Grade crossings —Cont'd

Signs.

Standard signs.

Violations of provisions, §46-8-196.

Hiding on train for purpose of stealing a ride, §46-8-381.

Intruding on railroad tracks, §46-8-380.

Locomotive engineers.

Qualifications.

Violations by companies, §46-8-150.

Locomotives.

Equipment.

Violations of provisions, §§46-8-170, 46-8-172.

Passengers.

Assignment to cars, compartments and seats.

Failure to remain in assigned car, compartment or seat, §46-9-135.

Stopping at track intersections.

Violations of provisions, §46-8-193.

Switches.

Signboards to warn of drawbridges, grade crossings and stations at which there is a switch.

Violations of requirement, §46-8-198.

Mississippi-Louisiana-Alabama-Georgia rapid rail transit compact, §46-9-300.

Mortgages.

Powers of railroad companies, §46-8-100.

Sale of railroad under trust deed or upon foreclosure of mortgage, §§46-8-107, 46-8-108.

Motor vehicles.

Alteration of tracks, bridges, etc., to accommodate motor vehicles, §46-8-133.

Negligence.

Liability for damages, §§46-8-290, 46-8-291.

Notice.

Cattle guards.

Owner of affected lands.

Notice to company, §46-8-129.

Meetings of directors, §46-8-47.

Meetings of stockholders.

Dissolution of railroad companies.

Meeting to consider resolution, §46-8-72.

Issuing bonds or increasing capital stock, §46-8-53.

Organizational meeting, §46-8-46.

RAILROADS —Cont'd

Notice —Cont'd

- Protection of property.
- Special officers.
- Termination of employment,
§46-8-232.
- Rates and charges.
- Schedules of rates.
- New and revised schedules, §46-9-21.
- Surrender of franchises.
- Hearing, §46-8-70.

Officers, §§46-8-46, 46-8-50, 46-8-55.

Passengers, §§46-9-150 to 46-9-152.

- Assignment of passengers to cars,
compartments and seats, §§46-9-134,
46-9-135.

Baggage.

Checking.

- Conductors, §46-9-152.

Bulletins of delayed trains.

- Duties of railroad companies,
§46-9-151.

Delayed trains.

- Duty of railroad to telegraph and post
bulletins of, §46-9-151.

Drinking water.

- Duty to furnish, §46-9-150.

**Duties of railroads, §§46-9-150 to
46-9-152.**

**Georgia rail passenger authority,
§§46-9-270 to 46-9-281.**

See RAIL PASSENGER AUTHORITY.

Lights.

- Duty to furnish to passengers,
§46-9-150.

**Railway passenger service corridor
system.**

Designated corridors.

- Planning and development,
§46-9-291.

Rapid rail passenger service.

- General provisions, §§46-8A-1 to
46-8A-4.

See RAPID RAIL PASSENGER
SERVICE.

Rates and charges.

- Demand or receipt of more than fair
and reasonable rate, §46-9-250.
- Discrimination as to rates, §46-9-251.

Penalties.

Civil penalties.

Baggage.

- Checking by conductor.
- Failure to comply with
requirements, §46-9-152.

RAILROADS —Cont'd

Penalties —Cont'd

Civil penalties —Cont'd

Connecting carriers.

- Violations of provisions, §46-9-216.

**Hours of service for employees
engaged in train operation.**

- Violation of limitations by
companies, §46-8-152.

**Obstructing commission in discharge
of its duties, §46-8-382.**

Reports.

- Neglect or refusal to make report
required by commission,
§46-8-382.

Telegraph operators.

- Qualifications of railroad telegraph
operators.

- Violations by companies,
§46-8-151.

Police.

**Street, suburban and interurban
railroads.**

- Free transportation for policemen,
§46-8-340.

**Powers of railroad companies, §§46-8-100,
46-8-120.**

**Additional nature of certain powers,
§46-8-122.**

**Appropriation of public highways,
bridges and ferries, §46-8-103.**

**Change of general direction and route
of railroad, §46-8-125.**

**Crossing other railroads to reach
minerals, timber, etc., §§46-8-104,
46-8-105.**

**Exercise of powers in another state or
territory, §46-8-109.**

Forfeiture of powers.

- Failure to construct, equip and
operate fifteen miles of road
within three years, §46-8-82.

**Street, suburban and interurban
railroads, §§46-8-331, 46-8-332.**

**Free transportation for policemen,
firefighters, etc., §46-8-340.**

**Sale of transportation operations by
companies engaged in operating
electric generating plants.**

- Effect on powers, §46-8-346.

**Steam for heating and power
purposes, §46-8-339.**

Trackless trolleys, §§46-8-342, 46-8-343.

Vessels.

- Construction and operation, §46-8-102.

RAILROADS —Cont'd

Presumptions.

Damages.

Proof of injury from running of train.

Prima facie evidence of lack of
reasonable skill and care,
§46-8-292.

Protection of property.

Special officers, §§46-8-230 to 46-8-233.

Appointment, §46-8-230.

Arrest.

Power of arrest, §46-8-230.

Bonds, surety, §46-8-232.

Duties, §46-8-231.

Powers, §§46-8-230, 46-8-231.

Qualifications, §46-8-232.

Revocation of appointment and
commission, §46-8-232.

Service of process.

Return of processes to county of
origin, §46-8-233.

Termination of employment.

Notice, §46-8-232.

Prudent person rule.

Directors and officers.

Standard of care in discharge of
duties, §46-8-55.

Public service commission.

Depots.

Power to order erection of depots,
§46-8-21.

Power to require locating of depots,
§46-8-20.

Dissolution of railroad companies.

Certificate approving or disapproving
application, §46-8-76.

Investigation of proposed dissolution,
§46-8-76.

Petition.

Transfer of copy from secretary of
state to commission, §46-8-75.

Distance between tracks with same
terminal points.

Regulation, §46-8-127.

Eminent domain.

Approval by commission as
prerequisite to exercise of power,
§46-8-121.

General provisions, §§46-2-1 to 46-2-95.

See PUBLIC SERVICE COMMISSION.

Grade crossings.

Signs.

Standard signs.

Duty to designate and require use,
§46-8-196.

RAILROADS —Cont'd

Public service commission —Cont'd

Inspections.

Contracts and agreements between
railroad companies, §46-8-24.

Safety inspections, §46-8-25.

Investigations, §46-8-22.

Dissolution of railroad companies,
§46-8-76.

Rates and charges.

Through rates, §46-9-22.

Surrender of franchises.

Applications, §46-8-70.

Obstructing commission in discharge of
its duties.

Penalty, §46-8-382.

Powers, §§46-8-20, 46-8-21, 46-8-23.

Investigations, §46-8-22.

Rates and charges.

Attorney general.

Representation of commission in
certain proceedings, §46-9-25.

Contracts and agreements between
railroad companies as to rates.

Submission to commission, §46-8-24.

Investigations.

Through rates, §46-9-22.

Powers of commission, §46-8-20.

Reports.

Excessive, unreasonable, etc.,
through rates, §§46-9-23,
46-9-24.

Schedules of rates.

Change and revision.

Duties of commission, §§46-9-20,
46-9-21.

Maximum rates and charges for
freight storage.

Prescribing schedule, §46-9-26.

Rules and regulations, §§46-8-21, 46-8-23.

Investigations and inspections,
§46-8-22.

Track motor cars.

Headlights and red rear lights,
§46-8-171.

Street, suburban and interurban
railroads.

Effect of provisions on jurisdiction,
§46-8-348.

Powers and duties as to, §§46-2-20,
46-2-21.

Sale of transportation operations by
companies engaged in operating
electric generating plants.

Approval, §46-8-345.

RAILROADS —Cont'd

Public service commission —Cont'd

- Supervision of railroad companies generally, §46-2-20.
- Surrender of franchises.
 - Procedure on application, §46-8-70.

Rapid rail passenger service.

- General provisions, §§46-8A-1 to 46-8A-4.
- See RAPID RAIL PASSENGER SERVICE.

Rapid rail transit compact, §46-9-300.

Rates and charges, §§46-9-20 to 46-9-26.

- Discrimination, §46-9-251.
- Excessive rates.
 - Demand or receipt of more than fair and reasonable rate, §46-9-250.
- Freight.
 - Demand or receipt of more than fair and reasonable rate, §46-9-250.
 - Discrimination as to rates, §46-9-251.
 - Storage charges.
 - Discrimination in applying, §46-9-53.
 - Remedy, §46-9-55.
 - Excessive charges.
 - Prohibited, §46-9-54.
 - Remedy, §46-9-55.
- Notice.
 - Schedules of rates.
 - New and revised schedules, §46-9-21.
- Passengers.
 - Demand or receipt of more than fair and reasonable rate, §46-9-250.
 - Discrimination as to rates, §46-9-251.
- Public service commission.
 - Attorney general.
 - Representation of commission in certain proceedings, §46-9-25.
 - Contracts and agreements between railroad companies as to rates.
 - Submission to commission, §46-8-24.
 - Investigations.
 - Through rates, §46-9-22.
 - Powers of commission, §46-8-20.
 - Reports.
 - Excessive, unreasonable, etc., through rates, §§46-9-23, 46-9-24.
 - Schedules of rates.
 - Change and revision.
 - Duties of commission, §§46-9-20, 46-9-21.
 - Maximum rates and charges for freight storage.
 - Prescribing schedule, §46-9-26.

RAILROADS —Cont'd

Rates and charges —Cont'd

- Schedules of rates.
 - Change and revision.
 - Duties of public service commission, §§46-9-20, 46-9-21.
 - Notice, §46-9-21.
 - Evidentiary effect, §§46-9-20, 46-9-21.
 - Public service commission.
 - Change and revision of schedules.
 - Duties of commission, §§46-9-20, 46-9-21.
 - Maximum rates and charges for freight storage.
 - Prescribing schedule, §46-9-26.

Real property.

- Powers of railroad companies as to, §46-8-100.
- Acquisition of property, §46-8-121.
 - Additional nature of powers, §46-8-122.
- Eminent domain, §§46-8-121, 46-8-124.

Receipts.

- Freight.
 - Duplicate freight receipts, §46-9-111.

Receivers.

- Actions against receivers of railroad companies, §46-8-314.
- Liens against companies.
 - Duties of receivers as to payment of liens, §46-8-254.
 - Manner of payment after placement of company in receivership, §§46-8-251, 46-8-253.
- Service of process.
 - Actions against receivers of railroad companies, §46-8-314.
- Venue.
 - Actions against receivers of railroad companies, §46-8-314.

Records, §46-8-3.

- Livestock and other property injured, killed or destroyed.
 - Engineer reports to be recorded in book, §46-8-210.

Refrigerator cars, §§46-9-90 to 46-9-92.

- Application for cars.
 - Filing by shipper, §46-9-90.
- Damages.
 - Failure of company to furnish, §46-9-91.
 - Failure or refusal of shipper to accept cars, §46-9-91.

RAILROADS —Cont'd

Refrigerator cars —Cont'd

Duty of railroad companies to furnish,
§46-9-90.

Liability for failure to furnish,
§46-9-91.

Failure or refusal of shipper to accept
cars.

Liability, §46-9-92.

Reports.

Neglect or refusal to furnish report
required by commission.

Penalty, §46-8-382.

Routes.

Change of general direction and route
of railroad, §46-8-125.

Rules and regulations.

Public service commission, §§46-8-21,
46-8-23.

Investigations and inspections,
§46-8-22.

Track motor cars.

Headlights and red rear lights,
§46-8-171.

Safety.

Inspections by public service
commission, §46-8-25.

Sales.

Judicial sale of railroad, §§46-8-107,
46-8-108.

Rolling stock and other equipment.

Conditional sales.

Contracts, §§46-8-270, 46-8-272.

Termination of prior lease.

Sale or lease of property, rights and
franchises upon, §46-8-106.

Secretary of state.

Dissolution of railroad companies.

Order dissolving corporation,
§46-8-78.

Effect, §46-8-79.

Petition.

Filing with secretary of state,
§46-8-72.

Duties of secretary of state upon,
§§46-8-74, 46-8-75.

Fee, §46-8-73.

Recordation of certain documents,
§46-8-78.

Incorporation.

Certificate of incorporation.

Issuance, §46-8-42.

Duties prior to, §46-8-43.

RAILROADS —Cont'd

Secretary of state —Cont'd

Incorporation —Cont'd

Conflicts of interest.

Disqualification of secretary of state.

Performance of duties by
commissioner of insurance,
§46-8-40.

Grant of corporate powers and
privileges by, §46-8-40.

Petition for incorporation.

Submission to and indorsement by,
§46-8-41.

Street, suburban and interurban
railroads.

Adoption of provisions by railroad
companies.

Filing of resolution with secretary of
state, §46-8-347.

Service of process.

Lessee of railroad.

Service on, §46-8-311.

Lessor railroad company.

Service on, §§46-8-312, 46-8-313.

Protection of property.

Special officers.

Return of processes to county of
origin, §46-8-233.

Receivers of railroad companies.

Actions against, §46-8-314.

Trustees of railroad companies.

Actions against, §46-8-314.

Signs and signals.

Bells and whistles.

Locomotives to be equipped with,
§46-8-170.

When to sound, §46-8-190.

**Southwest Georgia railroad excursion
authority, §§46-9-320 to 46-9-332.**

See SOUTHWEST GEORGIA
RAILROAD EXCURSION
AUTHORITY.

Stock and stockholders.

Consolidated companies.

Issuance of stock, §46-8-81.

Directors.

Election of directors, §46-8-46.

Immunity.

Property of stockholders.

Exemption from debts or liabilities
of corporation, §46-8-52.

Increasing capital stock.

Procedure, §46-8-53.

Meetings of stockholders.

Action by written consent without
meeting, §46-8-49.

RAILROADS —Cont'd

Stock and stockholders —Cont'd

Meetings of stockholders —Cont'd

Dissolution of railroad companies.

Meeting to consider resolution,
§46-8-72.

Notice.

Dissolution of railroad companies.

Meeting to consider resolution,
§46-8-72.

Issuing bonds or increasing capital
stock, §46-8-53.

Organizational meetings, §46-8-46.

Officers.

Election of officers, §46-8-50.

Par value of stock, §46-8-44.

Street, suburban and interurban
railroads.

Consolidation or merger.

Corporations operating electric
railroads or generating
electricity.

Dissenting stockholders,
§46-8-335.

Increase of capital stock, §46-8-332.

Tax exemption for capital stock of
certain railroad companies,
§46-8-338.

Subscription to capital stock, §§46-8-44,
46-8-45.

Wrecking a railroad company.

Depreciating value of stock.

Acts done with intent and purpose
of depreciating value.

Prima facie evidence of intent to
wreck, §46-8-365.

Street, suburban and interurban railroads,
§§46-8-330 to 46-8-348.

Adoption of provisions by railroad
companies, §46-8-347.

Applicability of laws pertaining to other
railroad companies, §46-8-348.

Cities.

Powers, §46-8-331.

Consolidation or merger.

Corporations operating electric
railroads or generating electricity.

Bond issues.

Issuance by consolidated
corporation, §46-8-337.

Dissenting stockholders.

Protection of rights, §46-8-335.

Generally, §46-8-334.

Rights and privileges of purchasing
or consolidated corporation,
§46-8-336.

RAILROADS —Cont'd

Street, suburban and interurban railroads
—Cont'd

Consolidation or merger —Cont'd

Corporations operating electric
railroads or generating electricity
—Cont'd

Secretary of state.

Certificate as evidence of
existence of corporation,
§46-8-336.

Time of effectiveness, §46-8-335.

Contracts.

Existing contracts between
municipalities and railroad
companies.

Effect of provisions, §46-8-348.

Definition of "interurban railroads,"
§46-8-330.

Distance between tracks with same
terminal points.

Applicability to, §46-8-331.

Electricity.

Consolidation or merger of
corporations operating electric
railroads or generating electricity,
§§46-8-334 to 46-8-337.

Generation of electricity, §46-8-333.

Sale of transportation operations by
companies engaged in operating
electric generating plants,
§§46-8-344 to 46-8-346.

Consent.

Requirements, §46-8-345.

Effect, §46-8-346.

Generally, §46-8-344.

Public service commission.

Approval, §46-8-345.

Resolutions.

Filing, §46-8-345.

Use, §46-8-333.

Gas.

Use, §46-8-333.

Incorporation, §46-8-331.

Leases.

Roads, franchises, etc.

Lease between companies,
§46-8-341.

Powers of railroad companies,
§§46-8-331, 46-8-332.

Free transportation for policemen,
firefighters, etc., §46-8-340.

Sale of transportation operations by
companies engaged in operating
electric generating plants.

Effect on powers, §46-8-346.

RAILROADS —Cont'd

Street, suburban and interurban railroads —Cont'd

Powers of railroad companies —Cont'd
Steam for heating and power purposes, §46-8-339.

Trackless trolleys, §§46-8-342, 46-8-343.

Public service commission.

Effect of provisions on jurisdiction, §46-8-348.

Powers and duties, §§46-2-20, 46-2-21.

Sale of transportation operations by companies engaged in operating electric generating plants.

Approval, §46-8-345.

Sales.

Motor buses, §46-8-342.

Roads, franchises, etc.

Sale between companies, §46-8-341.

Trackless trolleys, §46-8-342.

Transportation operations.

Sale by companies engaged in operating electric generating plants, §§46-8-344 to 46-8-346.

Secretary of state.

Adoption of provisions by railroad companies.

Filing of resolution with secretary of state, §46-8-347.

Steam for heating and power purposes.

Powers as to, §46-8-339.

Stock and stockholders.

Consolidation or merger.

Corporations operating electric railroads or generating electricity.

Dissenting stockholders, §46-8-335.

Increase of capital stock, §46-8-332.

Tax exemption for capital stock of certain railroad companies, §46-8-338.

Taxation.

Exemption of certain railroad companies, §46-8-338.

Trackless trolleys.

Acquisition, §46-8-342.

Sale, §46-8-342.

Utilization, §46-8-343.

Suburban railroads.

Generally, §§46-8-330 to 46-8-348. See within this heading, "Street, suburban and interurban railroads."

RAILROADS —Cont'd

Switches.

Signboards to warn of drawbridges, grade crossings and stations at which there is a switch.

Erection and placement, §46-8-198.

Taxation.

Street, suburban and interurban railroads.

Exemption for certain railroad companies, §46-8-338.

Telegraphs.

Qualifications of railroad telegraph operators, §46-8-151.

Timber.

Crossing other railroads to reach timber, §§46-8-104, 46-8-105.

Track motor cars.

Lights.

Headlights and red rear lights, §46-8-171.

Venue.

Actions against lessee or possessor of railroad, §46-8-310.

Actions against railroad companies, §46-1-2.

Receivers of railroad companies.

Actions against, §46-8-314.

Trustees of railroad companies.

Actions against, §46-8-314.

Vessels.

Construction and operation by railroad companies, §46-8-102.

Wages.

Liens against companies for wages of employees, §§46-8-250, 46-8-251.

Wrecking a railroad company.

Attempting to wreck a railroad company, §46-8-362.

Successful attempt to wreck, §46-8-363.

Unsuccessful attempt to wreck, §46-8-364.

Conspiring to wreck a railroad company, §46-8-363.

Definition of "to wreck," §46-8-360.

Depreciating value of stock.

Acts done with intent and purpose of depreciating.

Prima facie evidence of intent to wreck, §46-8-365.

Felonies, §46-8-361.

Attempting to wreck a railroad company, §46-8-362.

Successful attempt to wreck, §46-8-363.

RAILROADS —Cont'd

Wrecking a railroad company —Cont'd

Felonies —Cont'd

Attempting to wreck a railroad company —Cont'd

Unsuccessful attempt to wreck, §46-8-364.

Conspiring to wreck a railroad company, §46-8-363.

Generally, §46-8-361.

RAILWAY PASSENGER SERVICE CORRIDOR SYSTEM.

Designated corridors, §46-9-290.

Planning and development, §46-9-291.

RAPID RAIL PASSENGER SERVICE.

Definition of "person," §46-8A-1.

Extension of line or system.

Permit, §46-8A-4.

Permits.

Applications, §46-8A-3.

Extension of line or system, §46-8A-4.

Required, §46-8A-2.

RAPID RAIL TRANSIT COMPACT,

§46-9-300.

RATES AND CHARGES.

Common carriers.

General provisions.

See COMMON CARRIERS.

Motor carriers, §§46-7-18 to 46-7-20.

Electricity.

General provisions.

See ELECTRICITY.

Electric membership corporations,

§§46-3-340, 46-3-341.

Gas utilities.

Accounting procedures in rate proceedings, §46-2-26.4.

Purchased gas adjustment rate, §46-2-26.5.

Limousine carriers, §46-7-85.12.

Motor carriers, §§46-7-18 to 46-7-20.

Municipal electric authority of Georgia, §46-3-148.

Fixing by authority, §46-3-127.

Payment, §46-3-148.

Public service commission.

Jurisdiction of commission, §46-3-152.

Trust funds.

Status of revenues as, §46-3-149.

Municipal gas authority of Georgia, §46-4-118.

Fixing by authority, §§46-4-97, 46-4-118.

RATES AND CHARGES —Cont'd

Municipal gas authority of Georgia —Cont'd

Trusts and trustees.

Revenues held in trust for bondholders, §46-4-119.

Public service commission.

General provisions.

See PUBLIC SERVICE COMMISSION.

Railroads.

See RAILROADS.

Telephones.

See TELEPHONES.

Theft of telecommunications service,

§§46-5-2 to 46-5-4.

REAL PROPERTY.

Municipal electric authority of Georgia.

Acquisition of property.

Powers of authority, §46-3-126.

Municipal gas authority of Georgia.

Acquisition of real property.

Powers of authority, §46-4-96.

Public property.

Status of authority property as, §46-4-98.

Railroads.

Powers of railroad companies as to, §46-8-100.

Acquisition of property, §46-8-121.

Additional nature of powers, §46-8-122.

Eminent domain, §§46-8-121, 46-8-124.

REBATES.

Motor carriers.

Misdemeanors, §46-7-38.

RECEIVERS.

Electric membership corporations.

Dissolution.

Involuntary dissolution.

Liquidation proceedings, §§46-3-432, 46-3-433.

Municipal electric authority of Georgia.

Bond issues.

Default on bonds, §46-3-147.

Municipal gas authority of Georgia.

Bond issues.

Default.

Appointment of receiver, §46-4-117.

Railroads.

Actions against receivers of railroad companies, §46-8-314.

Liens against companies.

Duties of receivers as to payment of liens, §46-8-254.

RECEIVERS —Cont'd

Railroads —Cont'd

- Liens against companies —Cont'd
 - Manner of payment after placement of company in receivership, §§46-8-251, 46-8-253.
- Service of process.
 - Actions against receivers of railroad companies, §46-8-314.
- Venue.
 - Actions against receivers of railroad companies, §46-8-314.

RECORDS.

Electric membership corporations,
§46-3-271.

Motor carriers, §46-7-23.

Municipal electric authority of Georgia,
§46-3-124.

Applicable laws, §46-3-153.

Bond issues, §46-3-141.

Municipal gas authority of Georgia,
§46-4-94.

Applicable laws, §46-4-123.

Bond issues, §46-4-111.

Public service commission.

- Investigations.
 - Formal investigations, §46-2-52.

Railroads, §46-8-3.

- Livestock and other property injured, killed or destroyed.
 - Engineer reports to be recorded in book, §46-8-210.

Southwest Georgia railroad excursion authority.

Financial records, §46-9-325.

REFLECTORS.

Locomotives, §46-8-170.

REFRIGERATION.

Railroads.

Refrigerator cars, §§46-9-90 to 46-9-92.

REFUNDING BONDS.

Rail passenger authority.

Issuance, §46-9-275.

REFUNDS.

Natural gas competition and deregulation act.

Marketers, §46-4-160.2.

REGISTRATION.

Motor carriers.

Registration of vehicles, §§46-7-15, 46-7-16.

REHEARINGS.

Public service commission.

Rules and regulations, §46-2-51.

REPORTS.

Electric membership corporations.

Annual reports, §§46-3-480, 46-3-481.

Natural gas competition and deregulation,
§46-4-165.

Public service commission.

Annual report to governor, §46-2-31.

Evidence.

Admissibility in court proceedings,
§46-2-53.

Railroads.

Neglect or refusal to furnish report required by commission.

Penalty, §46-8-382.

RESIDENCE.

Municipal electric authority of Georgia.

Legal situs or residence of authority,
§46-3-112.

Members of authority.

Residency requirements, §46-3-114.

Municipal gas authority of Georgia.

Legal situs, §46-4-82.

RESIDENTIAL CONSERVATION SERVICE ACT OF 1981.

General provisions.

Electricity.

Residential conservation service,
§§46-4A-1 to 46-4A-14.

See ELECTRICITY.

Gas.

Residential conservation service,
§§46-4A-1 to 46-4A-14.

See GAS.

Short title, §46-4A-1.

RESTITUTION.

Theft of telecommunications service,
§§46-5-2, 46-5-3.

REVENUE AND TAXATION.

Municipal electric authority of Georgia.

Exemption from taxation, §46-3-128.

Payments in lieu of taxes, §46-3-128.

Municipal gas authority of Georgia.

Exemptions from taxation, §46-4-98.

Payments in lieu of taxes, §46-4-98.

Public service commission.

Rates and charges.

Tax accounting by utilities in rate-making proceedings,
§46-2-26.2.

Rail passenger authority.

Exemption of authority, §46-9-280.

REVENUE AND TAXATION —Cont'd

Railroads.

Street, suburban and interurban
railroads.

Exemption for certain railroad
companies, §46-8-338.

Rural telephone cooperatives.

Exemption from taxation, §46-5-101.

Mortgage or deed of trust to secure
indebtedness to federal agency.

Exemption, §46-5-93.

**Southwest Georgia railroad excursion
authority.**

Exemption from taxation, §46-9-331.

RIGHTS OF WAY.

Electric membership corporations.

Acquisition.

Actions growing out of, §46-3-204.

Powers of corporations, §46-3-201.

RULES AND REGULATIONS.

Hazardous materials and waste.

Transportation of hazardous materials,
§§46-11-4, 46-11-5.

Limousine carriers.

Administrative procedure, §46-7-85.13.

Chauffeur's permits, §46-7-85.9.

Implementation of provisions,
§46-7-85.17.

Motor carriers.

Enforcement of provisions, §46-7-27.

Safety regulations, §46-7-26.

Private carriers, §46-7-37.

**Municipal electric authority of Georgia,
§46-3-122.**

Public service commission, §46-2-30.

Rehearing and reconsideration of
orders, §46-2-51.

Telephones.

Pay telephones, §46-5-6.

**RURAL TELEPHONE COOPERATIVE
ACT.**

General provisions, §§46-5-60 to 46-5-105.

See RURAL TELEPHONE
COOPERATIVES.

Short title, §46-5-60.

RURAL TELEPHONE COOPERATIVES.

Acknowledgments.

Persons who may take acknowledgments,
§46-5-98.

Articles of incorporation.

Amendment, §46-5-85.

Superior court.

Power to approve amendment,
§46-5-64.

RURAL TELEPHONE COOPERATIVES

—Cont'd

Articles of incorporation —Cont'd

Contents, §46-5-67.

Members.

Amendment of articles, §46-5-85.

Publication, §46-5-72.

Submittal of publisher's affidavit,
§46-5-71.

Secretary of state.

Filing of copies with secretary of state,
§46-5-74.

Certificate of secretary of state,
§46-5-75.

Evidentiary effect, §46-5-76.

Time of corporate existence,
§46-5-77.

Signing and acknowledgment, §46-5-67.

Superior court.

Approval.

Order approving, §46-5-69.

Presentation to superior court for,
§46-5-68.

Certified copies of articles and orders
thereon.

Clerk to deliver to applicants,
§46-5-73.

Filing with clerk of court, §46-5-70.

Board of directors, §46-5-82.

Election of directors, §46-5-82.

Districts.

Division of service territory into,
§46-5-83.

Officers.

Election of officers, §46-5-84.

Quorum, §46-5-82.

Bond issues.

Applicability of certain provisions,
§46-5-104.

Bylaws, §46-5-78.

Members.

Adoption, amendment and repeal of
bylaws, §46-5-78.

Nonprofit operation.

Contents regarding, §46-5-92.

Citation of act.

Short title, §46-5-60.

Consolidation, §46-5-87.

Effect, §46-5-89.

Telephone corporations.

Consolidation into a cooperative,
§46-5-90.

Contracts.

Nonprofit operation.

Content of contracts with members
regarding, §46-5-92.

RURAL TELEPHONE COOPERATIVES

—Cont'd

Corporations.

Consolidation of telephone corporation into a cooperative, §46-5-90.

Conversion of telephone corporation into cooperative, §46-5-90.

Definitions, §46-5-62.

Dissolution, §46-5-91.

Districts.

Delegates, §46-5-83.

Division of service territory into, §46-5-83.

Eminent domain.

Power of eminent domain, §46-5-63.

Evidence.

Certified copies of charter and secretary of state's certificate.

Evidentiary effect, §46-5-76.

Fees, §46-5-100.

Annual license fee, §46-5-101.

Foreign nonprofit or cooperative corporations.

Extension of service in state, §46-5-99.

Fees.

Annual license fee, §46-5-101.

Service of process.

Secretary of state as agent for, §46-5-99.

Incorporation, §46-5-66.

Number of incorporators, §46-5-66.

Time of corporate existence, §46-5-77.

Interpretation and construction.

Construction of provisions, §46-5-105.

Jurisdiction.

Public service commission, §46-5-103.

Legislative declaration, §46-5-61.

Limitation of actions, §46-5-97.

Lines and facilities.

Construction standards, §46-5-96.

Interconnection with those of other telephone companies, §46-5-102.

Members, §§46-5-65 to 46-5-95.

Acknowledgments.

Taking of acknowledgments, §46-5-98.

Articles of incorporation.

Amendment of articles, §46-5-85.

Bylaws.

Adoption, amendment and repeal of bylaws, §46-5-78.

Certificate of membership, §46-5-79.

Liability for debts of cooperative, §46-5-94.

Meetings, §46-5-80.

Amendment of articles of incorporation, §46-5-85.

RURAL TELEPHONE COOPERATIVES

—Cont'd

Members —Cont'd

Meetings —Cont'd

Consolidation of cooperatives, §46-5-87.

Dissolution of cooperatives, §46-5-91.

Merger of cooperatives, §46-5-88.

Notice, §46-5-80.

Amendment of articles of incorporation, §46-5-85.

Consolidation of cooperative, §46-5-87.

Dissolution of cooperatives, §46-5-91.

Merger of cooperatives, §46-5-88.

Sale of all or substantial part of property, §46-5-93.

Waiver of notice, §46-5-81.

Qualifications for membership, §46-5-79.

Sale of all or substantial part of property.

Approval, §46-5-93.

Merger, §§46-5-65 to 46-5-95.

Effect, §46-5-89.

Mortgages and deeds of trust.

Approval of members, §46-5-93.

Recordation.

Effect, §46-5-95.

Securing indebtedness to federal agency, §46-5-93.

Names, §46-5-65.

Nonprofit operation, §46-5-92.

Notice.

Meetings of members, §46-5-80.

Amendment of articles of incorporation, §46-5-85.

Consolidation of cooperatives, §46-5-87.

Dissolution of cooperatives, §46-5-91.

Merger of cooperatives, §46-5-88.

Sale of all or substantial part of property, §46-5-93.

Waiver of notice, §46-5-81.

Office.

Change of principal office, §46-5-86.

Officers, §46-5-84.

Acknowledgments.

Taking of acknowledgments, §46-5-98.

Powers, §46-5-63.

Publication.

Articles of incorporation, §§46-5-71, 46-5-72.

Change of principal office.

Application, §46-5-86.

RURAL TELEPHONE COOPERATIVES

—Cont'd

Public service commission.

Jurisdiction, §46-5-103.

Purpose of provisions, §46-5-61.

Sale of all or substantial portion of property.

Approval by members, §46-5-93.

Secretary of state.

Articles of incorporation.

Filing of copies with secretary of state, §46-5-74.

Certificate of secretary of state, §46-5-75.

Evidentiary effect, §46-5-76.

Time of corporate existence, §46-5-77.

Fees, §46-5-100.

Service of process.

Foreign nonprofit or cooperative corporations.

Secretary of state as agent for, §46-5-99.

Stock and stockholders.

Acknowledgments.

Taking by shareholders, §46-5-98.

Liability of shareholders.

Debts of cooperative, §46-5-94.

Share certificates, §46-5-79.

Superior court.

Articles of incorporation.

Approval.

Order approving, §46-5-69.

Presentation to superior court for, §46-5-68.

Certified copies of articles and orders thereon.

Clerk to deliver to applicants, §46-5-73.

Filing with clerk of court, §46-5-70.

Dissolution of cooperatives.

Generally, §46-5-91.

Fees of clerk, §46-5-100.

Powers, §46-5-64.

Taxation.

Exemption from taxation, §46-5-101.

Mortgage or deed of trust to secure indebtedness to federal agency.

Exemption, §46-5-93.

Title of act.

Short title, §46-5-60.

United States.

Securing indebtedness to federal agency.

Mortgages, deeds of trust or pledge of property, §46-5-93.

S

SAFETY.

Limousine carriers.

Responsibility for safety regulation, §46-7-85.5.

Motor carriers.

Rules and regulations, §46-7-26.

Railroads.

Inspections by public service commission, §46-8-25.

SALARIES.

Public service commission.

Generally, §46-2-6.

Payment by commission, §46-2-8.

SALES.

Electricity.

Cogeneration and distributed generation act of 2001.

Sale of electricity by generating facilities, §§46-3-50 to 46-3-56.

See ELECTRICITY.

Railroads.

Judicial sale of railroad, §§46-8-107, 46-8-108.

Rolling stock and other equipment.

Conditional sales.

Contracts, §§46-8-270, 46-8-272.

Termination of prior lease.

Sale or lease of property, rights and franchises upon, §46-8-106.

Rural telephone cooperatives.

All or substantial portion of property.

Approval by members, §46-5-93.

Telephone sales.

Georgia no-call law, §46-5-27.

SEALS AND SEALED INSTRUMENTS.

Electric membership corporations.

Affixing corporate seal, §46-3-173.

Effect, §46-3-173.

SEARCHES AND SEIZURES.

Theft of telecommunications service.

Devices, equipment or apparatus, §46-5-4.

SEATS.

Common carriers.

Comfortable seats, §46-9-133.

Railroads.

Assignment of seats, §§46-9-134, 46-9-135.

SECRETARY OF STATE

CORPORATIONS.

Electric membership corporations.

See ELECTRIC MEMBERSHIP CORPORATIONS.

SECRETARY OF STATE

CORPORATIONS —Cont'd

Express companies, §§46-9-230 to 46-9-236.

See EXPRESS COMPANIES.

Motor carriers.

Nonresident carriers.

Service of process on secretary of state, §46-7-17.

Railroad companies.

General provisions, §§46-8-1 to 46-8-382.

See RAILROADS.

SECURITIES.

Electric membership corporations.

Exemptions from securities laws, §46-3-176.

SERVICE AREAS.

Rail passenger authority.

Defined, §46-9-272.

SERVICE OF PROCESS.

Consumers' utility counsel division.

Notice.

Service on director, §46-10-5.

Electric membership corporations,

§46-3-242.

Dissolution.

Involuntary dissolution actions, §46-3-430.

Foreign electric cooperatives, §46-3-459.

Express companies, §46-9-235.

Posting of name of chief officer on whom process may be served, §46-9-236.

Motor carriers.

Nonresidents, §46-7-17.

Railroads.

Lessee of railroad.

Service on, §46-8-311.

Lessor railroad company.

Service on, §§46-8-312, 46-8-313.

Protection of property.

Special officers.

Return of processes to county of origin, §46-8-233.

Receivers of railroad companies.

Actions against, §46-8-314.

Trustees of railroad companies.

Actions against, §46-8-314.

Rural telephone cooperatives.

Foreign nonprofit or cooperative corporations.

Secretary of state as agent for, §46-5-99.

Telegraph companies.

Actions against, §46-5-149.

SETTLEMENTS.

Electric membership corporation.

Derivative actions by members, §46-3-272.

SHERIFFS.

Common carriers.

Passes.

Annual passes for sheriffs and their deputies, §46-9-138.

Deputies.

Carrier transportation.

Annual passes, §46-9-138.

Telephones.

"911" system.

General provisions, §§46-5-120 to 46-5-139.

See TELEPHONES.

SHIPS AND VESSELS.

Passenger tickets, §§46-9-170 to 46-9-172.

Contents, §46-9-171.

County of registry.

Inclusion in advertisements, etc., §46-9-170.

Signatures, §46-9-171.

Violations of provisions, §46-9-172.

Railroads.

Construction and operation by railroad companies, §46-8-102.

SIGNATURES.

Electric membership corporations.

Articles of incorporation, §46-3-321.

Documents, §46-3-173.

Documents known to be false.

Misdemeanors, §46-3-541.

Municipal electric authority of Georgia.

Bond issues, §46-3-131.

SIGNBOARDS.

Railroad bridge warnings, §46-8-198.

SIGNS.

Railroad crossings, §§46-8-190, 46-8-191, 46-8-198.

SITUS.

Municipal electric authority of Georgia.

Residence, §§46-3-112, 46-4-82.

SOFTWARE.

911 system.

Billing of subscribers, §46-5-134.

SOLICITATION.

Telephone sales.

Georgia no-call law, §46-5-27.

SOUTHWEST GEORGIA RAILROAD

EXCURSION AUTHORITY,

§§46-9-320 to 46-9-332.

Accounts and accounting, §46-9-325.

Additional nature of provisions, §46-9-332.

**SOUTHWEST GEORGIA RAILROAD
EXCURSION AUTHORITY —Cont'd**

Bonds.

- Anticipation notes, §46-9-327.
- Approval, §46-9-327.
- Conditions, §46-9-326.
- Defined, §46-9-322.
- Exemption from taxation, §46-9-331.
- Findings required, §46-9-328.
- Issuance, §46-9-326.
- Local governments not obligated, §46-9-330.
- Multiple issues, §46-9-327.
- Powers as to, §46-9-323.
- Proceeds.
 - Use, §46-9-327.
- Source of payment, §46-9-326.
- State not obligated, §46-9-330.
- Tax free in Georgia, §46-9-331.
- Terms, §46-9-326.
- Validation, §46-9-327.

Composition of authority, §46-9-324.

Conflict of laws.

- Other projects, §46-9-332.

Conflicts of interest, §46-9-324.

Contracts.

- Powers as to, §46-9-323.

Costs of projects.

- Defined, §46-9-322.

Creation, §46-9-321.

Definitions, §46-9-322.

Department of transportation.

- Administrative assignment to department, §46-9-321.

Eligibility to serve on authority, §46-9-324.

Employees.

- Powers as to, §46-9-323.

Establishment, §46-9-321.

Interpretation and construction.

- Additional nature of provisions, §46-9-332.
- Liberal construction of provisions, §46-9-329.

Liberal construction of provisions, §46-9-329.

Nonprofit and charitable nature of authority, §46-9-331.

Notes.

- Bond anticipation notes, §46-9-327.
- Governments not obligated, §46-9-330.

Open and public meetings, §46-9-324.

Powers of authority, §46-9-323.

Projects.

- Defined, §46-9-322.
- Findings, §46-9-328.

**SOUTHWEST GEORGIA RAILROAD
EXCURSION AUTHORITY —Cont'd**

Projects —Cont'd

- Implementation, §46-9-328.

Quorum, §46-9-324.

Records.

- Financial records, §46-9-325.

Residence of members of authority, §46-9-324.

Revenue bonds.

- Defined, §46-9-322.

Service area.

- Defined, §46-9-322.

Short title of provisions, §46-9-320.

Taxation.

- Exemption from taxation, §46-9-331.

Travel expense reimbursement, §46-9-324.

Trustees of authority.

- Accountability of members, §46-9-325.

Vacancies, §46-9-324.

**SOUTHWEST GEORGIA RAILROAD
EXCURSION AUTHORITY LAW.**

General provisions, §§46-9-320 to 46-9-332.

- See SOUTHWEST GEORGIA RAILROAD EXCURSION AUTHORITY.

SPECIAL POLICEMEN.

Railroads.

- Protection of property, §§46-8-230 to 46-8-233.
- See RAILROADS.

SPIRIT OF THE LAW.

Stock and bond issuance, §46-2-28.

STATE GEOLOGIST.

Oil and gas.

- Underground storage of gas.
 - Duties of state geologist as to proposed storage project, §46-4-54.

STATUTE OF LIMITATIONS.

Electric membership corporations.

- Acquisition of rights of way and easements.
 - Actions growing out of, §46-3-204.
- Directors and officers.
 - Actions against, §46-3-304.

Rural telephone cooperatives, §46-5-97.

Telephone solicitation no call law.
Actions for violations, §46-5-27.

STEAM.

Railroads.

- Street, suburban and interurban railroads.
- Authority to furnish steam for heating and power purposes, §46-8-339.
- Laying and maintaining steampipes, §46-8-339.

STEAMPIPES.

Railroads.

- Laying and maintaining steampipes, §46-8-339.

STOCK AND STOCKHOLDERS.

Express companies.

- Subscription for capital stock, §46-9-231.

Motor common carriers.

- Public service commission.
- Approval of issuance of stocks and bonds.
- Exemption for certain motor carriers, §46-2-28.

Public service commission.

- Contemplated issuance.
- Approval procedures, §46-2-28.
- Confidentiality of information, §46-2-29.

Railroads.

- See RAILROADS.

Rural telephone cooperatives.

- Acknowledgments.
- Taking by shareholders, §46-5-98.
- Liability of shareholders.
- Debts of cooperative, §46-5-94.
- Share certificates, §46-5-79.

Stock subscriptions.

- Telegraph companies.
- Subscription books, §46-5-142.
- Voting by subscribers, §46-5-143.

Telegraphs.

- Companies.
- Public service commission.
- Review of capitalization of proposed company, §46-5-142.
- Subscription for shares, §§46-5-142, 46-5-143.

STOCK SUBSCRIPTIONS.

Telegraph companies.

- Subscription books, §46-5-142.
- Voting by subscribers, §46-5-143.

STORAGE.

Gas.

- Underground storage, §§46-4-50 to 46-4-62.
- See GAS.

STREET RAILROADS.

- Street, suburban and interurban railroads, §§46-8-330 to 46-8-348.
- See RAILROADS.

STREETS.

Railroads.

- Street, suburban and interurban railroads, §§46-8-330 to 46-8-348.
- See RAILROADS.

STRICT LIABILITY.

- Electricity, §46-3-40.

STRIKES.

Common carriers.

- Effect on duties, §46-9-42.

SUBPOENAS.

Public service commission.

- Hearing officers.
- Powers, §46-2-58.
- Witnesses, §46-2-54.

SUBURBAN RAILROADS.

Street, suburban and interurban railroads.

- General provisions, §§46-8-330 to 46-8-348.
- See RAILROADS.

SUICIDE.

- Prevention agencies, §§46-5-122, 46-5-124.

SUMMONS AND PROCESS.

Motor carriers, §46-7-17.

SUPERIOR COURTS.

Electric membership corporations.

- Dissolution.
- Involuntary dissolution.
- General provisions, §§46-3-429 to 46-3-437.
- See ELECTRIC MEMBERSHIP CORPORATIONS.

Express companies.

- Jurisdiction, §46-9-234.

Rural telephone cooperatives.

- See RURAL TELEPHONE COOPERATIVES.

SURVIVAL OF ACTIONS.

Electric membership corporations.

- Dissolution.
- Survival of remedy after dissolution, §46-3-439.

T

TARIFFS.

Electricity.

- Fuel-adjustment tariffs.
- Notation on bill of charges for fuel adjustment, §46-2-27.

TARIFFS —Cont'd

Electricity —Cont'd

Fuel-adjustment tariffs —Cont'd
Restriction as to use, §46-2-26.

Limousine carriers.

Rates and charges, §46-7-85.12.

Motor carriers.

Rates and charges, §46-7-18.

Natural gas competition and deregulation,
§46-4-159.

TAXATION.

Municipal electric authority of Georgia.

Exemption from taxation, §46-3-128.
Payments in lieu of taxes, §46-3-128.

Municipal gas authority of Georgia.

Exemptions from taxation, §46-4-98.
Payments in lieu of taxes, §46-4-98.

Public service commission.

Rates and charges.
Tax accounting by utilities in
rate-making proceedings,
§46-2-26.2.

Rail passenger authority.

Exemption of authority, §46-9-280.

Railroads.

Street, suburban and interurban
railroads.
Exemption for certain railroad
companies, §46-8-338.

Rural telephone cooperatives.

Exemption from taxation, §46-5-101.
Mortgage or deed of trust to secure
indebtedness to federal agency.
Exemption, §46-5-93.

**Southwest Georgia railroad excursion
authority.**

Exemption from taxation, §46-9-331.

TAXICABS.

Motor common carriers.

Exceptions to definition, §46-1-1.

TELECOMMUNICATIONS.

Telephones.

See TELEPHONES.

Theft of telecommunications service,
§§46-5-2 to 46-5-4.

TELECOMMUNICATIONS MARKETING.

Abusive acts or practices, §46-5-187.

Billing for services, §46-5-182.

Certificate of authority.

Required, §46-5-182.

**Changes in primary local exchange or long
distance carrier.**

Confirmation of changes, §46-5-183.
Contents of letter of confirmation,
§46-5-184.

**TELECOMMUNICATIONS MARKETING
—Cont'd**

Citation of act.

Short title, §46-5-180.

Construction of article, §46-5-192.

Damages.

Violations of article, §46-5-191.

Definitions, §46-5-181.

Forgery, §46-5-188.

Penalties.

Willful violation of article, §46-5-189.

Practicing abusive telemarketing acts,
§46-5-187.

**Primary local exchange or long distance
carrier.**

Change of customer back to local
exchange.
Burden of action, §46-5-186.
Investigation and reporting of changes,
§46-5-185.
Procedures for confirmation of changes
in selection, §46-5-183.
Contents of letter of confirmation,
§46-5-184.

Reports of unauthorized changes,
§46-5-185.

Time limit to change, §46-5-186.

Public service commission.

Factual findings by, §46-5-190.

Title of act.

Short title, §46-5-180.

Violations of article.

Damages, §46-5-191.
Willful violation, §46-5-189.

**TELECOMMUNICATIONS MARKETING
ACT OF 1998.**

General provisions, §§46-5-180 to 46-5-192.
See TELECOMMUNICATIONS
MARKETING.

Short title, §46-5-180.

TELEFACSIMILE MESSAGES.

Unsolicited commercial facsimile messages.

Consent to receipt of telefacsimile
messages.
Exception to provisions, §46-5-25.
Definition of "telefacsimile," §46-5-25.

TELEGRAPHS, §§46-5-140 to 46-5-149.

Actions.

Companies.
Power to sue and be sued, §46-5-146.
Service of process in actions against,
§46-5-149.
Venue for actions against, §46-5-149.

Companies.

Actions.
Power to sue and be sued, §46-5-146.

TELEGRAPHS —Cont'd

Companies —Cont'd

Actions —Cont'd

Service of process in actions against,
§46-5-149.

Venue for actions against, §46-5-149.

Amendment of charter, §46-5-145.

Certificate of organization.

Issuance, §46-5-144.

Recordation, §46-5-144.

Charters.

Amendment, §46-5-145.

Petitions for, §§46-5-141, 46-5-142.

Defined, §46-5-140.

Delivery of dispatches and messages.

Duty, §46-5-147.

Territorial extent, §46-5-148.

Directors, §46-5-143.

Fees.

Petition for charter.

Filing fee, §46-5-142.

Lines.

Power to erect and maintain telegraph
lines, §46-5-146.

Messages.

Duties as to, §§46-5-147, 46-5-148.

Organizational meeting, §§46-5-143,
46-5-144.

Petition for charter, §46-5-141.

Filing fee, §46-5-142.

Powers, §46-5-146.

Reports.

Organization meeting, §46-5-144.

Service of process, §46-5-149.

Stock and stockholders.

Public service commission.

Review of capitalization of proposed
company, §46-5-142.

Subscriptions for shares.

Organizational meeting.

Voting by subscribers, §46-5-143.

Secretary of state.

Issuance of license to open
stock-subscription books,
§46-5-142.

Definitions, §46-5-140.

Eminent domain.

Exercise of power by telegraph
companies, §46-5-1.

Lines.

Companies.

Power to erect and maintain telegraph
lines, §46-5-146.

Defined, §46-5-140.

TELEGRAPHS —Cont'd

Public service commission.

Companies.

Stock and stockholders.

Review of capitalization of proposed
company, §46-5-142.

General provisions, §§46-2-1 to 46-2-95.

See PUBLIC SERVICE COMMISSION.

Powers and duties as to telegraph
companies, §§46-2-20 to 46-2-22.

Rate-making.

Special provisions as to
telecommunications companies,
§46-2-23.

Railroads.

Qualifications of railroad telegraph
operators, §46-8-151.

Service of process.

Companies.

Actions against, §46-5-149.

Stock and stockholders.

Companies.

Public service commission.

Review of capitalization of proposed
company, §46-5-142.

Subscription for shares, §§46-5-142,
46-5-143.

Theft of services.

Telecommunications service generally,
§§46-5-2 to 46-5-4.

Venue.

Companies.

Actions against, §46-5-149.

TELEMARKETING.

General provisions, §§46-5-180 to 46-5-192.

See TELECOMMUNICATIONS
MARKETING.

Georgia no-call law, §46-5-27.

TELEMARKETING NO-CALL LAW,
§46-5-27.

TELEMARKETING SERVICES, §46-5-27.

TELEPHONE COOPERATIVES.

Rural telephone cooperatives, §§46-5-60 to
46-5-105.

See TELEPHONES.

TELEPHONES, §§46-5-20 to 46-5-139.

Actions.

"911" system.

Liability of service suppliers, §46-5-135.

Alternative regulation.

Company obligations associated with,
§46-5-169.

TELEPHONES —Cont'd

Area codes.

Inclusion of local exchanges 495 and 567 in area code 404, §46-5-5.

Authorities.

911 systems, §46-5-138.

Automatic dialing and recorded message (ADAD) equipment.

Prohibited acts as to use, §§46-5-23, 46-5-24.

Caller identification.

Telephone solicitors.

Blocking or circumventing subscriber's service, §46-5-27.

Certificates of authority, §46-5-163.

Commercial messages.

Automatic dialing and recorded message (ADAD) equipment.

Prohibited acts as to use, §§46-5-23, 46-5-24.

Recorded commercial messages.

Review for violations of prohibition against obscene comments and suggestions, §46-5-22.

Unsolicited commercial facsimile messages.

Transmission prohibited, §46-5-25.

Commission.

Jurisdiction and authority, §46-5-168.

Cooperatives.

Rural telephone cooperatives, §§46-5-60 to 46-5-105.

See RURAL TELEPHONE COOPERATIVES.

Criminal law and procedure.

Automatic dialing and recorded message (ADAD) equipment.

Prohibited acts as to use, §§46-5-23, 46-5-24.

Disconnection and removal of illegally used telephone facilities, §46-5-20.

Harassing purposes.

Use of telephone for, §46-5-21.

Obscenity.

Prohibited acts, §§46-5-21, 46-5-22.

Theft of telecommunications service.

Generally, §§46-5-2 to 46-5-4.

Threatening purposes.

Use of telephone communications for, §46-5-21.

Unsolicited commercial facsimile messages.

Transmission, §46-5-25.

Definitions.

ADAD equipment, §§46-5-23, 46-5-24.

TELEPHONES —Cont'd

Definitions —Cont'd

Lines, plants or systems.

Definition of "person," §46-5-40.

"911" system, §46-5-122.

Rural telephone cooperatives, §46-5-62.

Dial "911" §§46-5-120 to 46-5-139. See within this heading, "911 system."

Disconnection.

Illegally used telephone facilities, §46-5-20.

Eminent domain.

Exercise of power by telephone companies, §46-5-1.

Rural telephone cooperatives.

Power of eminent domain, §46-5-63.

Family violence shelters.

Confidentiality of locations and addresses.

Protection by directory information or listings publishers and disseminators.

Plan filed with commission, §46-5-7.

Federal aid.

"911" system, §46-5-130.

Unsolicited commercial facsimile messages.

Transmission, §46-5-25.

Harassing phone calls, §46-5-21.

Immunity.

"911" system, §46-5-131.

Injunctions.

Obscene comments or suggestions.

Using telephone communications for, §46-5-22.

Interconnection.

Certificated local exchange companies, §46-5-164.

Joint authorities.

911 systems.

Authorized to operate, §46-5-138.

Junk fax, §46-5-25.

Lines, plants or systems, §§46-5-40 to 46-5-46.

Certificate of public convenience and necessity, §§46-5-41, 46-5-43 to 46-5-46.

Application, §46-5-43.

Notice of receipt, §46-5-43.

Complaints regarding persons constructing or operating without certificate, §46-5-45.

Denial, §46-5-44.

TELEPHONES —Cont'd

Lines, plants or systems —Cont'd

- Certificate of public convenience and necessity —Cont'd
- Grandfather clause.
 - Persons engaged in construction or operation as of February 17, 1950, §46-5-46.
- Issuance, §46-5-44.
- Required, §46-5-41.
- Complaints.
 - Construction or operation without certificate of public convenience and necessity, §46-5-45.
- Construction or extension.
 - Interference with existing lines or systems, §46-5-42.
- Definition of "person," §46-5-40.
- Interference with existing lines or systems, §46-5-42.
- Rural telephone cooperatives.
 - Construction standards, §46-5-96.
 - Interconnection with other telephone companies, §46-5-102.

Local telephone numbering resources and assignments.

- Access to, §46-5-170.

Misdemeanors.

- Automatic dialing and recorded message (ADAD) equipment.
 - Prohibited acts as to use, §§46-5-23, 46-5-24.
- Harassing purposes.
 - Use of telephone for, §46-5-21.
- Obscenity.
 - Prohibited use of telephones, §§46-5-21, 46-5-22.
- Theft of service, §46-5-2.
- Threatening purposes.
 - Use of telephone for, §46-5-21.
- Unsolicited commercial facsimile messages.
 - Transmission, §46-5-25.

Mobile telephones.

- Telephone solicitations.
 - Mobile or wireless subscribers.
 - No-call law, §46-5-27.
- Theft of telecommunications service, §§46-5-2 to 46-5-4.

"911 system," §§46-5-120 to 46-5-139.

- Actions.
 - Liability of service suppliers, §46-5-135.
- Advisory boards, §46-5-136.

TELEPHONES —Cont'd

"911 system," —Cont'd

- Agency.
 - Approval of systems, §46-5-127.
 - Coordination with public service commission, §46-5-126.
 - Definition of "division," §46-5-122.
 - Emblem.
 - Duty to develop, §46-5-129.
 - Guidelines for implementing system, §46-5-124.
 - Cooperation by public agencies, §46-5-128.
- Approval of systems, §46-5-127.
- Authorities operating 911 systems, §46-5-138.
- Charges, §§46-5-133 to 46-5-134.1.
 - Billing of subscribers, §46-5-134.
 - Exchange access facilities, §46-5-138.1.
 - Liability of subscribers, §46-5-134.
- Local governments.
 - Resolution to impose monthly charge, §46-5-133.
 - Counties where governing authorities of more than one local government have adopted resolution to impose enhanced charge, §46-5-134.1.
- Citation of act.
 - Short title, §46-5-120.
- Committee, §46-5-123.
- Vacancies.
 - Filling, §46-5-123.
- Definitions, §46-5-122.
- Director of emergency management.
 - Information to be registered with by service suppliers, §46-5-124.1.
- Emblem, §46-5-129.
- Exchange access facilities, §46-5-138.1.
- Federal aid, §46-5-130.
- Findings of legislature, §46-5-121.
- Funds.
 - Emergency telephone system fund, §46-5-134.
- Immunity from liability, §46-5-131.
- Joint study committee on wireless enhanced charges, §46-5-139.
- Legislative declaration, §46-5-121.
- Local governments.
 - Advisory boards.
 - Creation, §46-5-136.

TELEPHONES —Cont'd

"911 system," —Cont'd

Local governments —Cont'd
Charges.

Resolution to impose monthly
charge, §46-5-133.

Counties where governing
authorities of more than one
local government have
adopted resolution to impose
enhanced charge,
§46-5-134.1.

Defined, §46-5-122.

Multijurisdictional systems.

Formation, §46-5-125.

Planning.

Agency, §46-5-124.

Cooperation by public agencies,
§46-5-128.

Public agencies.

Cooperation by, §46-5-128.

Defined, §46-5-122.

Public service commission.

Coordination with, §46-5-126.

Powers not affected, §46-5-137.

Regional systems.

Formation, §46-5-125.

Service suppliers.

Defined, §46-5-122.

Information to be registered with
director, §46-5-124.1.

Liability in civil actions, §46-5-135.

Title of act.

Short title, §46-5-120.

Wireless enhanced "911" charges,
§46-5-139.

Wireless service supplier.

Fees, §46-5-132.

No-call law, §46-5-27.

Notice.

Lines, plants or systems.

Certificate of public convenience and
necessity.

Application.

Notice of receipt, §46-5-43.

Obscenity.

Prohibited use of telephones, §§46-5-21,
46-5-22.

Operator services.

Access to live operator, §46-5-26.

Pay telephones.

Public service commission, §46-5-6.

Physically impaired persons.

Telephone system for, §§46-5-30, 46-5-31.

TELEPHONES —Cont'd

Plants.

Generally, §§46-5-40 to 46-5-46. See
within this heading, "Lines, plants
or systems."

Public service commission.

General provisions, §§46-2-1 to 46-2-95.

See PUBLIC SERVICE COMMISSION.

"911" system.

Coordination with commission,
§46-5-126.

Powers of commission not affected,
§46-5-137.

Powers and duties as to telephone
companies, §§46-2-20, 46-2-21.

Rate-making.

County-wide local calling, §46-2-25.1.

Sixteen mile toll free telephone
calling.

Rate-making power of commission
not affected, §46-2-25.2.

Special provisions as to
telecommunications companies,
§46-2-23.

Rural telephone cooperatives.

Jurisdiction of commission, §46-5-103.

Telecommunications and competition
development.

Jurisdiction and authority, §46-5-168.

Toll-free calls within 22 miles of an
exchange, §46-2-25.3.

Rates and charges.

Alternative regulation, §46-5-165.

Basic local exchange services, §46-5-166.

Local call charges based on duration or
time, §46-5-171.

Physically impaired persons.

Telephone system for, §46-5-31.

Public service commission.

Rate-making, §§46-2-23, 46-2-25.1,
46-2-25.2.

Sixteen mile toll free telephone calling,
§46-2-25.2.

Theft of telecommunications service,
§§46-5-2 to 46-5-4.

Reports.

Annual report of tier 1 company's
investment commitment, §46-5-172.

Commission's annual report to general
assembly, §46-5-174.

**Rural telephone cooperatives, §§46-5-60 to
46-5-105.**

See RURAL TELEPHONE
COOPERATIVES.

TELEPHONES —Cont'd

Systems.

Generally, §§46-5-40 to 46-5-46. See within this heading, "Lines, plants or systems."

Telecommunications and competition development.

Alternative regulation.

Company obligations associated with, §46-5-169.

Certificates of authority, §46-5-163.

Citation of article, §46-5-160.

Definitions, §46-5-162.

Intent of legislature, §46-5-161.

Interconnections among certificated local exchange companies, §46-5-164.

Jurisdiction and authority of commission, §46-5-168.

Legislative findings, §46-5-161.

Local telephone numbering resources and assignments.

Access to, §46-5-170.

Rates and charges.

Alternative regulation, §46-5-165.

Basic local exchange services, §46-5-166.

Local call charges based on duration or time, §46-5-171.

Reports.

Annual of tier 1 company's investment commitment, §46-5-172.

Commission's annual report to general assembly, §46-5-174.

Short title of article, §46-5-160.

Third party services.

Authorization by customer, §46-5-171.1.

Universal access fund, §46-5-167.

Unpublished telephone identification, §46-5-173.

Telemarketing services, §46-5-27.

Georgia no-call law, §46-5-27.

Theft of services.

Telecommunications service generally, §§46-5-2 to 46-5-4.

Third party services.

Authorization by customer for charges, §46-5-171.1.

Threats.

Use of telephone for threatening purposes, §46-5-21.

Toll-free calls.

Class within 22 miles of an exchange, §46-2-25.3.

TELEPHONES —Cont'd

Universal access fund, §46-5-167.

Unpublished telephone identification, §46-5-173.

Wireless service supplier.

"911" system.

Fees, §46-5-132.

TELEPHONE SOLICITORS.

Georgia no-call law, §46-5-27.

TELEPHONES SALES.

Georgia no-call law, §46-5-27.

TELEVISION.

Cable television.

Theft of telecommunications service generally, §§46-5-2 to 46-5-4.

Electric membership corporations.

Cable television systems.

Ownership or operation not authorized, §46-3-178.

TENANTS IN COMMON.

Electric membership corporation voting, §46-3-266.

TERRITORIAL ELECTRIC SERVICE ACT.

Electricity.

Allocation to suppliers, §§46-3-1 to 46-3-15.

See ELECTRICITY.

Short title, §46-3-1.

THEFT.

Services.

Telecommunications service, §§46-5-2 to 46-5-4.

THEFT OF TELECOMMUNICATIONS SERVICE.

Avoiding or attempting to avoid charges, §46-5-2.

Civil actions, §§46-5-2, 46-5-3.

Devices, equipment or apparatus.

Prohibited acts as to, §46-5-3.

Seizure and disposal, §46-5-4.

Restitution, §§46-5-2, 46-5-3.

THE GEORGIA COGENERATION AND DISTRIBUTED GENERATION ACT OF 2001.

Sale of electricity by generating facilities, §§46-3-50 to 46-3-56.

See ELECTRICITY.

Short title, §46-3-50.

THE TELECOMMUNICATIONS AND COMPETITION DEVELOPMENT ACT OF 1995.

General provisions, §§46-5-160 to 46-5-174.

See TELEPHONES.

Short title, §46-5-160.

THREATS.

Telephones.

Use of telephone communications for threatening purposes, §46-5-21.

TIE VOTES.

Municipal electric authority.

Election of members, §46-3-113.

Municipal gas authority.

Election of members, §46-4-83.

TIMBER.

Railroads.

Crossing other railroads to reach timber, §§46-8-104, 46-8-105.

TOLL-FREE TELEPHONE CALLING.

Sixteen mile toll-free telephone calling,
§46-2-25.2.

TORTS.

Comparative negligence.

Railroad liability.

Amount of recovery, §46-8-291.

Ordinary care or diligence.

Carriers, §46-9-1.

Passengers.

Extraordinary diligence, §46-9-132.

Common carriers.

Extraordinary care, §46-9-1.

TRACKLESS TROLLEYS.

Street, suburban and interurban railroads.

Acquisition, §46-8-342.

Sale, §46-8-342.

Utilization, §46-8-343.

TRACK MOTOR CARS.

Lights.

Headlights and red rear lights, §46-8-171.

TRACKS.

Railroads.

Contracts.

Common use of tracks within cities,
§46-8-101.

Distance between tracks with same
terminal point, §46-8-127.

Street, suburban and interurban
railroads, §46-8-331.

Intersections of tracks.

Stopping at, §46-8-193.

Intruding on railroad tracks.

Misdemeanor, §46-8-380.

Stopping at track intersections.

Violations of provisions, §46-8-193.

Motor vehicles.

Alteration of tracks, bridges, etc., to
accommodate motor vehicles,
§46-8-133.

TRAFFIC LAWS.

Speed limits.

Motor carriers.

Observance of laws, §46-7-24.

TRAILERS.

Motor carriers.

Safety regulations, §46-7-26.

TRANSPORTATION.

Hazardous materials, §§46-11-1 to 46-11-6.

See HAZARDOUS MATERIALS AND
WASTE.

Motor carriers, §§46-7-1 to 46-7-85.17.

See MOTOR CARRIERS.

Public service commission.

General provisions, §§46-2-1 to 46-2-95.

See PUBLIC SERVICE COMMISSION.

Railroads.

General provisions, §§46-8-1 to 46-8-382.

See RAILROADS.

**TRANSPORTATION OF HAZARDOUS
MATERIALS ACT.**

General provisions, §§46-11-1 to 46-11-6.

See HAZARDOUS MATERIALS AND
WASTE.

Short title, §46-11-1.

TRESTLES.

Railroad companies.

Building of embankments as substitutes
for trestles, §46-8-120.

TRIP-LEASE.

Motor carriers.

Trip-lease vehicle registration permits,
§46-7-15.

TROLLEYS.

Street, suburban and interurban railroads.

Trackless trolleys.

Acquisition, §46-8-342.

Sale, §46-8-342.

Utilization, §46-8-343.

TRUNKS.

Railroad companies.

Conductors.

Duty to check trunks and baggage,
§46-9-152.

TRUSTS AND TRUSTEES.

Municipal electric authority of Georgia.

Bond issues.

Securing of bonds by trust agreement
or indenture, §46-3-136.

Revenues and earnings of authority.

Status as trust funds, §46-3-149.

Municipal gas authority of Georgia.

Revenues held in trust for bondholders,
§46-4-119.

TV.

Theft of telecommunications service,
§§46-5-2 to 46-5-4.

U

ULTRA VIRES.

Electric membership corporations.
Defense of ultra vires, §46-3-202.

UNDERGROUND GAS STORAGE ACT.

Gas underground storage, §§46-4-50 to 46-4-62.

See GAS.

Short title, §46-4-50.

UNDERGROUND STORAGE TANKS.

Gas underground storage, §§46-4-50 to 46-4-62.

See GAS.

UNFAIR OR DECEPTIVE TRADE PRACTICES.

Fair business practices act of 1975.

Administrator.

Telephone solicitation no call law.

Violations, initiation of proceedings,
§46-5-27.

UNITED STATES.

Rural telephone cooperatives.

Securing indebtedness to federal agency.

Mortgages, deeds of trust or pledge of property, §46-5-93.

UNSOLICITED FAX TRANSMISSIONS,

§46-5-25.

UTILITIES.

Electricity generally.

See ELECTRICITY.

Motor carriers, §§46-7-1 to 46-7-85.17.

See MOTOR CARRIERS.

Municipal electric authority of Georgia,

§§46-3-110 to 46-3-155.

See MUNICIPAL ELECTRIC

AUTHORITY OF GEORGIA.

Municipal gas authority of Georgia,

§§46-4-80 to 46-4-125.

See MUNICIPAL GAS AUTHORITY OF
GEORGIA.

Public service commission.

General provisions, §§46-2-1 to 46-2-95.

See PUBLIC SERVICE COMMISSION.

Railroads generally, §§46-8-1 to 46-8-382.

See RAILROADS.

Rural telephone cooperatives, §§46-5-60 to 46-5-105.

See RURAL TELEPHONE
COOPERATIVES.

UTILITIES —Cont'd

Telephones.

See TELEPHONES.

UTILITY FINANCE SECTION.

See PUBLIC SERVICE COMMISSION.

V

VENUE.

Corporations.

Electric membership corporations,
§46-3-243.

Involuntary dissolution, §46-3-430.

Electricity.

Actions against electric companies,
§46-1-2.

Electric membership corporations.

Dissolution.

Involuntary dissolution actions,
§46-3-430.

Proceedings against, §46-3-243.

Motor carriers.

Actions against, §46-7-17.

Municipal electric authority of Georgia.

Actions under provisions, §46-3-151.

Public service commission.

Criminal prosecutions for violations,
§46-2-93.

Liability of companies subject to
jurisdiction of commission.

Actions for recovery, §46-2-90.

Penalties.

Recovery by state through civil action,
§46-2-92.

Railroads.

Actions against railroad companies,
§46-1-2.

Lessees or possessors of railroads.

Actions against, §46-8-310.

Receivers of railroad companies.

Actions against, §46-8-314.

Trustees of railroad companies.

Actions against, §46-8-314.

Telegraph companies.

Actions against, §46-5-149.

VESSELS.

Passenger tickets, §§46-9-170 to 46-9-172.

Railroads.

Construction and operation by railroad
companies, §46-8-102.

VILLAGES.

Municipal electric authority of Georgia,

§§46-3-110 to 46-3-155.

See MUNICIPAL ELECTRIC

AUTHORITY OF GEORGIA.

VILLAGES —Cont'd

Municipal gas authority of Georgia,

§§46-4-80 to 46-4-125.

See MUNICIPAL GAS AUTHORITY OF
GEORGIA.

W

WAGES.

Railroads.

Liens against companies for wages of
employees, §§46-8-250, 46-8-251.

WATERMELONS.

Railroads' duty to owners, §46-9-90.

WHISTLES.

Railroads.

Blowposts.

Engineers to use whistle, §46-8-190.

Equipment, §46-8-170.

WINDING UP.

Electric membership corporations,

§46-3-422.

WITNESSES.

Expert witnesses.

Fees.

Consumers' utility counsel division,
§46-10-6.

Public service commission.

Criminal prosecutions for violations.

Agents and employees of company.

Calling as witnesses, §46-2-93.

General provisions, §§46-2-54 to 46-2-56.

See PUBLIC SERVICE COMMISSION.

Hearing officers.

Powers as to, §46-2-58.

